Country Guide
South Africa

Prepared by

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THE VALUE OF KNOWING

DOING BUSINESS IN SOUTH AFRICA

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Foreword

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

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

We hope you find it useful.

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

Alan Keep
Managing Partner

The contents of this guide are for reference only and should not be considered to be a substitute for detailed legal advice. It is correct as at August 2023.

Introduction

The Country at a Glance

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

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

South Africa has 12 official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Sign Language, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

Cultural and religious influence in business

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

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

Office hours are similar to those in most Western countries and most South African businesspeople do not work on weekends. Exceptions include bank employees and government workers as banks and government offices are often open in the mornings for a half day on Saturdays.

Infrastructure and transportation

The transport infrastructure in South Africa is modern and developed, expedited by structural reforms linked to improvements in public investment management and greater private-sector participation in infrastructure development.

There are a number of options for travelling within the country, including domestic flights, buses and trains.

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

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

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

The South African rail industry is publicly owned and run by Transnet and its subsidiaries. Due to dwindling passenger numbers, Transnet has moved towards freight as a means of maximising the earning potential of its network.

Telecommunications

South Africa has become the leading data hub in Africa, boasting a total of 65 state-of-the-art data centres. There has been a remarkable influx of investments in data centres and cloud services providers, recognising their vital role in bolstering the economy through enhanced data storage, dissemination capabilities and improved access to digital solutions.

Telecommunications is one of the fastest-growing sectors of South Africa's economy, poised to drive significant economic growth in the future. With a network that is 99.9% digital and includes the latest in fixed-line, wireless and satellite communication, the country has one of the most developed telecoms networks in Africa.

South Africa has four licensed mobile operators: Telkom Mobile (a subsidiary of the parastatal Telkom, which is the only licensed provider of public switched telecommunications services); Cell C; MTN and Vodacom (majority owned by Vodafone). Mobile penetration is estimated at 95%, one of the highest rates in the world.

Public services

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

Due to dense population in the cities, increased urbanisation and ageing power stations, there is significant pressure on electricity supply at peak times, which has led to major energy concerns and intermittent blackouts, known as 'load shedding'. The South African Government and Parliament have taken numerous steps to address energy security, including among many other changes, amending Electricity Regulation, removing licensing thresholds for certain generation facilities, the launch of a new 'energy one-stop shop' by the Department of Trade, Industry and Competition (**DTIC**) to reduce turnaround times for approvals, and the launch and implementation of numerous policies and programmes to attract private sector investment in renewable projects.

South Africa has several primary-energy resources in abundance, including coal, wind and solar. There is also a potentially large gas resource base and an opportunity to tap into the region's large-scale hydropower prospects. In addition, there is a nuclear power plant, the only one on the continent, and the government has nuclear expansion plans that are being promoted to ensure security of supply and to lower the country's carbon emissions.

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

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

General Considerations

1. What is the legal system in South Africa?

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

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

As a general rule, South Africa follows English law in both criminal and civil procedure, company law (which is increasingly influenced by Delaware law), constitutional law and the law of evidence; while Roman-Dutch common law is followed in contract law, the law of delict (tort), the law of persons, the law of things and family law. With the commencement in 1994 of the interim Constitution, and in 1996 its replacement, the final Constitution, another strand was added to this weave.

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

Greylisting by the Financial Action Task Force (FATF)

South Africa has been greylisted by the FATF for not having sufficient laws in place to prevent anti-money laundering and terrorist financing. The concern with greylisting is the potential negative impact on investor sentiment.

Removal from the greylist is possible once both FATF and South Africa agree that all elements of the specific action plan have been largely or fully addressed. FATF will start with the next round of mutual evaluations in 2024, with the first mutual evaluation report from this round scheduled for its October 2025 plenary meeting. It is expected that South Africa will then be assessed again in the 2027/2028 round of mutual evaluations.

In response, South Africa has enacted a plethora of legislative changes, enhancing disclosure obligations around beneficial ownership and intensifying efforts to enforce its legislative reform and implement stricter sanctions and penalties.

Companies Act and stock exchange regulatory reform

The primary piece of legislation governing company law in South Africa, the Companies Act, is in the process of being amended, aimed at reducing administrative burdens, enhancing attractiveness to investors, providing clarity on certain sections and enhancing disclosure requirements. We anticipate the enactment of changes later this year.

The Johannesburg Stock Exchange Ltd (**JSE**), South Africa's primary exchange, has also undergone material regulatory reform in an effect to attract new business and encourage capital markets. Changes form part of its 'cutting red tape' initiatives and its newly released 'simplification project'.

The African Continental Free Trade Agreement

There is a renewed focus and increasing momentum as it pertains to the African Continental Free Trade Area (**AfCFTA**), which is set to be the world's largest free trade area. There are now 54 countries that are signatories to the agreement establishing the AfCFTA and 46 countries that have ratified the agreement, making them state parties. Protocols covering trade in goods, services, dispute settlement mechanisms, intellectual property, investment, competition policy, e-commerce and digital trade are either now settled or making good progress, and data is already showing increased trade. Some other imminent benefits include stimulated production through the development of regional value chains, the strengthening of African companies' capacities to access supply to world markets and a strengthened economic and commercial diplomacy.

Competition/anti-trust

The South African Competition Commission's assessment of public interest factors in merger control continues to gain prominence.

An emerging trend is that the Competition Commission is no longer satisfied that a merger has a neutral impact on public interest, but rather that the merger contribute something positive towards the public interest. In this regard, a number of mergers have been approved with parties committing financial resources to enterprise and supplier development, introducing participation of historically disadvantaged persons as shareholders, and establishing employee share ownership schemes, among other things. We discuss this in more detail below.

Transformation and broad-based black economic empowerment (B-BBEE)

Transformation and B-BBEE has generally received a lot of attention recently, predominantly because of the proposed new employment equity regulation, the increase in public interest conditions being imposed by the Competition Commission in the context of notifiable mergers, as discussed above, and the proposed changes to the JSE B-BBEE segment in the listings requirements.

In addition, the newly appointed head of the B-BBEE Commission has made it clear that he sees his mandate as identifying loopholes and making certain adjustments to existing legislation to give impetus to transformation, prioritising the commitment to existing policy and recalibrating policy where necessary, while also working together holistically with other instruments for transformation such as education and the work done by the Competition Commission.

We discuss each of these in more detail below.

Foreign direct investment

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

Government has emphasised policies and programmes to further encourage foreign investment. To this end, the DTIC offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries. Government/National Treasury are also increasingly looking for even more ways to encourage investment into South Africa and to streamline possible areas that may have caused delays or created a barrier to investment in the past.

Recent amendments to the Competition Act introduced national security provisions in terms of which authorisation must be sought for notifiable mergers involving a 'foreign acquiring firm' and impacting a designated list of national security interests. This provision is, however, not yet in force and the scope of such application, requirements, processes and mechanisms under this provision have not yet been outlined. In addition, the executive committee tasked with reviewing such transactions is yet to be established. While it is anticipated that this provision will shortly be implemented, there is no confirmation from authorities as to when this may take place.

Fintech

Rapid developments and collaboration between start-up tech disrupters and mature organisations continue in the Fintech space. In a long-awaited move, South Africa has seen the recent adoption of crypto assets as financial products.

Crypto exchanges in South Africa, among other crypto asset providers, will be required to operate with financial services provider licences by the end of November 2023.

Some other developments that mirror international trends

Similar to many other jurisdictions, we are also seeing increased focus on environmental, social and governance (**ESG**) issues, for good reason with its impact on obtaining financing; investment strategies; shareholder and other activism; and disclosure requirements.

Major incidents, cybercrime and associated data breaches globally continue to rise. The need for cyber controls, threat updates, monitoring and training, incident response plans (reviewed and tested frequently) and a multidisciplinary team to assist with the often-unintended consequences that flow from a major incident event, cyberattack or data breach is critical, particularly as this space becomes an increasingly regulated minefield.

The staggering generative artificial intelligence (**AI**) developments this year are already having a significant impact on businesses, creating new opportunities and risks linked to data security, intellectual property and liability. Corporates and governments are grappling with how to quickly formulate policies and laws, respectively, to address safety concerns without stifling innovation. South Africa has launched a body called the South African Intelligence Association, which aims to, among other things, encourage stakeholders to adopt responsible AI and will focus on its regulation, while its Information Regulator is developing policy around data protection and AI.

Establishing a Business

Business Vehicles

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

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

- limited liability companies;
- personal liability companies;
- partnerships, general or limited;
- sole proprietorships; and
- joint ventures.

Limited liability companies

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

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

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

The MOI is the founding document of the company. It sets out the rights, duties and responsibilities of shareholders, directors and third parties in respect of the company and must be read together with the Companies Act.

An investor may either incorporate a new limited liability company with the CIPC, or it may purchase a so-called 'shelf company'.

Incorporating a new company

Incorporating a new limited liability company initially requires the reservation of a company name with the Companies and Intellectual Property Commission (**CIPC**). If the name is available, a name reservation certificate, which is valid for a period of six months, is issued to the incorporators.

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

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

As soon as practicable after the CIPC accepts the NOI, it must assign a unique registration number to the company. After this, it will issue and deliver to the company a 'registration certificate' in the Form 14.3, dated as of the later of the date on, and time at which, it issued the certificate, or the date if any stated by the incorporators in the NOI.

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

The first incorporator of the company immediately becomes a director of the company upon the company being successfully registered at the CIPC.

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

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

Purchasing a 'shelf company'

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

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

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

Time frame

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

The time frame applicable to the incorporation of a limited liability company is usually about 11 to 25 business days, depending on the backlog faced by the CIPC and the complexity of the limited liability company's MOI. More complex structures can take up to 80 business days.

A shelf company is already registered; resultantly the entity can commence business within a few hours of purchase (following director and shareholder changes). The process to register the relevant amendments to the shelf company information usually takes between 10 and 25 business days, but this will not hold up the company commencing business.

Costs

We will provide fee estimates for clients interested in engaging our services to assist with the establishment of an entity in South Africa.

People

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

However, every company carrying on a business or having an office in South Africa must at all times be represented by a 'public officer' who resides in South Africa, and who serves as the company's representative taxpayer.

Diversity, equity and inclusion is important in South Africa and should be taken into consideration in all appointments. We discuss this in more detail in the B-BBEE and employment sections of this publication.

Company management structure and key liability issues

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

The board is considered the ultimate organ of a company. Where it is stipulated that 'the company' must or may take certain action, the default organ is the board and not the shareholders.

The board members have to exercise their fiduciary duties in the best interests of the company.

The board can, however, delegate this authority, whether expressly or impliedly, to any person, whether it is to a single director, a board-appointed committee or employees. Such delegation does not absolve the board from its responsibilities; it ultimately remains accountable for all decisions taken on its behalf.

Public companies, state-owned companies and companies that meet certain thresholds are required to appoint committees such as social and ethics, audit and remuneration committees.

