MOORE STEPHENS

BUSINESS IN SOUTH AFRICA GUIDE

Long Live Sensible

Contents

Important note and disclaimer

This guide is intended as an easy reference, pocket-sized guide for investors and entrepreneurs, both foreign and local on doing business in South Africa.

The information contained herein is a summary of some of the key issues and an overview of relevant legislation. Due to limitations in length of the guide, many aspects affecting the businessperson have not been covered. The guide should therefore not be relied upon for detailed planning. The reader is advised to consult a professional adviser for further assistance and information, and for guidance on new and existing legislation which may affect business and personal planning.

The guide should not be treated as a substitute for advice. Professional advice must therefore be sought in relation to any aspect referred to in this guide.

All references to the masculine gender shall include the feminine (and vice versa).

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

1 Overview

South Africa is strategically situated at the tip of the African continent, providing investment and marketing opportunities both within its borders, and to the rest of the African continent. South Africa offers investors a well capitalised banking system, developed regulatory systems, an established manufacturing base, and abundant natural resources.

The following extract from the 2014 -15 Global Competitiveness Report gives a good overview of South Africa's international standing.

South Africa's overall ranking is 56th out of 144, third among the BRICS economies. South Africa does well on measures of the quality of its institutions (36th), including intellectual property protection (22nd), property rights (20th), the efficiency of its legal framework in challenging and settling disputes (9th and 15th, respectively), and its top-notch accountability of private institutions (2nd). Furthermore, South Africa's financial market development remains impressive at 7th place.

The country also has an efficient market for goods and services (32nd), and it does reasonably well in more complex areas such as business sophistication (31st) and innovation (43rd), benefitting from good scientific research institutions (34th) and strong collaboration between universities and the business sector in innovation (31st).

South Africa's transport infrastructure (32nd) is good by regional standards, although its electricity supply does suffer disruptions (99th).

The country's strong ties to advanced economies, has made it more vulnerable to the economic slowdown of those economies. These ties are likely to have contributed to the deterioration of fiscal indicators: its performance in the macroeconomic environment—having dropped sharply in the previous year—remains at 89th.

Low scores for the diversion of public funds (96th), the perceived wastefulness of government spending (89th), and a more general lack of public trust in politicians (90th) remain worrisome, and security (95th) continues to be a major area of concern for doing business.

The health of the workforce is ranked 132nd out of 144 economies. Higher education and training remains insufficient (86th) and labour market efficiency (113th) is affected by extremely rigid hiring and firing practices (143rd), wage inflexibly (139th), and continuing significant tensions in labour-employer relations (144th).

Raising education standards and making its labour market more efficient will thus be critical in view of the country's high unemployment rate of over 20 percent, with its youth unemployment rate estimated at over 50 percent.

General	
Official name	Republic of South Africa
Form of State	A federal state, comprising a national government and nine provincial governments
Legal system	Based on Roman-Dutch law and the 1996 Constitution
Time	Two hours ahead of GMT
Internet domain	.za
Measures	Metric system

Geography	
Area	1 219 090 square kilometres
Population (census 2011)	51.77 million
Capitals	Pretoria (administrative) Cape Town (legislative) Bloemfontein (judicial)

Provinces	**Name**	**Area (km²)**	**% of total land area**	**Population (census 2011)**	**% of total population**
	Eastern Cape	169 580	13.9%	6 562 053	12.7%
	Gauteng	17 010	1.4%	12 272 263	23.7%
	KwaZulu-Natal	92 100	7.6%	10 267 300	19.8%
	Mpumulanga	79 490	6.5%	4 039 939	7.8%
	Northern Cape	361 830	29.7%	1 145 861	2.2%
	Limpopo	123 910	10.2%	5 404 868	10.4%
	North West	116 320	9.5%	3 509 953	6.8%
	Free State	129 480	10.6%	2 745 590	5.3%
	Western Cape	129 370	10.6%	5 822 734	11.3%

Population Groups (Census 2011)		**Number**	**% of total**
	African	41 000 938	79.2%
	Coloured	4 615 401	8.9%
	White	4 586 838	8.9%
	Indian/Asian	1 286 930	2.5%

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Economy	
Currency	One Rand (R) = 100 cents. International symbol: ZAR
GDP (second quarter 2015)	-1.3% q/q
PPI (July 2015)	+3.3% y/y
Real GDP growth rate (2015 y/y)	1.2%
Consumer Price Index (CPI) (July 2015)	4.7% y/y
Unemployment (third quarter 2015)	25%
Key industries	Mining (world's largest producer of platinum and chromium), automobile assembly, metal-working, machinery, textiles, iron and steel, chemicals, fertilizers, foodstuffs, commercial ship repair
Exports	Gold, minerals, diamonds, metals and metal products, foods and automotive components
Imports	Machinery, transport equipment, manufactured goods, chemicals, oil
Main trading partners (2011)	Germany, USA, UK, China, Japan and France

Languages
The country's democratic Constitution, which came into effect on 4 February 1997, recognizes 11 official languages, to which it guarantees equal status. They are: Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sesotho sa Leboa, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga. English is the language of commerce, banking, government and official documentation.

Sources: Statistics South Africa, www.southafrica.info

3 Companies Act, 71 of 2008

The Companies Act, 71 of 2008, which was promulgated in 2009, has been effective since May 2011 (referred to as "the Companies Act" in this guide). The Companies Act, Amendment Act, together with the Regulations completely replaced the Companies Act of 1973, however existing companies registered under the 1973 Act continue in existence.

The Companies Act regulates the formation and registration, governance, winding up, deregistration and liquidation of all companies.

The Companies Act makes no distinction between locally owned or foreign-owned companies.

4 Business Vehicles

When entrepreneurs draw up a business plan and try to get under way, the first hurdles they face are the procedures required to incorporate and register the new entity before they can legally operate. The main business vehicles used for doing business in South Africa are:

- Partnership
- Sole proprietorship
- Business Trust
- Public company
- Private company
- Personal liability company
- External company (branch of a foreign company).

South African law used to provide for a business entity type called Close Corporations (CC's) until the Companies Act, 71 of 2008 came into force on 1 May 2011. While CC's may no longer be created, existing CC's will continue to operate, until they are converted into companies.

Tax and other considerations affect the choice of a particular form of business vehicle.

The most commonly adopted forms of doing business by foreign investors are private companies and branches of foreign companies.

5 Companies and Intellectual Property Commission

One of the regulatory bodies set up and mandated by the Companies Act, is the Companies and Intellectual Property Commission (referred to as "the Commission").

The Commission is situated in Pretoria, and has jurisdiction throughout South Africa. Some of its main functions are:

- the registration and deregistration of companies
- director appointments
- registration of business names
- registration of intellectual property rights
- the disclosure of information on its business registers
- the promotion and compliance with relevant legislation
- the monitoring of compliance with (and contraventions of) financial reporting standards, and making recommendations to the Financial Reporting Standards Council (FRSC) in regard thereto.

Annual Returns

It is a legal requirement for all companies and close corporations to file annual returns with the Commission on an annual basis. Annual returns must be filed within 30 business days after the anniversary date of incorporation of the company or close corporation.

6 Categories of Companies

The Companies Act provides for two categories of companies, namely for profit and not for profit companies as follows:

FOR PROFIT	**Section 8(2)** a) state owned company (SOC Ltd)
	b) a private company [(Pty) Ltd] if: (i) its not a state owned company (ii) its Memorandum of Incorporation (MOI) (aa) prohibits it offering any of its securities to the public and (bb) restricts the transferability of its securities
	c) a personal liability company (Incorporated or Inc) if (i) it meets the criteria for a private company (ii) its MOI states that it is a personal liability company {i.e that the directors and past directors are jointly and severally liable together with the company, for the debts and liabilities of the company that were contracted during their respective terms of office} **{This type of company is registered by professionals such as Doctors, Lawyers and Engineers}**
	d) a public company, (Ltd) in any other case **{These companies are formed to raise funds by offering shares to the public}**
NOT FOR PROFIT	Name to be followed by suffix "NPC" Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests. The income and property of a non-profit company are to be applied solely to the promotion of the non-profit company's main object. **{Can be incorporated with or without members}**

Right to incorporate a company

For Profit Companies

- 1 or more persons may incorporate, except for a SOC Ltd, which may also be incorporated by an organ of state
- 1 or more directors required, 3 or more for public (Ltd) companies*
- no limit on number of shareholders
- **Share Capital of a private company:** A private company must have share capital, but there is no minimum or maximum amount. Shares issued in accordance with the Companies Act do not have a nominal or par value. Any shares of a pre-existing company (which existed on or at 1 May 2011) that have been issued with a nominal or par value under the Companies Act 1973, continue to have the nominal or par value assigned to them unless they are converted to non-par value shares.