Personal liability companies

A profit company is a personal liability company if it meets the criteria for a private company (i.e. there is a restriction on the transfer of its shares) and the company's MOI states that it is a personal liability company.

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

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

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

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

The people requirements for a personal liability company are the same as for a limited liability company.

Partnerships, general or limited

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

Unless the partnership agreement provides otherwise, partners are the co-owners of the partnership property, which is owned jointly in undivided shares. Unlike mere co-ownership, however, a partnership must also involve community of profit and loss and exist for the purpose of making a profit.

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

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

Sole proprietorships

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

If a sole proprietor wishes to trade under a business name (as opposed to his or her personal name), the name will need to be registered with the CIPC. The registration process usually takes two to four weeks, depending on backlogs experienced by the CIPC.

There is no legal framework applicable to sole proprietors.

Joint ventures

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

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

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

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

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

Together with the annual return filing, all companies must file their securities registers and companies that are required to be audited or meet similar thresholds are required to submit a copy of their annual financial statements.

New beneficial ownership disclosure requirements

In response to South Africa having been placed on the FATF greylist of countries with inadequate anti-money laundering and terrorist financing controls, there is a new requirement for companies to ascertain and record, in their security registers, the names, ID or passport numbers, country of birth and addresses of all individuals who ultimately own the company. This information must be recorded in share registers and filed annually with return filings. Any changes must be recorded in security registers within 10 business days of notification of any change and filed with the CIPC, together with certified copies of identity documents and notifications, within a further 10 business days.

Companies are required to implement measures to source and file this information before 1 October 2023 and on an ongoing basis thereafter.

New remuneration disclosure requirements

Proposed amendments to the Companies Act will introduce enhanced remuneration reporting obligations on public and state-owned companies. There are also proposed amendments to disclosure requirements for private companies, but that remains to be seen.

Foreign Direct Investment

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

As mentioned above, South Africa welcomes foreign investment and has one of the highest levels of investor protection.

The Protection of Investment Act (**PPI Act**) is intended to promote investment by modernising the current investment regime and achieving a balance of rights and obligations that will apply to all investors. Importantly, the PPI Act provides a foreign investor with the same rights that a domestic investor enjoys. It states that foreign investors will be treated no less favourably than domestic investors.

South Africa will also always benefit from the legal protection of property rights granted by the South African Constitution, the supreme law of the land.

Recent amendments to the Competition Act introduce a national security consideration which will allow an executive committee to intervene in relation to merger-type transactions involving a foreign acquiring firm and which transactions impact a national security interest (Screening Rules). This provision in the Competition Act is, however, not yet in force.

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What grants or incentives are available to investors?

The DTIC offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries. Government/National Treasury are also increasingly looking for even more ways to encourage investment into South Africa and to streamline possible areas that may have caused delays or created a barrier to investment in the past.

For example, special incentives apply in respect of investments made in a number of designated special economic zones. These incentives include a reduced corporate tax rate, a building allowance and employment tax incentives.

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

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

Local Ownership and Broad-Based Black Economic Empowerment

6. Are there any local ownership requirements?

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

Broad-based black economic empowerment

B-BBEE is a central part of the Government's economic transformation strategy.

It aims to increase the numbers of Black people (being South African citizens who have been racially classified as African, Coloured or Indian) who manage, own and control the country's economy and to decrease racially based income inequalities.

The B-BBEE Act, and the general sector-specific 'Codes of Good Practice' published thereunder are principal legislation through which B-BBEE is measured. Various sector-specific codes have been published detailing the way that B-BBEE must be measured for businesses operating in particular sectors, including, among other things: (i) defence; (ii) agriculture; (iii) financial; (iv) construction; (v) property; (vi) transport; (vii) forestry; (viii) information and communication technology; (ix) marketing, advertising and communication; (x) tourism; (xi) aviation; and (xii) media, advertising and communication.

In assessing B-BBEE, a 'scorecard' approach is used whereby the different aspects of B-BBEE are accorded points. The scorecards detail the various elements and sub-elements of B-BBEE on which enterprises are measured and stipulate targets to be achieved for each element and sub-element. Under the Codes, the elements of B-BBEE on which an enterprise's B-BBEE score is measured are: (i) ownership; (ii) management control; (iii) skills development; (iv) enterprise and supplier development; and (v) socio-economic development.

The closer an enterprise is to reaching a particular target, the more points it will achieve for that element of B-BBEE. The more points a business achieves in total across each of the individual elements, the higher its B-BBEE status level will be, which translates into a procurement recognition level. Where a business presents any information in relation to its B-BBEE score, for example in the context of a tender response, this must be supported by a certificate issued by an accredited

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verification agency. The certificates issued by the verification agencies are valid for 12 months. A business's B-BBEE score will be determined on the basis of its activities during the previous financial year and its ownership and management structures and staff profile as at the date of measurement.

In terms of the B-BBEE Act and the Preferential Procurement Policy Framework Act, government bodies and state-owned enterprises are required to take private sector parties' relative B-BBEE levels into account when they procure any goods or services, when they issue any licence or other authorisation, or enter into partnerships with the private sector. As such, businesses that interact with the Government by, for example, selling to the Government or that require licences to perform their particular activities (e.g. telecommunications, broadcasting, mining, banking, transportation) are incentivised to increase their levels of B-BBEE.

There is no 'hard law' requiring that any private entity in South Africa must meet specific B-BBEE targets or must implement a B-BBEE policy. At the same time, in certain sectors, such as mining, telecommunications and gaming, minimum equity requirements are, or may be, imposed in terms of the sector-specific legislation governing those sectors or in terms of licences issued to sector participants.

From a practical perspective, although there are no absolute requirements in relation to B-BBEE, any company wishing to do business in the South African environment must consider and develop its B-BBEE position as, in addition to pressures from the Government, an entity that does not have a good B-BBEE rating, or does not strive to improve its B-BBEE rating, may be hampered in the conduct of its day-to-day business with the Government, organs of state and private sector customers. Most private sector businesses to which services are rendered or goods are sold will themselves have B-BBEE procurement targets to meet, and so the B-BBEE rating of entities from which goods and services are purchased will be a factor in determining who to do business with.

Exchange Controls

7. Are there any exchange controls or currency regulations?

South African residents are subject to exchange controls in terms of the Exchange Control Regulations, issued under the Currency and Exchanges Act. This should not however be seen as a restriction since all that is required is obtaining the relevant approval up front by showing that the transaction is for fair value and on arms-length terms.

Guideline documents are issued pursuant to the abovementioned Regulations in the form of circular announcements and the relevant manuals (Excon Rules).

The Financial Surveillance Department of the South African Reserve Bank (**FinSurv**) is responsible for the day-to-day administration of exchange controls.

All of the major South African banks have also been appointed to act as authorised dealers in foreign exchange (**Authorised Dealers**). Authorised Dealers may buy and sell foreign exchange, subject to conditions and within limits prescribed by FinSurv, and must deal with any transaction in relation to foreign exchange. Authorised Dealers are not the agents of the FinSurv, but act on behalf of their customers.

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

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

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

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

A 'resident' means any person (i.e. a natural person or legal entity) who has taken up permanent residence, is domiciled or registered in South Africa. For these purposes, this excludes any approved offshore investments held by South African residents outside the Common Monetary Area (**CMA**) consisting of Lesotho, Namibia, South Africa eSwatini. Such entities are, however, still subject to Excon Rules and Regulations.

A 'non-resident' means a person (i.e. a natural person or legal entity) 'whose normal place of residence, domicile or registration is outside the CMA'.

'Foreign nationals' are defined as 'natural persons from countries outside the CMA who are temporarily resident in South Africa, excluding those on holiday or business visits'.

Government/National Treasury are actively relaxing requirements as they look for ways to encourage investment, moving away from the 'general' approach that disallowed any capital flows without permission, to an "exceptions" approach, pro-investment allowance of all capital flows, save for a limited list of risk-based capital flow measures.

Import/Export Regulations

8. Are there any import/ export regulations?

The South African Revenue Services (**SARS**) administers customs control in terms of the Customs and Excise Act (**Customs Act**) in respect of imported and exported goods. Any person, whether located in South Africa or not, who imports or exports goods to or from South Africa with a dutiable value in excess of R150 000 in any calendar year must register with SARS as an importer/exporter, on the prescribed DA 185 Form and respective annexures, in accordance with the Customs Act.

The Customs Act also requires certain additional categories of registration with SARS, including persons who act in the capacity of clearing and forwarding agents, and any persons who import, store, remove, or export goods in bond. A non-resident importer or exporter is also required to appoint a Registered Agent in South Africa, to attend to all customs compliance formalities on their behalf.

Imported goods may attract some or all of: (i) customs and excise duties (including ad valorem duties), (ii) anti-dumping, safeguard and countervailing duties, and (iii) value-added tax (**VAT**).

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

A foreign importer, exporter or licensed remover may apply for registration/a licence if represented by a registered agent. Such registered agent is: (i) a natural person, as a reference to a natural person ordinarily resident in South Africa at a fixed physical address in South Africa; or (ii) a juristic person, as a reference to a juristic entity that is incorporated, registered or recognised in terms of the laws of South Africa or of another country and that has a place of business at a specific physical address in South Africa.

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

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

The rate of duty imposed is determined in accordance with the rates set out in Schedules to the Customs Act (which incorporate the WCO's Harmonised System of Tariff Classification nomenclature into the Customs Act). Import duties and tariffs are usually calculated as a percentage of the value of the goods.

Meat, fish, tea, certain textile products and certain firearms, however, attract rates of duty calculated either as a percentage of the value or as cents per unit (for example, per kilogram or metre). Certain goods may be imported or exported on a duty-free basis. Additional *ad valorem* excise duties are levied on a wide range of luxury or non-essential items such as arcade games and perfumes. Imported goods will normally be subject to 15% VAT (this may be reduced to 0% in certain specific instances). Exported goods are generally subject to VAT on a similar basis, at a rate of either 15% or 0%. Imported goods from countries outside of the Southern African Custom Union (Namibia, Botswana, Lesotho, eSwatini and South Africa) attract an added VAT uplift charge – VAT is levied on the 'added tax value' of the goods, which is equal to the customs value plus 10% thereof, plus any non-rebated duties levied on the goods. Exported goods are typically not subject to any duties, with certain limited exceptions, such as exported scrap and waste metals.

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

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

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

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

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

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

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The movement of goods into and out of South Africa is administered and policed by SARS. The basic function that SARS performs at the points of entry into and exit out of South Africa is to monitor shipments entering and leaving the country in accordance with the customs clearance declaration that must be submitted for each import and export, and to detect and detain goods that are non-compliant with any aspect of the Customs Act and associated Rules and Regulations. SARS polices contraventions of the tax and customs and excise legislation in South Africa, as well as other legislation such as the health and medicines control legislation and environmental legislation.