Not For Profit Companies

- an organ of state, a juristic person, or 3 or more persons acting in concert, may incorporate
- 3 or more directors required*
- with/without members. In other words, an NPC without members can be incorporated
- can have voting or non-voting members
- membership can be held by juristic persons, including profit companies
- each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting member on any matter to be determined by vote of the members,exept to the extent that the company's MOI provides otherwise
- a special set of fundamental rules for NPC's is set out in Schedule 1 of the Act
- on dissolution, NPC's are restricted in terms of the distribution of any residual assets.

Notes:

A company's MOI may provide for a higher minimum number of directors as those described above.

*Public (Limited) and Non-Profit Companies: Three or more directors are required, in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee. Any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once.

An External Company

An external company means a foreign company (for profit or not for profit), which has been incorporated outside of South Africa, that intends to, or is conducting business or non-profit activities within South Africa. Section 23 of the Companies Act lists a series of activities which will be regarded as "conducting business" as follows:

The foreign company:

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

Such a company remains primarily regulated by its country of origin or registration, even though it does business in South Africa as an external company.

It will not be regarded as "conducting business activities" (or non-profit activities as the case may be) within South Africa **solely** on the grounds that it is or has engaged in one or more of the following activities in the country:

a) holding a meeting or meetings of the shareholders or board of the foreign company or otherwise conducting any of the company's internal affairs

b) establishing or maintaining a bank account or other financial accounts

c) establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities

d) creating or acquiring any debts or any mortgages or security interests in any property

e) securing or collecting any debt, or enforcing any mortgage or security interest

f) acquiring any interest in any property within South Africa.

An external company must register with the Commission within 20 business days after it first begins to conduct business or non-profit activities, as the case may be, within South Africa.

The following must accompany Form CoR 20.1 during the registration process:

- the filing fee
- a certified copy of the company's Memorandum of Incorporation, or similar document filed in the jurisdiction in which the external company is registered, together with a translation of the document if required
- the certificate of incorporation or comparable document issued by the jurisdiction in which the company was incorporated, together with a translation of the document if required
- the address of its principal office outside South Africa and the names of its directors at the time the form is filed
- the address of its registered office in South Africa and the name and address of the person within South Africa who has consented to accept service of documents on behalf of the external company.

A Domesticated Company

A domesticated company is a foreign company whose registration has been transferred to South Africa from a foreign jurisdiction in which it was registered. The transfer is required to comply with the criteria specified in Section 13(5) to (11), for example:

(i) in order to be transferred the majority of the company's shareholders are required to be resident in South Africa

(ii) the majority of its directors are or will be South African citizens, and

(iii) immediately following the transfer of the registration, the company will satisfy the solvency and liquidity test.

Should all the criteria set out in Section 13(5) to (9) be met, the Commissioner must issue a registration certificate to the company, indicating that such registration has taken place and that it is deemed that the company has been incorporated under the Companies Act. It is thus regulated as if it had been incorporated in South Africa, and is subject to all the requirements of the Companies Act.

Most foreign investors set up a private company, or an external company (branch of a foreign company).

Private companies

- Private Companies are cheap to establish and there are no minimum or maximum share capital requirements.
- They are not subject to the enhanced accountability and transparency requirements that SOC's and Public (Ltd) companies are subject to in terms of the Companies Act.
- SOC Ltd's and Public companies are statutorily subjected to enhanced accountability and transparency requirements, such as an audit, whereas private companies are not required to appoint an auditor unless the company passes a public interest score (PIS) [see page 17], or unless it provides for an audit in its MOI. A private company is also not required to appoint a company secretary or hold an Annual General Meeting.

Registration of a private company is effected by signature of the Memorandum of Incorporation (MOI) by the requisite number of persons, and by filing it together with the prescribed Notice of Incorporation at the Commission, together with payment of the prescribed fee.

7 Directors and Officers

General

The directors do not need to be South African residents or nationals. The Companies Act requires that the register of directors reflects each directors' nationality and passport number if they are not a South African. There are also no restrictions on foreign managers.

Liability of directors and officers

The Companies Act sets out the circumstances in which a Director can be held liable for loss, damages or costs of the company, incur civil liability to shareholders and third parties and/or criminal sanctions.

Criminal liability

- The Act aims to de-criminalise sanctions where possible and rather to enforce company law administratively via the appropriate bodies (Companies Tribunal, the Commission, the Take-Over Regulation Panel, or the Human Rights Commission).
- There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence and perjury.
- In addition, in order to improve corporate accountability, Section 216 states that it will be an offence, punishable by a fine or up to ten years imprisonment (or both) for a director to:

  Section 213

  commit a breach of confidence or

  Section 214 False statements, reckless conduct and non-compliance

  (1)(a) who is party to the falsification of any accounting records of a company or

(1)(b) with a fraudulent purpose knowingly provided false or misleading information or

(1)(c) was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose, or

(1)(d) is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101, that contains an untrue statement as defined and described in Section 95.

Section 214(3) it is an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence.

Section 214(4) states that a person who contravenes Section 99(1) to (9) (which deals with general restrictions on offers to the public) – and if that person is a company, every director or prescribed officer of the company who knowingly was a party to the contravention is (a) guilty of an offence and (b) liable to any other person for any losses sustained as a consequence of that contravention.

- Such offences may also lead to directors also incurring civil liability.
- All other offences – fine or imprisonment up to twelve months (or both).

Codified liability of directors and prescribed officers: Section 77

A director, is liable generally for:

- A breach of fiduciary duty (in accordance with the common law principles relating thereto), for any losses damages or cost sustained by the company from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company).
- in accordance with the principles of common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 76(3)(c) [acting with the degree of care, skill and diligence that may be reasonably expected of such a person], or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in Section 77.
- the code of conduct for directors as set out in Section 76 of the Act is extended to members of committees even if the member is not a director on the board, and thus the consequent liability relating to the transgression of any such duties will also apply to members of the committees.

Section 77(3) sets out specific liabilities as follows:

Directors are liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- S77(3)(a) – acted in the name of the company despite knowing he did not have the authority to do so

- S77(3)(b) – acquiescing to carrying on of company's business despite knowing that it was being conducted contra to Section 22 (reckless trading)
- S77(3)(c) – party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder, or had another fraudulent purpose
- S77(3)(d) for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement, despite knowing that the statement was false, misleading or untrue, [subject to S104 (3) – liability will not attach if there were reasonable grounds for the director to believe the statement was true]
- S77(3)(e) for being present at a meeting or for knowingly consenting to or failing to vote against:
  - (i) the issue of unauthorised shares, which had not been authorised
  - (ii) the issuing of authorised securities despite knowing that such issue was inconsistent with Section 41
  - (iii) for granting unauthorised options
  - (iv) the provision of financial assistance to any person contemplated in S44 for the acquisition of securities of the company despite knowing that the provision was inconsistent with S44 or the company's MOI
  - (v) the provision of financial assistance to a director for a purpose contemplated in S45 despite knowing that the provision of financial assistance was inconsistent with that section or the company's MOI
  - (vi) a resolution approving a distribution despite knowing that the distribution was contrary to S46
  - (vii) the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to S46 or 48
  - (viii) an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.

The liability that is incurred in terms of Section 77 is joint and several with any other person who may be held liable for the same act, and director in Section 77 includes an alternate director, prescribed officer, a a person who is a member of a committee of a board of a company, or of the audit committee of a company irrespective of whether or not the person is also a member of the company's board. Any person with a claim can thus bring it against all the Directors or any one particular Director. Action to recover loss, damages or costs may not commence more than three years after the act or omission.

Section 20 (4) and (5)

- This section allows one or more shareholders, directors or prescribed officers or trade union representing employees of the company may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Act, or that is inconsistent with any of the limits, restrictions or qualifications of the MOI, (without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification).

- Each shareholder may have a claim for damages (a personal claim) against any person including a director who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act, or any limitation, restriction or qualification in terms the MOI (unless the action has been ratified by shareholders). (Note: An action may not be ratified if it is in contravention of the Act).

Section 218 Civil actions

- A shareholder (and any other stakeholder) can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – i.e the action does not need to be fraudulent or carried out with gross negligence for a valid claim in terms of this Section.

Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them.

Note: If a company is a personal liability company the directors and past directors are jointly and severally liable together with the company for any debts and liabilities of the company as are or where contracted during their respective periods of office [Section 19(3)].

The Act does however provide some form of relief to Directors – by way of Indemnity and Insurance for Directors.

In addition – in terms of the Act a possible defence is open to a Director who asserts that he/she had no financial conflict, was reasonably informed and made a rational business decision in the circumstances – known as “the business judgement rule”.

8 Corporate Governance and King III

- The King III report and code of Governance for South Africa (King III) came into effect on 1 March 2010.
- All entities incorporated in, or resident in South Africa, (irrespective of their manner or form of incorporation or establishment) should apply the principles in the Code.
- It is not a legislated document but rather a statement of principles of “best practice”. All entities in South Africa should consider the best practice recommendations in the Report.
- However, as certain aspects of governance are legislated (Companies Act 2008, and the Public Finance Management Act) the use of instructive language is relevant i.e where the Code uses the word “must” – this indicates a legal requirement, and “should” indicates that an application of the principle will result in good governance (voluntary) and “may” indicates areas where the King Committee has recommended certain practices for consideration.
- As far as the JSE Securities Exchange South Africa (JSE) is concerned, listed companies must adhere to the King Report recommendations or indicate the extent to which they have deviated from them.