Every importer and exporter of goods must, before the goods are formally imported into or exported from South Africa submit a declaration to SARS Customs. A separate declaration must be presented in respect of each exporter and in respect of each exporting vessel, aircraft or vehicle and must, among others, indicate whether the goods in question are subject to any specific permit, authorisations or certificate.

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

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

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

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

South Africa also subscribes to, supports and participates in, several international agreements and arrangements pertaining to controls regarding the non-proliferation of weapons of mass destruction, conventional arms and dual-use goods. SARS publishes a list of Prohibited and Restricted Goods on its website, which is updated from time to time, and which sets out the additional controls and authorisations required for the import and/or export of dual use and other restricted categories of goods. All of these conditions must be complied with in order to lawfully import and export goods.

Operating a Business

Employment

9. What are the main laws regulating employment relations?

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

- Labour Relations Act;
- Basic Conditions of Employment Act;
- Employment Equity Act;
- National Minimum Wage Act;
- Skills Development Act;
- Skills Development Levies Act;
- Unemployment Insurance Act;
- Unemployment Insurance Contributions Act;
- Compensation for Occupational Injuries and Diseases Act; and
- Occupational Health and Safety Act.

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

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

- the full name and address of the employer, the name and occupation of the employee or a brief description of the work for which the employee is employed, the place of work and, where the employee is required or permitted to work at various places, an indication of this, and the date on which employment began;

- the employee's ordinary hours of work and days of work, the employee's wages or the rate and method of calculating wages, the rate of pay for overtime work, any other cash payments that the employee is entitled to, any payment in kind that the employee is entitled to and the value of such payment in kind, how frequently remuneration will be paid, and any deductions to be made from the employee's remuneration;

- the leave to which the employee is entitled, the period of notice required to terminate employment and if the employment is for a specified period, the date of termination of employment, and any period of employment with a previous employer that would count towards the employee's period of employment; and

- a description of any council or sectoral determination which covers the employer's business and a list of any other documents that form part of the contract of employment and where a copy of such documents may be obtained.

Individual contracts cannot provide for terms and conditions of employment that are less favourable than the minimum terms prescribed by law or set out in an applicable collective agreement. Where an employee's employment contract (or the employer's policies and procedures or a collective agreement) makes provision for terms and conditions of employment that are more favourable than the statutory minimum, the employer is bound by these terms and conditions and cannot revert to the statutory minimum without the employee's informed agreement.

Applicants for employment are not without protection. Employers may not discriminate unfairly, directly or indirectly, against an employee or job applicant, in any employment policy or practice, on any prohibited ground or grounds against applicants for employment on a wide range of prohibited grounds such as age, gender, HIV status, language, race and religion. An employer may, however, differentiate on the basis of the prohibited grounds if such differentiation is required for affirmative action consistent with the provisions of Chapter 3 of the Employment Equity Act or if it is required for the inherent requirements of the job.

11. Is there a minimum wage?

Yes. The National Minimum Wage Act, which came into effect on 1 January 2019, provides that every worker is entitled to payment of a wage in an amount not less than the national minimum wage. Currently, the national minimum wage amount is ZAR 25.42 per hour (as of 1 March 2023), which applies to all workers across all sectors, except for workers on an expanded public works programme and learners who have concluded a learnership agreement in terms of the Skills Development Act, who are entitled to different minimum wage rates.

In addition, the minimum wage for certain industry-specific sectors (for example, the hospitality sector and the wholesale and retail sector) is regulated in terms of a sectoral determination. Where the sectoral determination entitles an employee to a wage rate that is more favourable than the national minimum wage, then it will prevail over the national minimum wage. Where the sectoral determination provides for a lower wage rate, the wage rate specified in the terms of the National Minimum Wage Act will take precedence. Collective agreements, i.e. agreements between trade unions and employers, may also prescribe minimum wages for particular levels of employees.

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

Foreigners require work permits to work in South Africa. The Immigration Act provides for various permits. The most commonly used permits are general work permits and intra-company transfer permits. General work permits are typically only granted if no suitable South African is available to perform the work concerned. Intra-company transfer permits may be issued to employees of a multinational company transferred from another country to work at a branch, subsidiary or affiliate company in South Africa.

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

The Labour Relations Act provides that an employer may dismiss an employee where an operational requirement is present (redundancy). Operational requirements are requirements based on economic, technological, structural, or similar needs of an employer. In the event of potential redundancies, the employer is required to consult with the potentially affected employees in a meaningful, joint consensus-seeking manner on its proposals before making any decisions to retrench employees. The duty to consult arises when an employer first identifies or contemplates the possible need for redundancy and before any final decision on the redundancy is made. Where employees are members of a trade union, the employer must consult with the trade union on the proposed redundancies, irrespective of whether the trade union is formally recognised by the employer as a collective bargaining agent or not.

In circumstances where a business is acquired as a going concern, section 197 of the Labour Relations Act regulates the employment consequences. The phrase 'going concern' is not defined in the Labour Relations Act. It must therefore be given its ordinary meaning unless the context indicates otherwise. South African courts have indicated that what is transferred must be a business in operation so that the business remains the same but in different hands. In these circumstances, the employment contracts of the employees predominantly assigned to the business being acquired transfer, automatically by operation of law, to the new employer. The new employer is required to recognise the employees' past service with the old employer and to employ the employees on terms and conditions of employment that are on the whole no less favourable to what the employees enjoyed at the old employer (except where the employees' terms are regulated by a collective agreement, in which event the new employer must comply with the terms of the collective agreement as they are).

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It is possible to contract out of the automatic transfer provisions, but such an agreement cannot be concluded only between the two employer entities – the written agreement of the employee concerned is required. As section 197 provides for the automatic transfer of employment contracts, no consultation is required with the transferring employees or their representative trade union, but it is of course good industrial relations practice to keep employees informed of potential changes.

14. How is the termination of individual employment contracts regulated?

All employees, irrespective of their level of remuneration or seniority, have the right to not be unfairly dismissed. Accordingly, an employee's contract of employment cannot be terminated simply by giving the employee notice as South African law does not recognise 'dismissal-at-will'. Any dismissal must be both substantively and procedurally fair. Substantive fairness relates to the reason for the dismissal, and procedural fairness concerns the manner in which the dismissal is effected. There are four broad grounds for dismissal that are recognised by the Labour Relations Act:

- misconduct of the employee;
- incapacity of the employee related to poor work performance;
- incapacity of the employee related to ill health or injury; and
- the operational requirements of the employer (redundancies).

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

Certain reasons for dismissal are automatically unfair and employers are accordingly not permitted to rely on such reasons to justify a dismissal. These reasons include participation by the employee in a lawful strike, the employee's pregnancy or intended pregnancy, a going concern transfer or a reason related to a transfer contemplated in section 197 of the Labour Relations Act, or that the employer unfairly discriminated against an employee on a wide range of grounds, such as race, gender, age, religion, language, marital status or family responsibility.

Nevertheless, a dismissal based on age is permissible if the employee has reached the normal or agreed retirement age, and a dismissal based on any of the prohibited grounds is fair if it is based on an inherent requirement of the particular job.

On dismissal, an employee is entitled to:

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

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

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

It is fairly common for the employment contracts of more senior employees to contain longer notice periods, for example two to six months. A dismissal without the required notice period is procedurally unfair, unless it is in response to an employee's serious misconduct; this is known as a summary dismissal.

Remedies for unfair dismissal

An employee who is dismissed can bring a claim for unfair dismissal. The primary remedy in respect of a dismissal that is automatically or substantively unfair is retrospective reinstatement. Alternatively, the employee may be re-employed in other reasonably suitable work or be awarded compensation.

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

The employer does not have a continuing obligation towards dismissed employees, unless such continuing obligations arise out of the employment contract. Although fairly uncommon, some employers make post-retirement medical aid benefits available to their employees.

15. Are redundancies and mass layoffs regulated?

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

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

In circumstances where an employer employs more than 50 employees and contemplates retrenching a prescribed number of employees, Section 189A of the Labour Relations Act applies in addition to section 189. Section 189A provides for a minimum consultation period of 60 days and entitles employees who received notice of retrenchment to strike over the substantive fairness of the dismissal. Employees are entitled to the following amounts in the event of retrenchment:

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

The minimum severance payment requirement does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation, as the employee may seek an improvement on the statutory minimum severance pay. In addition, where the employer has a more favourable severance pay policy, it is required to follow this policy. A lump sum benefit on termination of employment qualifies for beneficial tax rates if such termination is due to redundancy.

16. Discrimination

Section 9 of the South African Constitution guarantees the right to equality and prohibits unfair discrimination. The Employment Equity Act gives effect to this right in the employment context. All employers are accordingly prohibited from discriminating unfairly against an employee (or applicant for employment) in any employment policy or practice on a wide variety of grounds, including race, sex, gender, age, religion, HIV status and family responsibility. Differentiation on one or more of these grounds is permissible if required by the inherent requirements of the job, or for purposes of taking affirmative action measures in accordance with the provisions of Chapter 3 of the Employment Equity Act. Harassment on any of the listed grounds is prohibited. In terms of section 6(4), a difference in terms and conditions between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any of the listed grounds constitutes unfair discrimination. The harassment of an employee is regarded as a form of unfair discrimination and is prohibited on any of the statutory grounds or a combination of these grounds. There is no definitive statutory definition of harassment in employment legislation, but – based on other legislation, codes of good practice and case law – it is generally viewed as persistent and unwelcome conduct that is hostile or offensive to a reasonable person, induces a fear of harm, and demeans, humiliates or creates a hostile or intimidating environment, or is calculated to induce submission by actual or threatened adverse consequence. Specific guidance on handling harassment, including sexual harassment, in the workplace is provided by the 'Code of good practice on the prevention and elimination of harassment in the workplace' (issued under the

Employment Equity Act). The Code took effect from 18 March 2022 and replaces the previous 'Code of good practice on the handling of sexual harassment cases in the workplace'. While the Code is a guideline, it will be taken into account by tribunals and courts when interpreting the employment equality legislation and an employer would need to explain to a tribunal or court why it has not complied with the Code in the event that it did not.

Disputes regarding alleged discrimination must be referred to the CCMA within six months of the date of the alleged discrimination. If the dispute cannot be resolved at conciliation, the aggrieved party may refer it to the Labour Court for adjudication, or, in certain limited circumstances, to arbitration under the auspices of the CCMA. The Labour Court and CCMA have wide powers to remedy unfair discrimination, including making awards for damages in respect of proven patrimonial loss or compensation in respect of non-patrimonial loss such as injury to feelings.

In terms of Chapter 3 of the Employment Equity Act, designated employers are required to take affirmative action measures designed to ensure that suitably qualified persons from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of the designated employer. Designated employers are those who employ more than 50 employees, or whose turnover is in excess of the prescribed turnover. Designated groups are Black people (i.e. Africans, Coloureds and Indians), women of all races, and people with disabilities of all races.