- The Code recommends that all entities should by way of explanation make a positive statement about how the principles have been applied or not – which disclosure will allow stakeholders (including shareholders) to comment on and challenge the Board on the quality of its governance – an "apply or explain" theory.
- Although the Code is not legally enforceable, Directors (and other office bearers) should view it as a valuable guide to good corporate governance in South Africa so as to ensure compliance with their statutory duties as set out in the Companies Act.
- King III applies to **all** entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors (unlike King I and II).

Key aspects of King III

1. *Effective leadership*

- Good governance is effectively about effective leadership – characterised by the ethical values of responsibility, accountability, fairness and transparency and based on the moral duties that find expression in the concept of Ubuntu.

2. *Sustainability*

- The primary moral and economic imperative of the 21st century;
- A company should develop a strategy to include accounting for sustainability issues and reporting these to stakeholders.

3. *Corporate citizenship*

- The company is a person and should operate in a sustainable manner – the company should be seen as a responsible "citizen" – involving social, environmental and economic issues – respect for human rights, effective management of stakeholder relationships, resource management with an eye on future needs, and ensuring a positive impact on the community within which it operates.

Emerging governance trends incorporated in the Report are Alternative Dispute Resolution (Principle 8.6), Risk based internal audit (Principle 7), Shareholders and remuneration (Principle 2.25), Evaluation of board and director performance (Principle 2.22).

New issues in the Report are IT Governance (Principle 5), and Business Rescue (Principle 2.15).

The King Code and Report is divided into 9 Principles (Chapters), as follows:

- Ethical leadership and corporate citizenship
- Boards and Directors
- Audit Committees
- The governance of risk
- The governance of information technology (IT)
- Compliance with laws, rules, codes and standards
- Risk-based Internal audit

- Governing stakeholder relationships (Alternative Dispute Resolution)
- Integrated reporting and disclosure.

The Board of Directors (According To King III)

Operation of the Board

Responsibilities

- responsible for corporate governance and has two main functions: to determine the companies strategic direction and responsibility for control of the company
- ensure management actively cultivates a culture of ethical conduct and sets the values to which the company will adhere – values to be incorporated into a code of conduct
- to consider the legitimate interests and expectations of the company's stakeholders in its deliberations, decisions and actions, and to communicate relevant matters to all stakeholders via press releases, to appreciate that stakeholders' perceptions affect a company's reputation
- ensure that disputes are resolved as effectively, efficiently and expeditiously as possible, and adopt a formal ADR process for internal and external disputes
- to ensure that the company is seen to be a responsible corporate citizen;
- to ensure that the company has an effective and independent audit committee (where applicable)
- to be responsible for information technology (IT governance) – to be vested in the board in much the same way as risk governance is. The board has the duty and responsibility (as part of their duty of care) to ensure that the company's IT systems and information integrity are protected, maintained and continually assessed (and subject to risk management)
- ensure that the company complies with applicable laws and regulations and considers adherence to non-binding rules, codes and standards – and ensure that each individual director has a working understanding of the relevant laws, rules, codes and standards of the company and its business, delegate to management the implementation of effective compliance framework and processes
- ensure that there is an effective risk-based internal audit-monitor effectiveness of company's system of internal control and risk management
- Integrated reporting and disclosure – ensure the integrity of the company's integrated report – a holistic and integrated representation of the company's performance in terms of both its finances and its sustainability
- A formal process of assurance with regard to sustainability reporting should be established – i.e reporting not only from a financial perspective but also from an ethical, social and environmental perspective – the well known "triple bottom line" method of reporting. King III takes this concept further and introduces the concept of the integrated report – whereby companies publish an integrated report focusing equally on financial, governance, strategy and sustainability issues – providing an overall picture of the company and a "true" value of it economically

- act in the best interests of the company
- consider business rescue proceedings as soon as the company is financially distressed
- review of management goals and plans
- responsible for the governance of risk through formal processes and that risk assessments are performed on a continual basis, and that continual risk monitoring is being done by management.

Appointments

- Board appointments – formal and transparent, shareholders ultimately responsible for the composition of the board
- Appointment of the CEO – being an Executive Director – not a member of any audit, remuneration or nomination committee
- The positions of CEO and Chairman should be separated.

Rights

- Receive all reports timeously
- Access to independent consultants
- Unrestricted access to company information.

Functions

- The majority of directors to be non-executive, who are also independent – minimum of two Executive Directors – [being the CEO and director responsible for finance]
- The non-executive directors should have sufficient experience and skill (which must be determined before their appointment)
- Director development through induction and on-going training programmes
- Assisted by a company secretary (compulsory for SOC (Ltd)'s and public companies)
- Performance assessments – evaluation of board, its committees and individual directors (including Chairman) annually
- Delegation of certain functions to well structured committees without abdicating its own responsibilities.

Remuneration

- Director's remuneration to be transparent and fair
- Companies should disclose the remuneration of each individual director and certain senior executives (the three most highly paid senior employees who are not directors) giving details of base pay, bonuses, share-based payments, granting of options or rights, restraint payments and all other benefits (including present values of existing future awards)
- Shareholders to approve the company's remuneration policy.

Some key provisions of the Companies Act are as follows:

Section 28: Accounting records

- All companies must keep accurate and complete accounting records in one of the official languages of South Africa at its registered office (a) as necessary to enable the company to satisfy its obligations in terms of the Companies Act, or any other law with respect to the preparation of financial statements and (b) including any prescribed accounting records, which must be kept in the prescribed manner and form. It is an offence for a company to not adhere to these requirements.

Section 29: Financial statements

- If a company provides any financial statements (including annual financial statements) to any person for any reason, these must satisfy the requirements as set out in Section 29(1) of the Companies Act. Any such statements must not be false or misleading in any material respect or incomplete in any material particular. If they are in the form of a summary, these summaries must comply with prescribed requirements for summaries. Non compliance is an offence.

Section 30: Annual financial statements

All companies are required to produce annual financial statements each year within 6 months after the end of their financial year.

The annual financial statements must include an auditors report if the statements are audited, and a report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs, and any prescribed information, and be approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board.

Regulation 28: Categories of Companies required to be audited in terms of the Companies Act:

- This Regulation applies to a company unless exempt in terms of Section 30(2A).
- In terms of Regulation 28, the following categories of companies are required to have an audit, conducted by a registered auditor:
  1. A public company (listed and unlisted)
  2. State owned companies (SOC Ltd)
  3. Any profit or non-profit company, if, in the ordinary course of its primary activities holds assets in a fiduciary capacity for persons who are not related to the company and the aggregate value of such assets held at any time during the financial year exceeds R5 million

4. Any non-profit company, if it was incorporated –
    a) Directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company, or
    b) Primarily to perform a statutory or regulatory function in terms of any legislation or to carry out a public function at the direct or indirect initiation or direction of an organ of state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function, or
5. Any other company whose public interest score, for the particular financial year as calculated in accordance with Regulation 26(2) – is
    (i) 350 or more, or
    (ii) Is at least 100, if its annual financial statements for that year were internally compiled.

Annual financial statements of private companies and personal liability companies may also be audited if it is required by that company's MOI, or by a shareholder's or director's resolution, or in terms of an agreement.

S30(2A) of the Amendment Act: Exemption of Owner-Managed Companies

If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption –

a) does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in subsection 7(a), and 28
b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law or in terms of any agreement to which the company is a party.

Assurance levels and the Public Interest Score

The Public Interest Score (PIS) is intended to reflect how much responsibility the company has towards the public.

It determines whether the company will need a financial audit, independent review or nothing at all (in other words, the "assurance levels" of the company).

It is calculated as follows:

Public Interest Score calculation

Every company must calculate its public interest score for each financial year, calculated as the sum of the following:

a) number of points equal to the average number of employees of the company during the financial year
b) one point for every R1 million (or portion thereof) in third party liability of the company at the financial year end

c) one point for every R1 million (or portion thereof) in turnover during the financial year, and

d) one point for every individual who at the end of the financial year, is known by the company –

   (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or

   (ii) in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company.

If the company has a public interest score:

Over 350

– the company will need an **audit**. This applies even where the company is owner managed, non owner managed or is a close corporation.

Between **100** and **349**

– the company will need an **independent review**:

• where the financial statements are independently compiled (externally), and it is not owner-managed.

– the company will need an **audit**:

• where the financial statements are internally compiled. This applies even where the company is owner managed, non owner managed or is a close corporation.

– the company will **not** need an audit, or independent review:

• where the financial statements are independently compiled (externally), and it is an owner managed company or close corporation.

Lower than **100**

– the company will need an independent review where it is not an owner managed company. In all other cases, there is no requirement for an independent review or an audit for owner managed companies or close corporations with a score below 100, unless the company's Memorandum of Incorporation states otherwise.