In order to give effect to the obligation to take affirmative action measures, designated employers must conduct an analysis of their workplace practices and policies with a view to identifying barriers to the advancement of people from designated groups; they must prepare and implement an employment equity plan; they must submit an annual report to the Department of Employment and Labour; and they must designate a senior manager responsible for employment equity. In addition, the designated employer must consult with their employees on the analysis, the employment equity plan and the annual report. For purposes of ensuring effective consultation, many employers establish an employment equity forum that is representative of the interests of people from designated groups as well as the interests of people who are not from designated groups.

The provisions of the Employment Equity Act are expected to change with the coming into effect of the Employment Equity Amendment Act. Once these changes come into effect, an employer will only be regarded as a designated employer where it employs more than 50 employees (i.e. an employer with less than 50 employees will not be required to comply with the provisions of the Employment Equity Act relating to designated employers, regardless of its annual turnover).

While these amendments were expected to come into effect on 1 September 2023, and subsequently did not take place, we anticipate that the amendments are likely to come into effect in the near future.

The failure by a designated employer to comply with the provisions of Chapter 3 exposes it to the risk of compliance proceedings and the imposition of fines. In certain circumstances, the fine imposed may be a percentage of the designated employer's turnover.

Tax

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

Income tax and capital gains tax

South Africa applies a residence-based system of taxation, which in essence means that residents of South Africa are subject to income tax on their worldwide income, while non-residents are subject to income tax on their income from a South African source, subject to any relief which a double tax agreement (**DTA**) could offer.

A foreign incorporated company should be treated as a resident of South Africa, unless its 'place of effective management' is in South Africa. The ordinary corporate income tax rate of 27% is calculated on the taxable income of a corporate taxpayer, after taking into account all available exemptions, deductions and other relevant provisions. For tax years before 31 March 2023, the corporate income tax rate was 28%.

South African residents are subject to capital gains tax (**CGT**) on their worldwide capital gains. Non-residents are taxed on capital gains in respect of South African immovable property or rights in immovable property and assets that are attributable to a permanent establishment (**PE**) of the non-resident, unless a DTA exists which provides otherwise.

A company is subject to CGT at an effective rate of 21.46%, being the corporate CGT inclusion rate of 80% multiplied by the corporate income tax rate of 27%. Prior to the reduction of the corporate tax rate to 27%, the corporate CGT rate was 22%.

A non-resident would thus, as a general rule, not be subject to South African income tax unless it derives income or gains from a South African source. to the PE.

Even so, if the non-resident is resident in a jurisdiction that has entered into a DTA with South Africa, its business profits would, as a general rule, only be exposed to South African income tax if the non-resident had a PE in South Africa and then only to the extent that such business profits are attributable.

A company will be tax resident in South Africa if it is incorporated in South Africa or if it has its place of effective management in South Africa. A company will not be regarded as a resident if the company is deemed to be exclusively a resident of another state in terms of a DTA between South Africa and such other state.

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

When a company is incorporated in South Africa, CIPC will generally allocate an income tax number to the company. This income tax number can then be activated by the company at any SARS branch. Alternatively, the company can register as a user on SARS' online tax filing (E-filing) platform, and can activate its income tax number (and its profiles for other taxes) on E-filing.

Withholding taxes

South Africa levies various types of withholding taxes, including dividends' tax, interest withholding tax and a withholding tax in respect of royalties paid to non-residents.

Dividends tax

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

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

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

In addition, dividends paid to regulated intermediaries (these include long-term insurers, a portfolio of a collective investment scheme in securities, brokers and a central securities depository participant) are exempt. Dividends are also exempt where the beneficial owner forms part of the same group of companies as the company paying the dividend.

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

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

The beneficial owner of the dividends must complete a declaration and written undertaking in order to qualify for a reduced rate of dividends tax. Since 1 July 2020, these declarations and undertakings are only valid for a period of 5 years.

Interest withholding tax

A withholding tax on interest provides for tax to be withheld at a rate of 15% in respect of interest received by, or accrued to, a non-resident that is not a controlled foreign company (**CFC**).

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

- interest received or accrued in respect of any government debt instrument;
- interest received or accrued in respect of any listed debt instrument (which includes any loan, advance, debt, bond, debenture, bill, promissory note, etc.);
- interest received or accrued in respect of any debt owed by a domestic bank or the South African Reserve Bank;
- interest paid or payable by a headquarter company, subject to certain specified criteria; and
- if a foreign individual was physically present in South Africa for more than 183 days in aggregate during a particular year, or at any time during that year carried on business through a PE in South Africa.

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

The amount of interest withholding tax could also be reduced in terms of an applicable DTA. An exemption or reduced rate declaration is required to qualify for exemptions from, and reduced rates of, interest withholding tax. Since 1 July 2020, these declarations and undertakings are only valid for a period of 5 years.

Value added tax

South Africa has an indirect tax known as VAT, levied in terms of the Value-Added Tax Act. VAT is imposed in respect of:

- the supply of goods and services by a vendor in the course and furtherance of an enterprise carried on by him or her; the importation of any goods into South Africa; and
- the supply of any 'imported services'.

The requirement to register as a VAT vendor applies irrespective of whether the person is a resident or non-resident, but an 'enterprise' is defined to include any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration.

There are deeming provisions which apply to the supply of electronic services, which could require a non-resident to register as a VAT vendor even if it does not have any kind of physical presence in South Africa.

VAT is charged at a rate of 15%, subject thereto that the supply of certain goods or services, such as financial services, will qualify as exempt supplies for VAT purposes. Also, the supply of certain goods and services are zero rated, such as the export of goods, the sale of an enterprise or part thereof as a going concern, and services rendered outside of South Africa.

VAT vendors may claim their input VAT (i.e. VAT paid by them) as an input deduction if the input VAT was incurred to make taxable supplies.

18. How are the following taxed?

Dividends paid to foreign corporate shareholders? Dividends tax is imposed in respect of dividends declared by resident companies. In the case of non-resident companies, dividends tax is only payable in respect of shares that are listed on a South African stock exchange. South Africa does not impose any tax on the distribution of profits by a branch. The rate of withholding tax on dividends is 20%, though this may be reduced in terms of the provisions of an applicable DTA or where the SA company is an oil and gas company.

Interest paid to foreign corporate shareholders? The rate of withholding tax on interest is 15%, though this may be reduced in terms of the provisions of an applicable DTA or where the SA company is an oil and gas company.

IP royalties paid to foreign corporate shareholders? The rate of withholding tax on royalties is 15%, though this may be reduced in terms of the provisions of an applicable DTA.

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

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

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

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

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

SARS subsequently, on 17 January 2023, released Interpretation Note 127 (Determination of the taxable income of certain persons from international transactions: intra-group loans) (**IN127**), which applies to loans advanced in years of assessment commencing on or after 1 April 2012.

IN127 confirms the principle that the acceptable amount of debt must be determined on an arm's length basis, which is inherently a detailed factual enquiry and takes into account a wide range of factors particular to the specific taxpayer.
In assessing the arm's length nature of a loan, SARS follows the guidance on the application of the arm's length principle as contained in the OECD Transfer Pricing Guidelines, which involves a comparison of the conditions in a controlled transaction with the conditions that would have been made had the parties been independent and undertaking a comparable transaction under comparable circumstances.

Unfortunately, IN127 still does not provide any form of safe harbour, but it indicates that it will consider a taxpayer's debt to be non-arm's length if, among other factors, some or all of the following circumstances exist:

- The taxpayer is carrying a greater quantity of debt than it could sustain on its own (that is, it is thinly capitalised).
- The duration of the lending is greater than would be the case if negotiated at arm's length.
- The repayment, interest rate or other terms are not what would have been entered into or agreed to at arm's length.

Where the terms and conditions of the loan are not arm's length and to the extent that there is a difference in the calculation of the taxable income under arm's length conditions and the calculation in respect of the loan, the excess interest paid by the debtor will be deemed to be a dividend in specie declared by the debtor where the debtor is a resident company, and where the debtor is a person other than a company, the excess will be deemed to be a donation by the debtor.

The thin capitalisation rules should be considered taking into account Section 23M of the ITA. The section provides for a limitation on interest deductions in respect of debts owed to persons not subject to tax under Chapter II of the ITA. It contains a formula that restricts the interest deduction to a percentage of 'adjusted taxable income' as defined in the section.

This effectively provides for the interest deduction not to exceed an amount equal to 30% of the adjusted taxable income plus interest received by the debtor less other interest incurred by the debtor. The current legislative cycle proposes certain changes to the definition of adjusted taxable income.

In 2020 National Treasury issued a discussion document titled 'Reviewing the tax treatment of excessive debt financing, interest deductions and other financial payments', inviting taxpayers to comment on the proposals set out in the discussion document. One of the proposals was to replace the existing interest limitation in section 23M with a new rule to restrict net interest expense deductions to 30% of EBITDA. It is anticipated that changes to the interest limitation rules will be included in the current or the next legislative cycle.

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

The South African CFC rules may include an amount equal to a proportionate amount of the net income of a CFC in the income of resident shareholders. Several exemptions are available, essentially in respect of a substantial business presence of the CFC offshore (a foreign business establishment (**FBE**). The current legislative cycle proposes an amendment to the FBE rules to effectively exclude subcontracting arrangements by a FBE, but the proposal received substantial opposition, and it remains to be seen whether it will be implemented as proposed.

21. Are there any transfer pricing rules?

South Africa's transfer pricing rules effectively require SARS to adjust prices on the transfer of goods and services between related resident and non-resident entities if the prices are found to be artificially high or low and result in South African tax benefits for either party. In order to prevent triggering these rules, transactions and agreements between a South African subsidiary and any non-resident related parties must be entered into on an arm's length basis.

Parties applying for approval in respect of the licensing of IP to a non-resident are generally required to submit an opinion from an independent transfer pricing specialist that the proposed royalty is acceptable for South African transfer pricing purposes (i.e. that the royalty has been determined on an arm's length basis). The current legislative cycle also proposes the implementation of an advanced pricing agreement (**APA**) programme.

22. In what circumstances are employees taxed in South Africa, and what criteria are used?

In terms of the residence basis of taxation, employees who are residents will in principle be subject to income tax on their worldwide income, and employees who are non-residents only in respect of their income from a South African source.

In an employment context, the originating cause for the income (remuneration), would be the services rendered by the employee. For a non-resident employee, the important question is thus where the services are performed, not by whom or where payment is made or received. It is generally accepted that remuneration received for services rendered in South Africa is regarded as being from a South African source. In certain instances, the non-resident employee would be entitled to rely on relief in terms of an applicable DTA.

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

Employees' tax

Resident employers must withhold employees' tax (often referred to as pay as you earn or **PAYE**) from remuneration payable to employees.