Annual General Meeting Requirement

The Act only requires a public company and SOC Ltd to call an AGM within eighteen months of its date of incorporation and thereafter once in every calendar year, but no more than fifteen months of the date of the previous AGM to present the audited annual financial statements to the shareholders.

The Act does not require a private company to have an AGM.

However, the Board is required to approve the annual financial statements, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

Purpose and Policy

The Consumer Protection Act, 68 of 2008, and Regulations (hereinafter referred to as the CPA) is intended to promote fair business practices by governing all transactions and services that occur in South Africa between suppliers and consumers.

Scope and Application

The CPA intends to regulate the marketing of goods and services to consumers as well as the relationships, transactions, advertisements and agreements between the consumers, suppliers, producers, distributors, importers, retailers, service providers and intermediaries of those goods and services.

The principal commercial activities to which the CPA applies are whether 'transactions', 'marketing', 'promotion' and 'supply' of goods and services are being conducted by the supplier in his ordinary course of 'business'.

Fundamental to the determination of the scope and application of the CPA are therefore the definitions contained in the Act of market, advertise, promote, supply, transaction, the consumer, the supplier, the supply chain, and business.

The CPA applies to:

- Every transaction occurring within South Africa between suppliers and consumers (unless specifically exempted)
- The promotion or supply of any goods or services, within South Africa (unless exempted)
- To the goods or services themselves i.e. which are supplied or performed in terms of a transaction to which the CPA applies
- To the goods which form the subject of an exempted transaction.

Where the CPA does not have application:

1. Juristic Persons whose asset value or annual turnover equals or exceeds R2 million

- The CPA is intended to protect the vulnerable consumer and not big business, and thus it does not apply to consumers who are juristic persons, whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister, currently set at **R2 million**.

Juristic persons, for purposes of the CPA include: a company, a close corporation, and also a body corporate, partnership or association, or a trust as defined in the Trust Property Control Act, 57 of 1988.

2. The State

- The CPA does not apply where goods or services are promoted or supplied to the State.

3. Credit Agreement Transactions

- A transaction that constitutes a credit agreement under the National Credit Act, 34 of 2005 is excluded, but the goods or services that are the subject of the credit agreement are not excluded.

4. Employment contracts

- Services supplied under an employment contract are not included within the ambit of the CPA.

5. Collective bargaining and bargaining agreements

- Both an agreement giving effect to a collective bargaining agreement within the meaning of Section 23 of the Constitution and the Labour Relations Act, 66 of 1995, or agreement giving effect to a bargaining agreement as defined in Section 213 of the Labour Relations Act are not included.

6. Specific exemption granted by the Minister

- If the transaction falls within an exemption granted by the Minister – where a regulatory authority has applied to the Minister for an industry-wide exemption from one or more provisions of the CPA on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority.

Certain provisions nevertheless apply despite the exemptions listed in 1 to 6 above:

- **Franchise Agreements**
  - The CPA will apply to all franchise agreements in South Africa irrespective of whether the franchisee is a juristic person and falls above or below the threshold.
- **Product Liability**
  - If any goods are supplied within South Africa to any person in terms of a transaction that is exempt from the application of the CPA, those goods and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.

Definitions contained in the CPA are of vital importance when determining its scope and application:

The definition of goods and services take on an entirely new meaning under the CPA.

“Goods” includes, inter alia, anything marketed for human consumption, any tangible object other than the former, including any medium on which anything is or may be written or encoded, gas, water, electricity, literature, music, and motion pictures.

“Services” includes, inter alia,

(a) any work or undertaking performed by one person for the direct or indirect benefit of another

(b) the provision of any education, information, advice or consultation, (except advice that is regulated by the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS)

(c) any banking services or related or similar financial services or the undertaking, underwriting, or assumption of any risk by one person on behalf of another, except to the extent that any such service (i) constitutes advice or intermediary services that is subject to regulation by FAIS or (ii) is regulated in terms of the Long-Term or Short-Term Insurance Acts (no's 52 and 53 of 1998 respectively)

(d) the transportation of any individual or goods

(e) the provision of – (i) any accomodation or sustenance (ii) any entertainment or similar intangible product or access to any such entertainment or intangible product (iii) access to any electronic communication infrastructure (iv) access to or the right of access to, any event or to any premises, activity or facility (v) access to or use of any premises or other property in terms of a rental

(f) a right of occupancy of, or power or privilege over or in connection with any land or other immovable property, other than in terms of a rental

(g) rights of a franchisee in terms of a franchise agreement.

So who is a Consumer and who is a Supplier in terms of the CPA?

Consumer
Means: a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business "Person" includes • An individual • A juristic person who falls below the threshold • Franchisee's are to be regarded as consumers irrespective of whether the franchisee is a juristic person which falls above or below the threshold. b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of the Act (see list 1 to 6 on pages 19 and 20) c) Any user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services, (if the context so requires or permits).
Supplier
Defined in the CPA as any person who markets any goods or services **Irrespective of whether the supplier –** a) resides or has its principal office within or outside South Africa b) operates a for profit business or a non-profit entity c) is an individual, juristic person, partnership trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all.

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Some examples of Suppliers (not an exhaustive list):

Retailers (furniture, clothing, music, car dealers), estate agents, tourism operators, airlines, casinos, marketing and advertising agencies, the print media industry, professional services rendered by accountants, auditors, attorneys, medical doctors, education, banking and financial services, transportation, telecommunication, NGO's and trade unions, voluntary associations, clubs, a society (even if nothing is charged for the service), municipalities.

Franchisors

In fact all service providers and intermediaries of those goods and services acting in the ordinary course of business.

Where an organisation operates in any part of the supply chain as producer, importer, distributor and retailer of goods or as a service provider to the extent of the application of the CPA to such activities – for example, manufacturers need to consider the implications of the product liability provisions of the CPA.

The Supply Chain

With respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether there is a producer, importer, distributor or retailer of goods, or as a service provider or intermediary (agent).

Eight Fundamental Consumer Rights

The CPA introduces a formal set of consumer rights into law, based on internationally accepted and United Nations adopted consumer rights – as follows:

- Right to equality in the consumer market
- Right to privacy
- Right to choose
- Right to fair and honest dealing
- Right to disclosure and information
- Right to fair value, good quality and safety
- Right to fair and responsible marketing
- Right to fair, just and reasonable terms and conditions.

The CPA integrates these eight fundamental consumer rights and consequently creates a corresponding duty or obligation on suppliers, thereby regulating their activities. The supplier's obligation to account to consumer's is also included in the CPA.

Safety of consumers and informed consent

The Act is designed to ensure the safety of consumers and to provide specifically for informed consent. A supplier is required to draw the consumer's attention to any risk that could result in serious injury or death – and must draw the consumer's attention to this fact in a conspicuous, clear and understandable way.

Product liability

Product liability and safety law are both areas of law focused on:

- unacceptable risks of death, injury or damage
- prevention of the realisation of those risks
- assuring compensation when or if the risks do realise.

The CPA, under the fundamental right to fair value, good quality and safety, establishes a form of modified strict liability of producers, importers, distributors or retailers (or all of them jointly and severally) – for harm caused by or as a result of, the supply of goods which are unsafe, or failed products, or defects or hazards in any goods, and for inadequate instructions or warnings provided to the consumer, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.

11 National Credit Act, 34 of 2005

Key features:

- The National Credit Act (hereinafter referred to as “the NCA”) became fully operative on 1 June 2007. The aim of the NCA is to “*promote and advance the social and economic welfare of South Africans, promote a fair, transparent.........accessible credit market and industry and to protect consumers...”* The most important feature of the NCA is that it is designed to protect the consumer against unlawful credit provision.
- The NCA has created a National Credit Regulator (the Regulator) which is responsible for the registration of industry participants and carries out research and educates the public. In addition it is tasked with the investigation of complaints and to ensure enforcement of the NCA.

Scope and application

- The NCA generally applies to every written credit agreement between parties dealing at arm’s length and made in, or having effect in, South Africa.
- A credit agreement is defined as a credit facility, credit transaction, credit guarantee, or any combination of the three.
- The following agreements are **excluded** from the operation of the NCA:

A credit agreement in terms of which the consumer (borrower) is:
A] a juristic person* whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds R1 million
B] the State, or an organ of State
C] a large agreement (as defined in the NCA**) in terms of which the consumer (borrower) is a juristic person whose asset value or annual turnover does not, at the time the agreement is made, exceed R1 million

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D] when the credit provider is the SA Reserve Bank
E] when the credit provider is situated outside South Africa, his exemption only applies upon successful application by the consumer (borrower) to the Minister
F] insurance policies, leases of immovable property, transactions between a stokvel and its members
**a juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them. A juristic person under the NCA includes a partnership and unincorporated association, but not a sole proprietor.* ***The NCA differentiates between small, intermediate and large agreements depending on monetary thresholds stipulated in the National Credit Regulations:* > *a small agreement is an agreement of which the credit limit is R15 000 or less;* > *an intermediate agreement is a credit facility (as defined) of which the credit limit falls above R15 000 or a credit transaction (as defined) of which the credit limit falls above R15 000 but is less than R250 000; and* > *a large agreement is a mortgage agreement or a credit transaction (both as defined) of which the principal debt exceeds R250 000.*

- Thus, for example, family loans, shareholder loans, a company financing an equity buy in, incidental credit agreements, and where the consumer is a legal entity, such as a company, close corporation, partnership and trust, whose annual turnover or asset value exceeds R1 million – will not fall within the ambit of the NCA.

Limited application in respect of Juristic Consumers

- The Act applies but is limited in its application to juristic persons whose asset value or annual turnover is below R1 million and the value of the agreement is below R250,000. The sections not applicable are those which deal with:
  - over-indebtedness and reckless credit provisions (specifically the powers of Courts to suspend credit agreements and alleviate over-indebtedness). This means that credit providers are absolved from conducting in depth assessments when granting loans or credit to companies, CC's, partnerships, trusts etc.
  - agreements determined to be unlawful (among others, concluded in terms of negative option marketing schemes)
  - illegality of variable interest rates, except if pegged to a reference rate such as the prime overdraft rate, and
  - fees, charges, maximum interest rates and credit insurance (charging of interest subject to common law).

Registration of Industry participants

All industry participants (credit providers, credit bureaux and debt counsellors) must have registered with the Regulator. If they have not registered as such, they cannot extend credit or trade as a credit provider.

The following industry participants are required to register with the Regulator:

a) Credit providers

- Who have entered into at least 100 credit agreements to which the NCA applies, (other than incidental agreements*), or
- The total principal debt of all outstanding credit agreements concluded by the credit provider to which the NCA applies (other than incidental credit agreements) exceeds R500 000
- Are juristic persons and individuals
- Have a commitment to combating over-indebtedness.

***Incidental credit agreements** – are agreements whereby no formal agreement of credit is signed and concluded, and is defined in the NCA as an agreement in terms of which an account is tendered for goods or services that have been or will be provided to the consumer where:*

- *A fee, charge or interest becomes payable when payment of an amount charged in terms of that account is not made on or before a determined period or date, or*
- *Two prices are quoted for settlement of the account (early settlement discount). In other words an extra charge is levied for 'late payment'.*

The NCA does not require providers of incidental credit agreements to register – however certain sections of the NCA still apply to these transactions – such as providing a multi-lingual contract, conducting an affordability assessment and quotation – otherwise the loan or credit agreement may be deemed to be reckless credit.

b) Credit Bureaux

All Credit Bureaux must register. An entity qualifies as a Credit Bureaux if it is engaged in the business of receiving reports or investigating credit applications, credit agreements, payment history or patterns or consumer credit information regarding consumers or prospective consumers.

c) Debt Counsellors

Debt Counsellors may be registered as such if they have complied with the NCA and satisfied the training requirements of the Regulator. Debt counsellors are not defined in the NCA, but must be a natural person. They will conduct independent enquires into consumers financial circumstances and make recommendations to the Courts regarding debt restructuring and the suspension of reckless credit agreements.

Reckless credit

The NCA aims to stamp out reckless credit by introducing measures such as the requirement for Quotations (see below) and affordability assessments. Reckless credit is when a credit provider gives the consumer (borrower) a loan or other credit without assessing whether he can repay the loan or in a case where the consumer does not understand or appreciate the risks, costs or obligations under the credit agreement or if granting the credit leads him to becoming over-indebted.

Quotations

The NCA ensures that the consumer (borrower) is provided with all the relevant information to make an informed decision before entering into a credit agreement. A credit provider must provide the consumer with a quotation, or written pre-agreement (in prescribed format) showing all the relevant costs, repayment values, before the consumer signs the agreement. The quotation is valid for 5 days, during which time the consumer is free to look at other options.

The NCA creates a responsibility on credit providers to refuse to give the consumer (borrower) credit if he cannot afford it.

Interest rates

The Regulations of the NCA specify the maximum interest rates and transaction fees that can be charged on credit agreements or loans. The interest levied on the principal debt may not exceed the value of the principal debt. An interest rate may not vary unless it is pegged to a determinable reference rate, such as the prime overdraft rate. Any change of interest rate, credit fee charge or frequency or time of payment of a credit fee charge will not be allowed unless the credit provider has delivered written notice of the change to the consumer.

Banning of negative-option marketing

The NCA bans this type of marketing – whereby the consumer has to provide a "no" response to offers of credit to stop future offers automatically coming through to him. Agreements concluded on this basis are unlawful and void. This prohibition does not apply to juristic consumers.

Complaints

The consumer can take disputes with credit providers to a National Consumer Tribunal – which will mete out penalties and issue declaratory orders on his behalf.

Right to check or challenge information at Credit Bureaux

The NCA gives consumers the right to check their records at the Credit Bureaux once a year (at no charge). A consumer also has the right to challenge any information held at the Credit Bureaux or the Regulator, which bodies are then required to investigate the challenge (also at no charge).

Compulsory referral to debt counsellor prior to approaching a Court or Tribunal

- A credit provider must refer a consumer to debt counselling before it is entitled to take legal steps to enforce a credit agreement to which the NCA applies or re-possess the goods sold.
- Only when a credit provider has referred a consumer to a debt counsellor, and the consumer has not responded for a period of 10 business days to the debt counsellor's notification to the consumer of the referral, and the consumer is in default of the credit agreement for a period of at least 20 business days, may the credit provider approach a court for relief.

- There is therefore an intermediary procedure which the credit provider is compelled to embark on before it can enforce the terms of the credit agreement. The efficacy and duration of the procedure will largely depend on the efficiency and level of administration of the debt counsellor's office. This again will have serious implications for the ability of credit providers to recover outstanding debt.

Only an order of court can render void a credit agreement or a provision thereof.

Dispute Settlement other than debt enforcement

Any person, not only the parties to a credit agreement, may initiate a complaint to the Regulator. The Regulator may also initiate a complaint in its own name, to the Tribunal.

- Ombuds (particularly the Credit Ombud), consumer courts and alternative dispute resolution agents, may hear complaints arising from the application of the NCA.
- The Regulator has the power to refer any matter to the National Prosecuting Authority where it believes that an offence in terms of the NCA has been committed.
- Tribunal hearings will follow similar procedures and platforms to the CCMA.
- No complaint may be referred to the Tribunal or to a consumer court more than three years after the cause of the complaint arose.

Further Consumer Rights

The NCA provides the consumer with the following important rights:

- The right to apply for credit
- To be protected against discrimination in the granting of credit
- To be informed of the reason why the application for credit was refused, if requested
- To receive a credit agreement in plain and understandable and an official language, and
- To receive a copy of the credit agreement and a replacement copy when requested.

12 The Financial Intelligence Centre Act, 38 of 2001

- The Financial Intelligence Centre Act, 38 of 2001 (FICA) is a comprehensive piece of legislation dealing with money laundering controls, with the aim of fighting organized crime and terrorism, both locally and internationally.
- South African banks are required to obtain certain information and supporting documentation from any new customers before new accounts may be opened.
- Depending on whether the customer is a natural person, part of an entity, or whether he or she is a South African citizen or a foreign national permanently resident in South Africa, a private company, trust or other legal entity, will determine the nature of the information and documents required.

- Employment in South Africa is regulated by statute, common law and contract.

Sources of Labour Law In South Africa
Common Law
The employment relationship is regulated by the common law to the extent that legislation is inapplicable
The SA Constitution
Entrenches fundamental rights, e.g. the right to privacy, which affects individuals rights in the workplace. Chapter 2 provides for protection against servitude, forced labour and discrimination, the right to pursue a livelihood and protection against child labour. Section 23 provides for the right to fair labour practices
The Employment Contract
The individual contract of service between the employer and employee governs the relationship between the parties, however certain minimum conditions of employment are entrenched by the BCEA
Basic Conditions of Employment Act, 1997 (BCEA)
Imposes minimum conditions of employment for employees, mainly in relation to working hours, leave, the prohibition of child and forced labour, the payment of remuneration and notice and payments on termination of employment
Labour Relations Act, 1995 (LRA)
Governs all employers and employees in South Africa except for those excluded. Grants employees protection against unfair dismissal and unfair labour practices. Encourages collective bargaining and settlement of disputes, codifies guidelines re Trade Unions, bargaining councils and the Commission for Conciliation Mediation and Arbitration (CCMA)
The Occupational Health and Safety Act, 1993 (OHSA)
Imposes a general duty on employers to ensure that a reasonably safe and healthy environment is provided to workers and to provide protective equipment
The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA)
Ensures that employees and their dependants who have suffered injury, illness or death occurring in the workplace and during the course of the employee's duties are compensated (excluding policemen, soldiers, domestic and contract workers)
Skills Development Act, 1998 (SDA)
SETA's (Sector Education and Training Authorities) are established for sectors to establish "learnerships", approve workplace skills plans, allocate grants, monitor education and training, to collect and disburse SDL levies, (training is financed by a levy equivalent of 1% of each employer's payroll)

Skills Development Levies Act, 1999 (SDLA)
This imposes a compulsory levy on most employers of an amount equal to 1 % of the employer's total payroll amount, the proceeds of which are used to fund the various SETA's. In certain circumstances, employers are allowed to claim rebates for the levies paid to a SETA
The Unemployment Insurance Act, 2001 (UIA)
Provides for payment of benefits to employees who have lost their employment due to pregnancy, or other circumstances beyond their control (i.e. not by resignation). Applies to domestic workers. See page 32 for workers not covered by UIF
The Employment Equity Act, 1998 (EEA)
To eliminate discrimination in the workplace, on grounds such as race, gender, sex, age and religion and promotes affirmative action
International Labour Organisation (ILO)
International labour standards, conventions and recommendations
Codes of Good Practice
Various labour statutes empower the Minister of Labour to issue "codes of good practice" which are intended as guidelines for employers when formulating policies and procedures
All references to the abbreviations used above under this section of this guide refers to the applicable Act as per this table.