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

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

Remuneration is widely defined and does not only include cash payments, but also fringe benefits. The Seventh Schedule to the ITA deals with the taxation of taxable fringe benefits. It stipulates to which extent benefits provided to employees will be taxable. It also deals with how such benefits should be valued.

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

Certain allowances provided to employees to enable them to incur business expenses (e.g. using their own vehicles for business purposes or paying for meals and incidental costs while on business trips away from home) are subject to different tax rules.

The full amount of these allowances is not subject to employees' tax at the time when they are paid. The final income tax liability in respect to allowances is determined on assessment. All other allowances are dealt with as remuneration and thus taxed in full, even if the allowance was advanced in respect of business-related expenditure.

Unemployment Insurance Fund contributions

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

Employees are required to contribute 1% of their salaries to the UIF (up to an annual remuneration limit), and their employers are required to match this amount. The annual remuneration limit is currently ZAR 178 464 per annum (ZAR 17 712 per month). Thus, the maximum amount that an employee is currently required to contribute to the UIF is ZAR 177.12 per month and the employer is required to match this amount.

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

The application for UIF registration is made on an EMP101e Form and the contributions are paid to SARS. In circumstances where an employer is not obliged to register for tax in terms of the ITA, the application to register for UIF contributions must be made directly to the Unemployment Insurance Commissioner. There is also in any event a registration and declaration obligation *vis-à-vis* the UIF, and all employers must accordingly register with the Fund (apart from the registration with SARS).

Skills development levies

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

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

Compensation for Occupational Injuries and Diseases Act

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

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

Consumer Protection

24. Are there consumer protection laws and, if so, what are they?

The Consumer Protection Act (**CPA**) generally applies to transactions involving the supply of goods and services in South Africa; to the promotion of any goods or services, or of the supplier of any such goods and services, in South Africa; and to the goods and services that are supplied or performed in terms of a transaction to which the CPA applies.

If the investor's operations involve the supply of goods or services (including education) to consumers in South Africa, the CPA will apply, unless the consumer is a juristic person whose asset value or annual turnover exceeds the prescribed threshold value of ZAR 2 million. While certain transactions (e.g. those with a juristic person whose asset value or annual turnover is over ZAR 2 million) are exempted from the application of the CPA and are, accordingly, not subject to the requirements of the CPA, any goods supplied in terms of those transactions, and the importer or producer, distributor and retailer of those goods are nevertheless still subject to Section 60 (product recall) and Section 61 (product liability) of the CPA.

Key aspects regulated by the CPA include:

- restrictions on unwanted direct marketing;
- consumers' rights to a cooling-off period after direct marketing;
- consumers' rights to cancel fixed-term agreements on two months' notice (on payment of a reasonable cancellation fee);
- consumers' rights to fair, just and reasonable terms and conditions (i.e. provisions which limit or exclude liability for gross negligence, which purport to waive any of the consumer rights conferred by the CPA or to avoid any of the obligations imposed on suppliers by the CPA, or which override the provisions of the CPA, are not permissible); and
- consumers' rights to fair value, good quality and safety (including strict liability for harm caused by defective products, and an implied warranty of quality). Where a product does not meet the standards imposed by the implied warranties, the consumer may return the product to the person who supplied it. The consumer may elect either to receive a refund of the purchase price or to have the particular product repaired or replaced. The consumer has this right for a period of six months from the date of purchase.

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

The CPA Regulations, 2011 include a list of contract terms that are presumed to be unfair (i.e. these could be regarded as fair provided that the supplier has a clear justification for including them). Examples of these terms include:

- exclusions or limitations by the supplier of foreseeable liability or of remedies/ actions available to the consumer, giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer without the consumer's agreement; and
- provisions that the laws of a country other than South Africa apply to a consumer agreement concluded and implemented in South Africa.

Certain contract terms must be drawn to the attention of consumers in a conspicuous way and must be drafted in plain language. These are contract terms that:

- limit or exclude the supplier's liability;
- provide that the consumer assumes any liability;
- indemnify the supplier; or
- constitute an acknowledgement of any fact by the consumer.

As yet, there are no formal requirements in relation to how such contract terms must be drawn to consumers' attention. The practice that has been adopted by many suppliers is to present such terms in bold font, underlined or capitalised.

Consumer protection requirements in the context of e-commerce are provided for under the Electronic Communications and Transactions Act (**ECTA**). ECTA also makes provision for a 'cooling-off' period of seven days during which a consumer is entitled to cancel the contract without reason or penalty. This is in addition to any remedy provided to consumers under any other applicable law. Under ECTA, in addition to the mandatory information that must be made available on a supplier's website where goods or services are offered to consumers, suppliers must provide a consumer with the opportunity to (i) review the entire electronic (online) transaction; (ii) correct any mistakes; and (iii) withdraw from the transaction before finally placing an order. Failure to comply with these requirements will give the consumer the right to cancel the transaction within 14 days of receiving the goods or services under the transaction. ECTA is not prescriptive as to how the information is presented to consumers, provided that the information is, in fact, provided to consumers. ECTA does not expressly provide that the consumer needs to accept affirmatively any terms or any of the information relating to making a purchase. The common law rules of contract require that the consumer show active consensus to the purchase and the associated terms. Acceptance of the terms may be communicated by continuing to use the website.

25. How are product liability and product safety regulated?

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

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

Insurance

26. How is insurance regulated?

Generally, there is no obligation on companies to obtain insurance to establish a business in South Africa, unless stipulated in the applicable legislation (e.g. financial services providers are required to have professional indemnity and fidelity guarantee insurance cover). However, parties in some instances require from a contractual perspective that the counterparty to the contract obtains insurance when providing or rendering certain services or providing certain products or goods.

To the extent that the business has any employees, it is required to:

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

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

The Export Credit Insurance Corporation of South Africa SOC Limited (**ECIC**), is a licensed non-life insurer and a state-owned entity. It provides political and commercial risk insurance to South African exporters of capital goods and related services. The ECIC aims to facilitate South African export trade by underwriting export credit loans and investments outside the country to enable South African contractors to win capital goods and services' contracts in other countries.

The ECIC's mandate has been extended to provide insurance cover to South African manufacturers exporting to countries elsewhere in Africa in key priority sectors, as African countries prepare for increased trade and industrialisation following the signing of the AfCFTA agreement. ECIC will provide product coverage to small and medium-sized enterprises and first-time exporters, who do not typically get access to trade finance products. The expanded mandate is intended to provide South African businesses with additional trade credit support to grow exports into the rest of the African continent.

Sasria SOC Limited is another state-owned non-life insurer that provides special risk cover to all individuals and businesses that own assets in South Africa, as well as government entities. It provides cover for risks such as civil commotion, public disorder, strikes, riots and terrorism, making South Africa one of the few countries in the world that provide this insurance, particularly at affordable premiums. The cover is added to the underlying insurance policy procured by the policyholder.

South Africa has established credit guarantee insurance providers. Some of these insurers form part of large South African financial services groups and there are some insurers that are subsidiaries of foreign based insurance groups. The cover provides for domestic or international debtors, which means exporters are protected against non-payment.

Warranty and indemnity insurance cover is also becoming more prevalent in South Africa for very large commercial transactions. Usually such risks are provided through local insurers who form part of a foreign-based insurance group alternatively the cover is sought outside of South Africa.

Data Protection

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

The provisions of South Africa's first comprehensive data protection legislation, POPIA, became enforceable on 1 July 2021. Regulations under POPIA were also published and came into effect simultaneously with POPIA on 1 July 2021. Proposed amendments to the Regulations were, however, published for comment in October 2021.

Prior to POPIA, the personal information of data subjects in South Africa was regulated in accordance with the common law and the Constitution of the Republic of South Africa. This provides that everyone has a reasonable expectation of privacy, which may not be wrongfully or intentionally interfered with. The provisions of POPIA are broadly regarded as a codification of the common law and constitutional right to privacy.

28. Are there laws protecting personal information?

Yes. The primary data protection legislation in South Africa is POPIA. The purpose of POPIA is to give effect to the common law and constitutional right to privacy and to regulate the manner in which the personal information of both natural and juristic persons to whom the personal information relates (also referred to as data subjects) may be 'processed', i.e. collected, held, used, disclosed, stored or transferred, among other things, by a responsible party (also referred to as the 'data controller' in some other jurisdictions).

POPIA does this mainly by placing duties on responsible parties and operators. Responsible parties who decide the purpose and means by which personal information is to be processed. The responsible party may mandate an operator (also referred to as a 'data processor' in other jurisdictions) to process personal information on its behalf. In such circumstances, the responsible party must conclude a written agreement with the operator. In the written agreement the operator must undertake obliging it to keep the personal information confidential, to put in place appropriate security measures and to comply with the relevant provisions of POPIA.

POPIA applies to the processing of personal information entered into a record by or for a responsible party where the responsible party is domiciled in South Africa, or is not domiciled in South Africa, but makes use of automated or non-automated means situated in South Africa (unless those means are used only to forward personal information through South Africa).

Personal information is defined in POPIA as any information relating to an identifiable, living natural person, and where it is applicable, an identifiable, existing juristic person. Personal information is very widely defined and includes:

- information related to a person's race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth;
- information related to a person's education or medical, financial, criminal or employment history;
- any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to a person;
- the biometric information of a person;
- the personal opinions, views or preferences of a person and the views or opinions of another individual about a person;
- correspondence sent by a person that is implicitly or explicitly of private/confidential nature, or further correspondence that would reveal the contents of the original correspondence; and
- the name of the person if it appears with other personal information relating to a person, or if the disclosure of the name itself would reveal information about a person.

POPIA also recognises a special category of personal information, referred to as 'special personal information', the processing of which is subject to additional protections provided for in POPIA. Special personal information is information about a data subject's religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life, biometric information and criminal behaviour.

Not all personal information is subject to POPIA – only personal information that is contained in a 'record'. A record is widely defined and means any recorded information, regardless of form or medium, that is in the possession or under the control of a responsible party, for example writing, marks, graphs, videos or photographs.

In addition, certain processing activities are excluded from the application of POPIA. For example, POPIA will not apply to the processing of personal information in the course of a purely personal or household activity, or for the purpose of journalistic, literary or artistic expression, or where the personal information has been sufficiently de-identified to the extent that it cannot be re-identified.

POPIA makes provision for eight conditions of lawful processing and regulates, among other things, the following:

- when and how to share and otherwise process personal information (personal information must be collected for a specific, defined and lawful purpose relating to the activities of the responsible party, and personal information may only be processed if, given the purpose for which it is processed, the processing is adequate, relevant and not excessive);
- the obligation on the responsible party to ensure the integrity and continued accuracy and quality of personal information (personal information must be complete, accurate, not misleading and regularly updated);
- transparency and accountability on how personal information will be processed (limited to the purpose it was collected for);
- security safeguards, and who has access to personal information (there must be appropriate, reasonable technical and organisational measures and controls in place to track access and prevent unauthorised people, even within the same company, from accessing personal information);
- how and where personal information is stored (there must be adequate measures and controls in place to safeguard personal information to protect it from theft, or being compromised); and
- data subject participation (including the right of access to and correction of personal information, the right to object to the processing of personal information in limited circumstances, and the right to prevent the use of personal information for direct marketing purposes).

POPIA also regulates the transfer of personal information from South Africa to a foreign country. Such cross-border transfers are permitted *inter alia* with the consent of the data subject, or if the recipient of the information is subject to a law,

binding corporate rules or a binding agreement that provides for an adequate level of protection that effectively upholds the principles contained in POPIA.

In certain circumstances, the prior authorisation of the Information Regulator will be required for the processing of personal information, such as where the processing is for credit reporting purposes or the responsible party intends to transfer special personal information or personal information relating to children to a recipient in a foreign country that is not subject to laws, binding corporate rules or a binding agreement granting adequate protection.

POPIA also introduces specific provisions regarding the processing of personal information for direct marketing purposes via unsolicited electronic communications (email, SMS, automated voice messages, but excluding telephone calls).

In terms of POPIA, direct marketers will only be able to use individuals' personal information (e.g. their names, contact details and other personal information) for direct marketing purposes after obtaining the prior specific consent of the intended recipients of any such direct marketing communications. In other words, individuals will have to opt-in in order for direct marketing communications to be sent to them lawfully.

Prior consent is not required, however, if the data subject is a customer of the responsible party, and the responsible party has obtained the customer's contact details in the context of a sale or a product or service; if the purpose of the direct marketing relates to the responsible party's own similar products or services; and if the customer is given a reasonable opportunity to object, free of charge, from receiving direct marketing communications at the time when the information was collected, and on each occasion thereafter in which the customer receives marketing communications – thus an opt-out opportunity.

Responsible parties must appoint and register an information officer (and, if necessary, deputy information officers) with the data protection authority, the Information Regulator.
Once registered, POPIA prescribes certain duties that an information officer is required to comply with. These duties include, among other things, encouraging and ensuring that the responsible party complies with the provisions of POPIA, dealing with requests made under POPIA, and assisting the Information Regulator with any investigations conducted in respect of the responsible party. Further, the POPIA Regulations prescribe additional duties to be performed by information officers, which include ensuring that: a compliance framework is developed, implemented, monitored and maintained; a personal information impact assessment is conducted; an access to information manual is developed and maintained; and internal awareness sessions are conducted regarding the provisions of POPIA.

Under POPIA, an enforcement notice will generally be issued by the Information Regulator in the event of non-compliance with POPIA. The Information Regulator may also impose an administrative fine of up to ZAR 10 million. Civil action for damages may also be brought by an aggrieved data subject or by the Information Regulator at the request of a data subject.

Further, POPIA makes provision for various criminal offences (e.g. for a failure to comply with an enforcement notice or for making false statements). Penalties for criminal offences include a fine or up to 12 months' imprisonment.

In addition to POPIA, personal information is protected by a number of other statutes. For example, the Cybercrimes Act, which Act has recently been assented to by the President of South Africa. The Act criminalises, among other things, the unlawful and intentional access to, or interference with, data, a computer programme, a computer data storage medium, or a computer system. The Act also criminalises the unlawful and intentional interception of data, any act of cyber fraud and any malicious communications. It has not yet been determined as to when the provisions of the Cybercrimes Act will come into force.

In terms of the ECTA, a person may not, without authority or permission, intentionally access or intercept any data; interfere with data in a way that causes such data to be modified, destroyed or otherwise rendered ineffective; or use any device or computer programme to unlawfully overcome security measures designed to protect or restrict access to data. ECTA also prohibits computer-related extortion, fraud and forgery.

Fintech

29. Is fintech regulated? If so how?

At present, there are no specific regulatory frameworks, which directly regulate fintech or financial innovation in South Africa, except for crypto assets as discussed below. Notwithstanding, certain fintech products and services may fall within the scope and ambit of traditional existing financial sector regulatory frameworks as the frameworks are generally activities based.

South African financial services legislation is therefore wide enough to apply to most existing fintech products and services. Examples of such legislation are:

- the Banks Act, which regulates banking business and deposit-taking related activities, including the issuance of e-money or electronic money;
- the Financial Advisory and Intermediary Services Act (**FAIS**), which regulates the provision of financial services (investment advice and intermediary services) in relation to financial products including automated investment advice;
- the Financial Markets Act, which regulates the capital/financial markets, particularly securities trading infrastructures and their participants;
- the National Credit Act, which regulates the provision of credit and lending activities including peer-to-peer lending, crowdfunding and buy-now-pay-later platforms;
- the National Payment Systems Act, which regulates the domestic payment system and role-players in the payment system, both banks and non-banks (such as payment aggregators and payment service providers/ payment gateway providers); and
- the Exchange Control Regulations, issued under the Currency and Exchanges Act, which regulates the cross-border flow of capital (including money) and institutions that facilitate cross-border flow of capital.

There is also a Conduct of Financial Institutions (**CoFI**) Bill, which is on the horizon. Once in effect, the CoFI Bill will materially change the regulatory regime currently applicable to financial institutions and parties seeking to carry out regulated financial services activities in or in relation to South Africa. South Africa's regulatory bodies are alive to the fast-paced developments in the fintech space and have adopted a pro-innovation stance. The most significant developments in the fintech regulation space are outlined below:

- In 2016, the Intergovernmental FinTech Working Group (**IFWG**) was established (comprising of members from a number of financial sector regulators) with the purpose of developing a common understanding among regulators and policymakers of financial technology developments as well as policy and regulatory implications for the financial sector and economy.
- In 2018, a joint working group was formed under the auspices of the IFWG to specifically review the position on cryptocurrencies. The working group is called the Crypto Assets Regulatory Working Group (**CARWG**).
- In January 2019, the CARWG published a consultation paper containing policy proposals for the development of regulatory responses , proposing its intended regulatory approach as regards priority areas, and heralding an initial focus on anti-money laundering, token-based transacting, capital raising, cryptographic derivative products and market provisioning.
- The IFWG Innovation Hub consists of a regulatory guidance unit, a regulatory sandbox unit, and the innovation accelerator. The regulatory guidance unit helps market innovators resolve specific questions regarding the policy landscape and regulatory requirements and provides a central point of entry for market innovators to submit enquiries related to fintech and innovation-oriented policies and regulations.
- On 11 June 2021, the IFWG, through the CARWG, published a Position Paper on crypto assets. Essentially, the Position Paper provides a roadmap for putting in place a phased and structured framework for regulating crypto assets through the regulation of crypto asset service providers (**CASPs**). It also serves to initiate the process for the individual financial sector regulators to implement the various recommendations contained therein which concern three main areas: anti-money laundering and combatting the financing of terrorism, cross-border financial flows and application of financial sector laws.

- On 19 October 2022, the Financial Sector Conduct Authority (**FSCA**) published, in terms of General Notice 1350 of 2022, the declaration of crypto assets as a financial product in terms of FAIS (Crypto Asset Declaration). The effect of the Crypto Asset Declaration is that any person providing financial services (comprising the furnishing of 'advice' and/or the rendering of 'intermediary services' (including marketing) (CASPs), each as defined in FAIS) in relation to crypto assets to clients, on an onshore (whether operating from a business within South Africa or otherwise) or offshore (cross-border) basis, is required to be appropriately licensed as a financial services provider (**FSP**) and to comply with the requirements of FAIS. This requirement does not apply to crypto asset miners, node operators and persons rendering financial services in relation to non-fungible tokens. In order to ensure a smooth compliance transition, the FSCA also published an exemption under FSCA FAIS Notice 90 of 2022, on 21 October 2022 (**Exemption**), in terms of which providers of financial services related to crypto assets are currently exempt from the FAIS licensing requirement so long as such providers submit their respective FSP licence applications to the FSCA between 1 June 2023 and 30 November 2023. This means that with effect from 30 November 2023, no person can render financial services in relation to crypto assets (i.e. act as a CASP) unless that person holds an FSP licence covering crypto assets as a product or has filed an FSP licence application before 30 November 2023.
- On 30 November 2022, the amendments to Schedule 1 (which designates 'accountable institutions'), Schedule 2 (which lists supervisory bodies) and Schedule 3 (which lists reporting institutions) to the Financial Intelligence Centre Act (**FICA**) were published, with effect from 19 December 2022. In an effort to enhance the achievement of the stated aims of FICA, the amendments to Schedule 1 materially increase the number of sectors qualifying as accountable institutions, to include (among other things) CASPs. This means that CASPs must register as accountable institutions with the Financial Intelligence Centre and comply with all anti-money laundering obligations applicable to accountable institutions in terms of FICA.
- The outlook for fintech innovation in South Africa is promising. It is driven by the market demand for innovative products and services; the proven capacity of innovators and suppliers to respond to the demand; and an inquisitive regulatory approach.
- Much activity is centred on financial services, payment systems, money transfers and applications (mobile or otherwise) that obviate the need to hold, or transact via, a bank account held with a traditional bank. This has major implications for both exchange control as well as tax regulations, as fintech can be used to undermine them. These concerns have informed the South African Reserve Bank ban on commercial banks' processing of card transactions for acquiring crypto assets from 'offshore' exchanges. Regulators' concerns regarding volatility and credit-rating of crypto assets, as well as several high-profile scams, have prompted a ban on investment in crypto assets by pension funds, set out in the amendments to Regulation 28 issued under the Pension Funds Act.

Environmental Law

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

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

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

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

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

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

- **National Environmental Management Act (NEMA):** requires an environmental authorisation to be obtained before many types of construction, development, expansion, closure or decommissioning and a range of other so-called statutorily prescribed 'listed activities' can commence. These include certain activities associated with the clearing of vegetation, transformation of land use, exploration for, extraction, production and mining of mineral and petroleum resources, establishing electricity generation facilities as well as closure or decommissioning of certain activities, facilities, structures or infrastructure. NEMA also imposes a duty of care on a wide variety of people including landowners, lessees and any other person in control of the land to prevent pollution and where pollution has occurred to take reasonable measures to remediate pollution.

- **National Water Act:** entitlement (such as a general authorisation) for undertaking certain water uses, including abstractive water uses, various effluent and waste-related activities that may impact on water resources as well as activities entailing physical impacts on or in proximity to water resources. The National Water Act also has a duty of care to prevent pollution of water resources. This duty is borne by a number of persons.