Application of labour legislation

- South African employment law applies to employees working in South Africa.
- In most instances, where an employee performs work in South Africa and is paid there, South African law will apply.

The employment contract

- There is no legal requirement that a contract of employment needs to be in writing. An oral employment is as binding and valid as a written one.
- However, the BCEA requires that "written particulars of employment" be given to the employee – this imposes a duty on the employer to provide the employee with certain information in writing, and does not force the parties to enter into a written contract. In practice these written particulars are *converted* into a contract, when the employee signs it.
- An exception is learnership agreements which must be in writing.
- Some basic clauses are: Identity of employer (name and address), identity of employee, date of commencement of employment, place of work, working hours, job description and duties, probationary periods, remuneration, clauses relating to electronic communications and privacy in the workplace, restraint of trade clauses, termination, notice periods, polices and procedures.
- The BCEA requires that the written particulars provided to the employee should be retained for 3 years after termination of the employment.

- Terms and conditions cannot be changed unilaterally by one party.
- Terms and conditions may be changed by operation of law – if the Minister of Labour issues a sectoral determination in terms of Section 50 of the BCEA, the effect of such determination may be to change the terms and conditions of a whole sector.

Notice periods

- The employer or employee may give notice to terminate the employment relationship by giving the written statutory, agreed or reasonable notice to the other party.
- Where an employee is illiterate, the notice must be given verbally as well.
- Any employee who works for more than 24 hours per month for the employer is entitled to notice in terms of his/her contract, or if no contract exists, then to the legal minimum as follows:

Period of service	Written Notice Requirement
6 Months or less	1 Week*
6 to 12 Months	2 Weeks*
12 Months +	4 Weeks
6 Months + Farmworkers and Domestic workers	4 Weeks*
*cannot be reduced by agreement	

- If the employer complies with these statutory minimum periods or agreed notice period (contained in a contract), the notice given will be lawful.
- The employee may nevertheless challenge the fairness of the dismissal in terms of the LRA.
- Notice cannot run concurrently with any period of annual, maternity or family responsibility leave, (i.e. annual leave cannot be taken during a period of notice).
- Fixed term contracts do not need notice to be given when they expire – unless the employee has a reasonable expectation that the contract will be renewed.

Dismissal

- The LRA grants employees protection against unfair dismissal.
- A dismissal must be both substantively and procedurally fair.
- The three main grounds for dismissal are misconduct, incapacity (ill health or poor work performance) and operational requirements of the employer.
- Payment on dismissal includes accrued annual leave pay, payment in lieu of notice – unless summarily dismissed or if the employee is required to work the notice period.
- If dismissal is due to operational requirements, severance pay of a minimum of one week's salary for every completed year of service, and any other amount that the employee is contractually entitled to.

Remedies for unfair dismissal

- The CCMA or the Labour Court may hear claims for unfair dismissal.
- Should it be found that the dismissal was unfair, the employee may be entitled to the following remedies:
  - Reinstatement
  - Re-employment of the employee in other reasonably suitable work
  - Compensation paid to the employee.
- Where the dismissal is found to have been discriminatory in nature, compensation of up to 24 months' remuneration may be ordered.

Dismissal for operational reasons (Redundancy)

- Must be both substantively and procedurally fair.
- Substantive fairness means that the dismissal was required for operational reasons such as economic, structural or technological considerations.
- The potentially affected employee(s) (or their representatives) are required to be consulted (procedural fairness).
- Section 189A of the LRA regulates mass redundancies and additional requirements apply in these circumstances.

Administrative Consequences of hiring employee(s)

- Once an employee is hired, the employer is required to comply with the administrative and tax requirements contained in the table below:

	Compliance	Requirement
PAYE	Registration as Employer with SARS for P.A.Y.E {EMP101 form}	Deduct tax from employees each month and pay to South African Revenue Service (SARS) by 7th day of following month. At end of each year issue each employee with an IRP5 certificate (which must reconcile with total P.A.Y.E paid). Also payable by members of CC's and Directors of companies
UIF	Register with the UIF and with SARS (if registered for P.A.Y.E will automatically be registered for UIF)	Pay over monthly contributions on basis of 1% contribution by employee and 1% by employer based on the employees remuneration being below a certain amount (**R14 872** per month from 1 Oct 2012)
SDL	Also automatically registered if register for P.A.Y.E	1% of total remuneration paid to employees. Employers paying annual remuneration of less than **R500 000** are exempt from payment of these levies Annual wage report and accident record form
Workman's compensation	Register and provide annual reports re wages	Basis of assessment to be paid by employers annually

- PAYE should be withheld from remuneration paid to labour brokers unless an exemption certificate is obtained.

- Before being employed in South Africa, foreigners must first obtain a work permit (which is regarded as a temporary residence permit).
- The South African Department of Home Affairs (DHA) is responsible for the implementation, control and management of the policy and legislation relating to foreigners who wish to work in South Africa, or settle permanently.
- There are a number of categories of work permit, some of which are as follows:

Temporary residence permits	
General work permit	Issued to specific applicant, in possession of a written and time specific work offer, in line with his skills and qualifications. Valid for up to five years
Exceptional skills permit	Issued to an individual who has exceptional skills or qualifications and to members of his immediate family as determined by the Director-General
Corporate permit	Issued to corporate applicant employing multiple foreign employees. Valid for up to five years
Intra-company transfer permit	Issued to an employee employed abroad by a business operating in South Africa as a branch, subsidiary or affiliate relationship. Strictly limited to two years without any possibility of extension
Study permit	Issued to a person wishing to study in South Africa, provided admission to the tertiary institution has been confirmed, and it does not prejudice a South African student
Business or Self-employed permits	Issued to an applicant intending to conduct business in South Africa. Required to establish a presence in South Africa through employing, training and building capacity for at least five South African citizens or permanent residents. Minimum investment of R2.5 million (share capital investment), and a perceived benefit to the South African
Relative permits	Issued to a foreign national who is a member of the immediate family of a South African citizen or permanent resident, provided the latter provides the ‘prescribed’ financial assurances
Exchange permit	Issued to persons participating in programmes of cultural, economic, or social exchange organised by an organ of state or a public higher educational institution, in conjunction with an organ of a foreign state
Retired person’s permit	Issued to a retired person provided that person can prove that he has the right to a pension or irrevocable retirement annuity with a minimum value of R20,000 per month, or a net worth of R20,000 per month. These financial requirements may be met by the combined resources of two spouses who apply jointly
The Immigration Act, no 13 of 2002, as amended by The Immigration Act, no 19 of 2004.	

- When issuing work permits, the DHA will consider factors such as whether or not a South African citizen or permanent resident with the appropriate skills is available to take the position.

Permanent residence permits	
Permanent offer of employment	Issued to a person who has received a permanent offer of employment in South Africa. The applicant's occupation and work permit must comply with the Quota list published in the Government Gazette
Extraordinary skills or qualifications	Issued to a person who is a foreign national and has demonstrated to the DHA that he or she has qualifications or extraordinary skills that are not available in South Africa
Direct residence	Issued to a foreign national who is the holder of a work permit for a number of years, and has received an offer of employment on a permanent basis (or is the spouse of a SA citizen or permanent resident)
Child of a South African or permanent resident	A South African or permanent resident may apply for permanent residence of a child under 21 years of age. [The permit lapses if such a foreigner does not submit an application of confirmation within two years of having turned 21)
Quota category	The applicant's occupation must comply with the quota list published in the Government Gazette
Business Category (establishing a business in SA)	Issued to a foreign national who intends to establish or invest in an established business in South Africa. The applicant will be required to invest a prescribed financial capital contribution
Relative permits	Issued to a foreign national who is a member of the immediate family of a South African citizen or permanent resident, provided the latter provides the 'prescribed' financial assurances
Spousal category	Issued to a foreigner who has been married to or the life partner of a South African spouse for at least five years before applying for permanent residence
Retired person's permit	Issued to a retired person provided that person can prove that he has the right to a pension or irrevocable retirement annuity with a minimum value of R20,000 per month, or a net worth of R20,000 per month. These financial requirements may be met by the combined resources of two spouses who apply jointly
The Immigration Act, no 13 of 2002, as amended by The Immigration Act, no 19 of 2004.	