- **National Environmental Management: Waste Act:** requires licensing of various listed waste management activities or registration and compliance with regulated norms and standards for certain other listed activities, and currently regulates residue deposits and residue stockpiles in the context of mining, production and related operations. However, this is subject to change as residue deposits and residue stockpiles and intended to in future be regulated under the National Environmental Management Act. This Act also imposes obligations regarding the reporting and handling and remediation of contaminated land. Contaminated sites may need to be reported to the environmental authorities and are potentially subject to remediation orders, being declared as remediation sites and recorded on the South African contaminated land register and with the Deeds Registry. The environmental authority may impose conditions that must be complied with in the transfer of ownership of remediation sites. Extended producer responsibility obligations are also being imposed in certain sectors, including the electrical and electronic equipment sector, the lighting sector and the paper, packaging and some single-use products.

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

- **National Environmental Management: Air Quality Act:** requires the licensing of various listed activities that result in atmospheric emissions, with specific minimum emission standards being prescribed for such activities, as well as dates being set by when compliance with the minimum emission standards must be achieved by operations.

  The Act also requires the reporting of emissions, includes various mechanisms for air pollution control (such as creating priority areas around the country where air quality management plans are in place), applies dust control regulations and establishes categories of 'controlled emitters', which also have regulated emission standards that must be complied with. Mechanisms for registration, measuring and reporting regarding greenhouse gas emissions have been established in South Africa in light of the Carbon Tax Act and other anticipated tighter climate change related regulatory controls, including the pending Climate Change Act.

- **National Heritage Resources Act:** creates various forms of heritage protection, including permitting requirements for impacts on heritage resources, and requires notification to, and approval from, the heritage authorities for certain types of specified development activities.

- **Provincial and local authority (municipal) legislation:** authorisations, licences or permits or agreements with the municipality are typically required for activities such as the storage of flammable substances or dangerous goods, the discharge of effluent into municipal sewers, and undertaking offensive or listed scheduled trades. Permits are often required under provincial legislation for activities that impact protected animal or plant species, while noise control and specific waste-related legislation also applies in certain provinces, among other environmental laws.

Apart from the direct compliance costs (e.g. infrastructure or measures necessary to contain or limit emissions, pollution or environmental impacts), when prescribed by law or contained in authorisations, licences or permits, there are typically costs and time delays associated with obtaining the relevant environmental authorisations, licences and permits, with public participation processes often being required, as well as for any non-compliance. There are also costs in complying with any conditions attached to these authorisations, licences and permits. A breach of environmental legislation can also result in criminal liability.

Comprehensive requirements are set in law regarding making financial provision for remediation of environmental damage associated with production, mining and related operations as well as relating to the closure of such operations. This is an effort to ensure that land is 'restored' as close as possible as to what it was prior to the activities taking place.

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

Frequently, requirements are imposed that the competent authorities must be provided with reports on the environmental impacts and performance of the operations at specified intervals, necessitating monitoring equipment to be installed at facilities. There are often obligations for ongoing auditing and reporting to assess the state of compliance of the operation with the relevant authorisation conditions and environmental management programme.

Generally, a breach of environmental laws may lead to both criminal and administrative sanctions, with certain statutes potentially imposing a strict liability regime in the context of pollution and contamination. There is also a possibility of civil action directly by the authorities and there is broadened legal standing with respect to environmental compliance under South African environmental law which would allow, *inter alia*, directly affected neighbours or environmental non-governmental organisations or civil society interest groups the potential to approach the courts for appropriate relief, for example, in the interests of protecting the environment, and to institute private criminal prosecutions. Additionally, there is the potential for personal criminal liability for directors, managers, employees and agents in the case of so-called NEMA Schedule 3 offences.

Dispute Resolution

31. How are disputes resolved in South Africa?

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

Strictly speaking, the South African Judiciary is an independent branch of the Government that is subject only to the Constitution and it exercises its function based on the law. In the resolution of disputes, however, the South African courts do take into account matters of public policy.

Thus the dispute resolution methods in South Africa are not completely devoid of all political influence, although they can be categorised as mainly non-political. It must be emphasised that judges are not politically elected, and the 'politics' referred to here is in the broad sense, rather than the narrow interests of party politics.

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

Various tribunals

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

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

Time taken to resolve disputes

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

A matter can take anything from eight months (in instances where the matter is simple and the parties are cooperative) to five years or more (in instances where the matter is complex, the parties are uncooperative, or the matter has been taken on appeal to its highest appealable point – the Supreme Court of Appeal or Constitutional Court, depending on the nature of the matter and the lower court in which it originated).

It is also important to note that South African courts have a significant backlog of cases, which can create delays in court processes. Accordingly, the division of the High Court in which the parties litigate may influence the time taken to resolve the dispute. In many courts, significant steps have been taken to expedite the dispute resolution process, such as encouraging the referral of disputes to mediation, the introduction of interlocutory courts and trial readiness procedures to hear 'side issues' that arise in the process of resolving disputes.

The High Court in Johannesburg has created a commercial court with particular expertise in the resolution of disputes arising from company law. This court is modelled on international best practice in jurisdictions such as Delaware and London. The creation of the commercial court is aimed at facilitating the efficiency of the courts in hearing matters.

At the beginning of 2020, an online case management system 'CaseLines' was implemented in the busiest divisions of the High Court, situated in Johannesburg and Pretoria. The system enables litigants to file and upload pleadings and other documents electronically from which attorneys and the courts are able to access the relevant case and court documents online. To further progress the online case management system 'Court Online' was implemented in 2022 with the effect that all new cases in the Johannesburg and Pretoria High Court divisions are initiated on the Court Online Portal.

The effect of Court Online is that new cases in these divisions are not to be issued in person, therefore enabling practitioners to file documentation electronically anywhere and without being physically present at court. As is the case around the world, the various divisions of the High Courts are, wherever possible, conducting court hearings remotely.

32. Are there any alternatives to litigation?

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

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

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

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

33. Are foreign judgments and international arbitration awards enforceable in South Africa?

The enforcement of foreign judgment

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

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

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

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

Arbitration law and the enforcement of arbitral awards

South Africa reformed its arbitration law in December 2017 with the enactment of the International Arbitration Act (**IAA**).

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

The IAA is a significant step in the development of South African arbitration law. After the commencement of the Arbitration Act in 1965, the country fell behind the rest of the global community in following and adopting international best practice.

Much work had been done by transnational bodies, such as the United Nations Commission on International Trade Law (**UNCITRAL**), to establish model laws and arbitration procedures that contributed significantly to the harmonisation of arbitration law around the world.

By adopting these standards, other African jurisdictions took the lead in becoming centres for international arbitration.

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

- South African arbitration law now incorporates the UNCITRAL Model Law on International Commercial Arbitrations (Model Law). This means that the Model Law, as adapted in Schedule 1 to the Act, will apply to international commercial arbitrations where South Africa is the juridical seat of the arbitration. This general rule is subject to the provisos that the dispute is capable of determination by arbitration in South Africa, and that the arbitration agreement is consistent with public policy
- The IAA applies to international commercial arbitrations involving both private and public bodies. The definition of a public body under the IAA adopts the definition of an organ of State in terms of the Constitution. With an increasingly structurally pluralistic state, a public body may in certain circumstances include a private company where that party exercises a public law power or performs a public function (either in terms of the Constitution or in terms of legislation). This will be subject to the Section 13 of the Protection of Investment Act, which deals with disputes between the State and foreign direct investors arising from that legislation.
- The IAA promotes respect for party autonomy in the resolution of disputes and confirms that no court shall intervene in an arbitration except where provided for in the legislation. In addition to the provisions of the Model Law and the question of enforcement of agreements and awards, the IAA confirms that arbitration may not be excluded solely on the ground that legislation confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.
- The IAA affords immunity to arbitrators and arbitral institutions in the bona fide discharge of their functions. This is a vital measure to ensure the independence and neutrality of the adjudicators in arbitration proceedings.

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

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

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

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

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

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

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

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

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

- A party to the arbitration agreement did not have capacity to contract under the laws applicable to that party, or the arbitration agreement is invalid under the laws to which the parties have subjected the agreement. Alternatively, where the parties have not subjected the agreement to any law, the order can be resisted if the agreement is invalid under the law of the country in which the award was made.
- The defendant did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case.
- The arbitral award deals with a dispute falling outside the terms of reference to arbitration.
- The constitution of the arbitral tribunal, or the arbitration procedure, was not in accordance with the arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place.
- The arbitral award has not yet become binding on the parties, is subject to an appeal, or has been reviewed or set aside in the country in which the award was made.

AFSA is the leading arbitral institute in South Africa and its revised International Arbitration Rules will facilitate the continued growth of its international caseload and ensure that it keeps pace with developments of the rules of other major arbitral centres around the world.

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

Competition

34. What is the relevant competition legislation, and who are the enforcers?

legislation is the Competition Act, as amended (**Competition Act**) and the regulations promulgated in terms of the Competition Act. The Competition Act is enforced by the Competition Commission (**Commission**), the Competition Tribunal (**Tribunal**) and the Competition Appeal Court (**CAC**). In circumstances where a competition matter raises constitutional issues or if the matter raises an arguable point of law of general public importance, such matters can be taken on appeal from the CAC to the Constitutional court, the apex court of the land.

The Commission has issued various soft laws including: (i) a final guideline on Small Merger Notification (the Small Merger Guideline); (ii) guide on Promoting Competition in Public Procurement; (iii) final guidelines on Collaboration between Competitors on Localisation Initiatives; (iv) block exemptions regulations for energy supplier and users; (v) and a practice note on the Promotion of Competition and Inclusion of Supplier Panels in Banks and Insurers. The Commission also issued guidelines on information exchange and draft-block exemption regulations allowing small, medium and micro-sized enterprises (**SMEs**) to collaborate on initiatives and share information which ordinarily may have been prohibited in terms of the Competition Act.

35. Is the law actively enforced?

The law is actively enforced, both in respect of mergers and prohibited practices (including cartels, abuses of dominance and other conduct). The Commission is also increasingly using its powers to conduct market inquiries as a tool to regulate competition in markets in general. There are several market inquiries that have been completed (most recently in relation to Online I intermediation platforms) and others that are ongoing (including in relation to fresh produce). The online Intermediation Platforms Market Inquiry resulted in the Commission seeking to impose remedial actions on various firms, including global tech players.

36. What are the current priorities or focus areas of the competition authorities?

The Commission's priority sectors are the (i) food and agro-processing; (ii) healthcare; (iii) intermediate industrial inputs; (iv) construction and infrastructure; (v) banking and financial services; (vi) information and communication technology; and (vii) energy. According to the Commission, these sectors were selected taking into account South Africa's economic policies, the volume of complaints received in the sector and market failures which the Commission has identified through past investigations and scoping exercises. Both mergers and prohibited practices in these sectors attract close scrutiny.

As noted above various market inquiries have been and are being conducted into the state of competition in certain markets. The latest one being the media and digital platforms market inquiry which will commence mid-October 2023. The focus of the market inquiry is on digital platforms that distribute news media content which have material implications for the South African news media sector. Platforms include:

(i) search engines;
(ii) social media sites;
(iii) news aggregator sites and/or applications;
(iv) video sharing platforms;
(v) generative AI services whether integrated into the above platforms or not;
(vi) ad tech stack companies on the supply and demand side, as well as ad exchanges; and
(vii) other platforms which may be identified in the course of the Inquiry.

The market inquiry is broadly focused on: (i) the interaction and dependency of South African news media on relevant digital platforms as an intermediary to online users for the dissemination of news content online; (ii) the impact thereof on news media to aggregate, display, create and monetise their news content online; and (iii) the implications of the dependency on digital platforms by news media organisations on consumers, in the sustainability of the news media sector and the provisions of credible news content as a public good to consumers.

37. What kind of transaction constitutes a notifiable merger?

In terms of the Competition Act, a 'merger' occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

There are two categories of mergers that require mandatory notification and approval prior to lawful implementation in South Africa. These are 'intermediate' or 'large' mergers. The categorisation is determined with reference to certain asset and turnover thresholds, set out below.

*For an **intermediate** merger:*

1. the target firm must have assets in or turnover in, into or from South Africa of at least ZAR 100 million (**target threshold**); and
2. the value in 1, combined with the entire acquiring group's assets in or turnover in, into or from South Africa, must be at least ZAR 600 million (**combined threshold**).

*For a **large** merger:*

The values in 1 and 2 above are replaced by ZAR 190 million (target threshold) and ZAR 6.6 billion (combined threshold).

Note that foreign-to-foreign mergers are notifiable where the thresholds are met.

Small mergers (i.e. where the thresholds are not met) are only notifiable at the request of the Commission (within 6 months of implementation) or in limited circumstances in accordance with the Small Merger Guideline.

38. What is the merger review period?

The Commission is the decision-making body in intermediate mergers. The Commission has a maximum of 60 business days (commencing the day after which a complete merger notification is filed) to review an intermediate merger (consisting of an initial period of 20 business days which may be extended once by a period not exceeding 40 business days). Within this period, the Commission must approve, approve with conditions or prohibit the transaction.

For large mergers, the Tribunal is the decision-making body, and the Commission has an initial period of 40 business days (commencing the day after which a complete merger notification is filed) within which to assess the transaction and to make a written recommendation, with reasons, to the Tribunal on whether or not the merger should be approved, approved with conditions or prohibited. The commission may extend its review period (either with the consent of the merging parties, or on application to the Tribunal) by no more than 15 business days at a time. In terms of the Competition Act, the Commission does not have a maximum period within which to review and make a recommendation on a large merger and only the Tribunal may limit this period on opposition by the merging parties. Upon receipt of the Commission's recommendation, the Tribunal will set the matter down for a hearing within 10 business days. Within 10 business days of completion of the hearing, the Tribunal must either approve, approve with conditions or prohibit the merger. The Tribunal must publish its reasons for the decision within a further 20 business days.

The review period of a small merger is the same as an intermediate merger, the Commission is also the decision-maker.

39. To what extent are non-competition factors relevant to the assessment of a merger?

The Competition Act provides for public interest considerations to be taken into account, and these are equally weighted to the competition factors which must be considered. The public interest considerations under the Act are reflective of government policy objectives on transformation and inclusion, and include a consideration of the effect that a merger will have on:

(i) a particular industrial sector or region;
(ii) employment;
(iii) the ability of SMEs, or firms controlled by historically disadvantaged people (**HDP**), to effectively enter into, participate in or expand within the market;
(iv) the ability of national industries to compete in international markets; and
(v) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market. As noted, this is currently an area of significant focus for the Commission.

40. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?

The Competition Act regulates prohibited practices and specifically prohibits certain horizontal restrictive practices (unlawful conduct between actual or potential competitors). The Competition Act prohibits price-fixing (which may relate to a purchase or selling price or any other trading condition); dividing markets (by allocating market shares, customers, suppliers, territories, or specific types of goods or services); and collusive tendering.

The Commission has prosecuted firms across a wide range of industries for engaging in cartel conduct, including in the construction, cement, concrete, bread, milling and airline industries.

41. Is minimum resale price maintenance prohibited?

Minimum resale price maintenance is *per se* unlawful. Section 5(2) of the Competition Act specifically provides that the practice of minimum price maintenance is prohibited. Section 5(3) of the Competition Act provides that despite section 5(2), a supplier or producer may recommend a minimum resale price to the re-seller of a good or service, provided that:

(i) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and
(ii) if the product has its price stated on it, the words recommended price must appear next to the stated price.

42. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?

The Competition Act prohibits the abuse of a dominant position. A firm is considered to be dominant in a market if:

(i) it has at least 45% of that market;
(ii) it has less than 35% of that market, but has market power (as defined in the Competition Act); or
(iii) it has at least 35% but less than 45% of a particular market, unless it can show that it does not have market power. 'Market power' is defined in the Competition Act as 'the power of a firm to control prices, or to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers'.

The Competition Act includes prohibitions which prevent a dominant firm from: (i) charging an excessive price (as defined in the Competition Act); and (ii) refusing to give a competitor access to an essential facility (as defined in the Competition Act) when it is economically feasible to do so.

A dominant firm is also prohibited from engaging in any exclusionary act (as defined in the Competition Act) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

There are also provisions prohibiting a dominant firm from: (i) discriminating between purchasers in relation to equivalent transactions of goods or services of like grade and quality; and (ii) abusing buyer power. Special rules apply when dealing with SMEs and HDP firms.

Dissolving a Business

43. Are there any considerations in terminating a business?

What follows assumes that a voluntary process is used to deregister or wind up the business entity. A compulsory, court-ordered process involves many different considerations.

Tax consequences

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

- taxable income or taxable capital gains on the disposal of assets, depending on whether the assets were held as capital assets or trading stock;
- recoupments in respect of allowance assets;
- income tax or CGT in respect of the reduction of debt; and
- dividends tax on distributions to shareholders.

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

Where the entity being wound up was a registered VAT vendor and it ceases to conduct an enterprise, it must be deregistered as a vendor. This will result in the deemed disposal of certain types of assets which could in certain circumstances result in a VAT liability.

Where the business being wound up has an outstanding tax liability or a potential tax liability, regard must be had to the relevant provisions of the TAA. In certain circumstances, tax debt may be collected from third parties such as:

- the financial management, if the negligence or fraud of such person resulted in the failure to pay the tax;
- the shareholders, if they received assets within one year prior to the winding up of the company;
- a transferee who is a connected person to the taxpayer, who received an asset without consideration or for consideration below market value; or
- a person who assisted in the dissipation of assets.

Costs

Company: The CIPC does not prescribe any fee to terminate a company by means of deregistration. The filing fee for Form CoR40.1 to initiate a solvent voluntary winding up by the shareholders of the company is ZAR 250 and the filing fee for Form CM26 to initiate an insolvent voluntary winding up by the shareholders of the company is ZAR 80. In the case of a voluntary winding up, the Master of the High Court of South Africa (**Master**) charges a fee ranging from ZAR 250 to ZAR 275 000, depending on the value of the assets of the company concerned. The liquidator's fees will be paid out of the estate of the company. If the estate has no assets or insufficient assets, the liquidator will call upon the creditors to contribute to the winding up costs or will agree a fee with the company itself before accepting the appointment.

Partnership: There are no costs involved in the termination of a partnership.

Trust: Trusts are dissolved/terminated by the Master at no cost.

The above costs are the administrative costs only. They do not take into account costs that may be incurred should legal, tax or financial advisors be consulted in the process of dissolving a business.

Time frame

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

Partnership: The partnership will be terminated in accordance with the terms of the partnership agreement. Therefore, there is no set time or estimated timeframe for the termination of a partnership agreement.

Trust: The trust deed will set out a process for its voluntary termination. The trust will be terminated at the completion of that process and the filing of the relevant documents with the Master. Once the documents have been filed with the Master it can take between one and two months to dissolve the trust.

Forms of business in termination

Company: During the process of termination, the company maintains its legal personality and its assets remain vested in it. However, if a winding-up process is followed rather than a deregistration process, all assets will be under the control of the duly appointed liquidator. Once the company has been dissolved it ceases to exist.

Partnership: The partnership ceases to exist upon termination.

Trust: During the process of termination the trust will retain its *sui generis* status and trust assets remain vested in the trust until disposed of. After termination (dissolution) the trust ceases to exist.

Our Firm

We help our clients manage legal complexity and unlock opportunity in Africa.

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With seven offices in five African countries and over 500 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, Bowmans won the 2023 Africa Legal Awards M&A Team of the Year Award and our South African Practice was named South African Law Firm of the Year for 2023 by Chambers and Partners.

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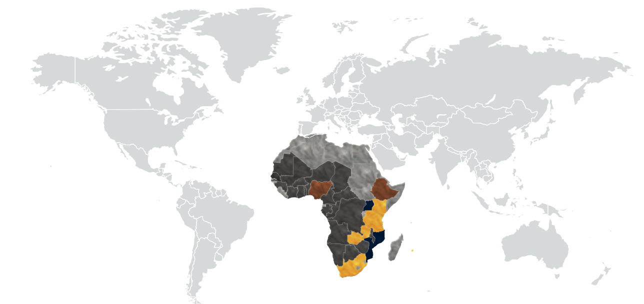
Our Presence in Africa



Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

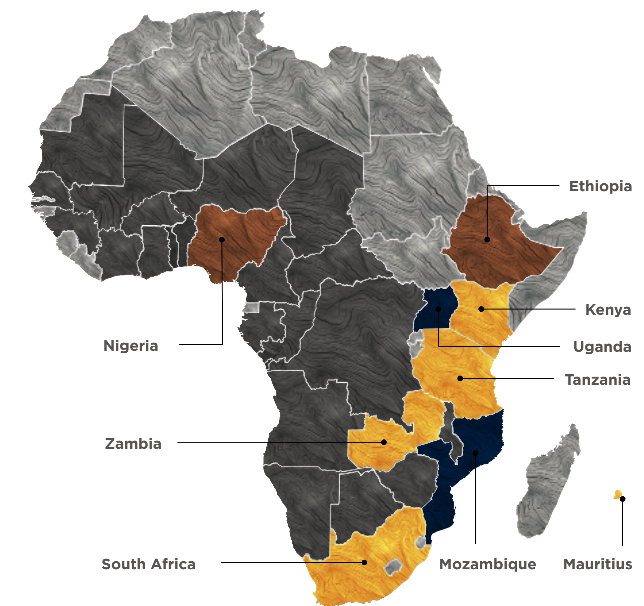
Currently, we have our own offices in five African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam) and Zambia (Lusaka).

We work closely with our Bowmans Alliance firms in Ethiopia (Aman & Partners LLP) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with firms in Mozambique and Uganda. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association independent law firms in in more than 125 countries, which gives us the ability to connect our clients with the best law firms in each of the countries represented.



Bowmans offices

Alliance firms

Special relationships

Significant transaction or advisory experience

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