Source: http://www.southafrica.info/travel/documents/workpermits.htm

- B-BBEE initiated by the South African government, and is aimed at empowering “black” people.
- It redresses the inequalities of the past. The Department of Trade and Industry (DTI) is the custodian of B-BBEE in terms of the B-BBEE Act.
- “Black” people in South Africa include Africans, Asians and persons of mixed race. Women of all races are also seen to be previously disadvantaged and B-BBEE encourages the empowerment of all women.
- Through its B-BBEE policy, the government aims to achieve some of the following objectives:
    - Empower more black people to own and manage enterprises. Enterprises are regarded as black-owned if at least 51% of the enterprise is owned by black people, and black people have substantial management control of the business.
    - Achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.
    - Promote access to finance for black economic empowerment.
    - Increase the extent to which black women own and manage existing and new enterprises, and facilitate their access to economic activities, infrastructure and skills training.
    - Ensure that black-owned enterprises benefit from the government’s preferential procurement policies.
- The Codes set out guidelines for facilitating B-BBEE and scoring.

How compliance is achieved:

- In terms of the amended Codes, B-BBEE compliance is achieved by a business by reference to its overall score achieved in respect of five specific B-BBEE elements and measured in accordance with a B-BBEE scorecard.
- Every entity subject to B-BBEE is required to maintain a scorecard prepared and verified by an accredited verification agency.

Trumping Provision:

The Minister of Trade and Industry, Dr Rob Davies has announced that Section 3(b) of the B-BBEE Amendment Act has automatically commenced with effect from the 24 October 2015, by operation of law.

Section 3(b) stipulates that in the event of any conflict between the B-BBEE Act and any other law in force immediately prior to the date of commencement of the B-BBEE Amendment Act, the B-BBEE Act prevails if the conflict specifically relates to a matter dealt with in the B-BBEE Act. This trumping provision was inserted to safeguard the objectives and spirit of transformation.

The general public is therefore informed that section 3(b) of the Amendment Act, 2013, by operation of law, automatically commenced on 24 October 2015.

Turnover Thresholds

	Amended Code	Previously
Large Enterprises (Generic)	Turnover greater than R50 million per year	Turnover greater than R35 million per year
Qualifying Small Enterprises (QSE)	Turnover between R10 million and R50 million per year	Turnover between R5 million and R35 million per year
Exempt Micro Enterprises (EME)	Turnover between R0 and R10 million per year	Turnover between R0 and R5 million per year

Elements of the Scorecard

- The elements of the scorecard have been reduced from seven to five, scored on five targeted elements totaling 109 points, plus 9 bonus points (previously 100 plus 7 bonus points).

Amended Code	Points	Previously	Points
Ownership (Priority element)	25	Ownership	20
Management Control	19	Management Control	10
		Employment Equity	15
Skills Development (Priority element)	20	Skills Development	15
Enterprise and Supplier Development (Priority element)	40	Procurement	20
		Enterprise Development	15
Socio-Economic Development	5	Socio-Economic Development	5

Under the amended Codes:

- All companies are required to comply with all the elements of the amended Codes, except EME's (Exempt Micro Enterprises) and > 50% black owned QSE's.
- The Generic scorecard is adjusted in accordance with government key priorities.
- Ownership, Skills Development and Enterprise and Supplier Development are Priority Elements.

Priority Elements:

- Large Enterprises are required to comply with all three priority elements.
- QSE's are required to comply with Priority element one, namely Ownership, and either one of Priority element two (Skills Development), or Priority element three (Enterprise and Supplier Development).

Sector Codes

- Specific codes exist for certain sectors in South Africa, and apply if a business is involved in these sectors. They are: financial services, chartered accountancy, construction, forestry, property, agriculture, marketing, advertising and communication, information and communications technology, tourism and the transport sector. Phase 2 of the amended Codes (Gazette 38766 of 6 May 2015) sets out the process for developing and gazetting Sector Codes, as well as the approach for drawing up Sector Codes, and the role of Sector Charter Councils.
- Each Sector Industry Council is required to compile their own B-BBEE scorecard.
- The general rule is that an entity falling under a specific sector code must be measured under that code, and may not choose the generic codes.
- Although the Generic Scorecard was implemented on 1 May 2015, most of the amended Sector Scorecards have not been finalised or implemented as at the date of publication hereof. These Sector Codes are required to be published in the Government Gazette for public comment for at least 60 days . The Minister of Trade and Industry is required to then approve and issue the final sector code in terms of the Act. The only Draft Sector Codes that have been submitted to the DTI and gazetted for comment are:
- The Forestry Sector Code (Government Gazette no. 39368 of 6 November 2015)
- The updated Property Sector Code (Government Gazette no.39320 of 23 October 2015, as corrected in Government Gazette no.39342 of 30 October 2015).
- The Tourism Sector Code (Government Gazette no. 38915 of 30 June 2015) was published for comment on 30 June 2015.
- The other updated Sector Codes have not been submitted to the DTI at date of publication hereof. Sector Industry Councils and Stakeholders have been given until the 15th November 2015 to align these Codes, and submit them to the DTI, failing which, the DTI has released a statement to the effect that all existing Sector Codes that have not submitted applications for approval to the Minister (by the required date) to be aligned with B-BBEE Codes of Good Practice, will be repealed.
- All businesses that fall under a Sector Scorecard, and whose Industry Council does not meet the deadline, could be measured under the General Amended Codes Scorecard.

Enhanced recognition status of black-owned EME's and QSE's

- See chapter 6 for further detail on the enhanced recognition of black-owned EME's and QSE's.

- The South African Tax regime is set by the National Treasury and managed by the South African Revenue Service (SARS). The National Budget Speech is delivered in parliament on the last Wednesday in February each year, where announcements and proposals are made affecting taxation in South Africa, and how funds are planned to be spent by the Government. (www.sars.gov.za and www.treasury.gov.za)

Residence Based Tax

South Africans are taxed on their worldwide income, subject to certain exclusions. Foreign taxes on that income are allowed as a credit against South African tax payable. This is applicable to individuals, companies, close corporations and trusts.

Definition of Resident

Natural Person

- any natural person who is ordinarily resident in South Africa, or
- any natural person who is not ordinarily resident in South Africa but who:
  - is physically present in South Africa for a period exceeding 91 days in aggregate during the current year of assessment and for a period exceeding 91 days in aggregate during each of the prior 5 years of assessment; and was physically present in South Africa for a period exceeding 915 days in aggregate during the previous 5 years of assessments
  - Where a person has been outside of South Africa for a continuous period of at least 330 full days after he ceases to be physically present in South Africa, he will be deemed to not have been resident in South Africa from the day that he ceased to be physically present in the country
  - South African resident employees who render services for any employer outside South Africa for a period which in aggregate exceeds 183 full days commencing on or ending during a period of assessment, and for a continuous period exceeding 60 full days during such 183 day period, will not be liable for income tax on their remuneration for the period that they are outside South Africa
  - Any person who is deemed to be a resident of another state through the application of a double tax agreement will not be treated as a South African resident.

Companies

A company will be considered to be resident in South Africa for tax purposes if it is incorporated, established, formed or has its place of effective management in South Africa.

Controlled Foreign Companies (CFC)

A Controlled Foreign Company (CFC) means any foreign company where more than 50% of the total participation rights in that foreign company are held or more than 50% of the voting rights in that foreign company are directly or indirectly exercisable by one or more residents. South African residents must impute all income of a CFC in the same ratio as the participation rights of the resident in such a CFC, subject to a number of exclusions. Net income of the CFC is defined as the CFC's taxable income determined as if the CFC is a South African taxpayer.

Foreign Dividends

Foreign Dividends received from a non –resident company, including deemed dividends are taxable.

Foreign dividends are exempt as follows:

For years beginning on or after 1 March 2012 (individuals) and 1 April 2012 (companies and trusts)

1. If received by a resident who holds at least 10% of the equity shares and voting rights in the foreign company
2. The shareholder is a company which is in the same country as the foreign company paying the dividend
3. If declared by a company listed in South Africa and a foreign stock exchange
4. If paid out of the profits of a foreign company if the profits of the foreign company have been included in the South African shareholders income in terms of the CFC provisions.

Where a foreign dividend is not exempted in terms of the provisions above the following part of a foreign dividend will be exempted from tax:

1. Individuals: 25/40 or 63% of the foreign dividend received
2. Companies and trusts: 13/28 or 46% of the foreign dividend received.

No deduction will be granted for any expenditure incurred in the production of income in the form of foreign dividends.

Foreign Tax Credits

Residents are allowed to deduct all foreign taxes paid in respect of foreign income from the tax payable in South Africa on foreign income. Any excess credits may be carried forward. There is also a foreign tax credit available for foreign companies that are taxed on management fees earned in South Africa.

Non-residents

Non residents are taxed on all income from a South African source. In other words, tax on the income of non-South African resident's is source-based, meaning that any income from a source within (or deemed to be within) South Africa is taxed, irrespective of the residence of the recipient of the income.

Non-residents may invest in the Republic, provided that suitable documentary evidence is received in order to ensure that such transactions are concluded at arms length, at fair market-related prices, and are financed in an approved manner subject to exchange control approval.

Capital Transactions

Proceeds from the sale of assets in South Africa, owned by non-residents (excluding emigrants), may be remitted abroad.

Dividends

Dividends declared by quoted companies out of income earned are remittable to non-resident shareholders. An emigrant shareholder will be entitled to dividends declared out of income earned after the date of emigration. Dividends declared by non-quoted companies are remittable in proportion to percentage shareholdings, subject to certain restrictions. Dividends in favour of emigrant shareholders may be remitted subject to additional requirements.

Fees

Authorised dealers may transfer directors fees to non-resident directors permanently domiciled outside South Africa, provided the application is accompanied by a copy of the resolution of the board of the remitting company, confirming the amount to be paid to the beneficiary.

Income Tax

Normal rates of tax payable by natural persons for the year ended 29 February 2016

Taxable Income	Rates of Tax
R0 – R181 900	+ 18% of each R1
R181 901 – R284 100	R32 742 + 26% of taxable income above R181 900
R284 101 – R393 200	R59 314 + 31% of taxable income above R284 100
R393 201 – R550 100	R93 135 + 36% of taxable income above R393 200
R550 101 – R701 300	R149 619 + 39% of taxable income above R550 100
R701 301 and above	R208 587 + 41% of taxable income above R701 300

Normal rates of tax payable by natural persons for the year ended 28 February 2015

Taxable Income	Rates of Tax
R0 – R174 550	+ 18% of each R1
R174 551 – R272 700	R31 419 + 25% of taxable income above R174 550
R272 701 – R377 450	R55 957 + 30% of taxable income above R272 700
R377 451 – R528 000	R87 382 + 35% of taxable income above R377 450
R528 001 – R673 100	R140 074 + 38% of taxable income above R528 000
R673 101 and above	R195 212 + 40% of taxable income above R673 100

Tax rebates	2015	2016
Primary	R12 726	R13 257
Secondary (Persons 65 and older)	R7 110	R7 407
Tertiary (Persons 75 and older)	R2 367	R2 466

Tax thresholds	2015	2016
Below age 65	R70 700	R73 650
Age 65 to below 75	R110 200	R114 800
Age 75 and over	R123 350	R128 500

Interest Exemption:	2015	2016
Below age 65	R23 800	R23 800
Age 65 and above	R34 500	R34 500

Comparative Tax Rates

Rates of Tax	2014	2015	2016
Natural persons			
Maximum marginal rate	40%	40%	41%
• Reached at a taxable income	638 600	673 100	701 300
Minimum rate	18%	18%	18%
• Up to taxable income of	165 600	174 550	181 900
• CGT inclusion rate	33.3%	33.3%	33.3%
Companies and CC's			
• Normal tax rate	28%	28%	28%
• STC rate/Dividends Tax	15%	15%	15%
• CGT inclusion rate	66.6%	66.6%	66.6%
Trusts (other than special trusts)*			
• Flat rate	40%	40%	40%
• CGT inclusion rate	66.6%	66.6%	66.6%
Sundry			
• Donations Tax	20%	20%	20%
• Estate Duty	20%	20%	20%
Small Business Corporations**			
Maximum marginal rate			
• Reached at a taxable income	28%	28%	28%
Minimum rate	550 000	550 000	550 000
• Up to a taxable income of	0%	0%	0%
	67 111	70 700	73 650
Micro Business***			
Max Rate of Tax	6%	6%	3%
• On turnover of	750 000	750 000	750 000
Minimum Rate	0%	0%	0%
• Up to a turnover of	150 000	150 000	335 000

Definitions:

***Special trusts:** Section 1 of the Income Tax Act defines two types of special trust:

a. **Special trust for incapacitated persons:** This is a trust created for the maintenance and care of a person with a mental illness (as defined in the Mental Health Care Act) or any serious physical disability which precludes him from earning income, or managing his own affairs, or

b. **A testamentary trust:** This is a trust created by a testator by or in terms of his Will solely for the maintenance and care of his relatives who are alive on the date of death of the deceased (including any beneficiary who has been conceived but not yet born on that date), where the youngest of those beneficiaries is on the last day of the year of assessment of that trust, under the age of 21 years. Taxed at the same rate as individuals. No primary rebate or interest exemption.

A **small business corporation is a close corporation or private company (other than a personal service provider) of which:

- the entire shareholding or membership is held by natural persons
- the gross income does not exceed R20 million (previously R14 million) during the year of assessment
- none of the members/shareholders, at any time during the year of assessment, held shares in any other company other than listed companies, collective investment schemes, body corporates, shareblock companies, certain associations of persons, friendly societies and small interests in cooperatives, shares in private companies that are inactive and have assets of less than R5 000 or have taken steps to liquidate, wind-up or deregister (effective for years of assessment commencing on or after 1 January 2011)
- not more than 20% of the gross income and capital gains consists of investment income and income from the provision of personal services
- if engaged in the provision of personal services, maintains at least three fulltime employees (none of whom may be a shareholder or a connected person in relation to the shareholder) for core operations.

These entities are entitled to certain allowances and reduced tax rates.

*****Micro business:** Sole proprietors, partnerships, close corporations, companies and co-operatives with a turnover of less than R1 million per year may elect to incorporate the micro business turnover tax system. The tax is an elective tax and is a simplified turnover based tax system substituting income tax, STC, CGT and in certain circumstances VAT.

Value Added Tax (VAT)

The VAT system comprises three types of supply:

- standard-rated supplies – supplies of goods and services subject to the VAT rate in force at the time of supply (currently 14%)
- exempt supplies – supplies of certain services not subject to VAT. Vendors making exempt supplies are not entitled to input VAT credits. Exports and certain foodstuffs are zero-rated

- zero-rated supplies – supplies of certain goods or services subject to VAT at zero percent. Vendors making zero rated supplies are entitled to input VAT credits.

Key features

- Enterprises with a turnover of less than R1 000 000 in any period of 12 months are not obliged to register for VAT
- Enterprises with a turnover of less than R50 000 in any period of 12 months are not permitted to register for VAT
- VAT returns are generally submitted on a 2 monthly basis unless turnover in any period of 12 months exceeds R30 million, in which case returns are submitted monthly
- Farmers may submit VAT returns on a 6 monthly basis and property letting companies may, subject to certain requirements, submit annual VAT returns
- Businesses with turnover of less than R1,5 million may apply to submit returns every 4 months
- A vendor is legally obliged to notify SARS as soon as annual turnover exceeds or is expected to exceed R30 million
- Vendors may reclaim the VAT element of all expenditure except on:
  - entertainment, except qualifying subsistence
  - passenger vehicles (including hiring), and
  - club subscriptions.
- Input tax credits may not be claimed on expenditure relating to exempt supplies
- Input tax credits may only be claimed upon receipt of a valid tax invoice
- The name, address and VAT registration number of the recipient and supplier must appear on tax invoices where the VAT inclusive total exceeds R3 000
- If a subsidiary or branch of a foreign-owned company sells goods or provides services, it must register as a vendor with SARS.

Capital Gains Tax (CGT)

CGT is payable on the **disposal** of **assets** that take place on or after valuation date, i.e. 1 October 2001; in the case of South African residents, the tax will apply to disposals of all assets (including overseas assets); in the case of **non-residents**, the following assets will be subject to CGT:

- immovable property, or any right or interest in a property (this includes a direct or indirect interest of at least 20% held alone or together with any connected person in the equity share capital of a company, where at least 80% of the value of the net assets of the company is, at the time of the disposal, attributable to immovable property in SA), and
- any asset of a permanent establishment through which a trade is carried on in SA.

The purchaser must withhold CGT on the purchase price where assets are purchased from a non-resident (except where the amount payable by the purchaser is less than R2 million).

A capital gain or loss is calculated separately in respect of each asset disposed. Once determined, gains or losses are combined for that year of assessment and if it is:

- an assessed capital loss, it is carried forward to the following year, or
- a net capital gain, it is multiplied by the inclusion rate (individuals 33.33%, companies and trusts 66.67%).

This taxable capital gain is included in taxable income and taxed at the normal income tax rates applicable.

The following exemptions for individuals are applicable:

- Annual exclusion: R30 000 (Until 2012: R20 000)
- The exclusion amount on death: R300 000 (until 2012: R200 000)
- The primary residence exclusion: R2 million (until 2012: R1.5 million)
- The exclusion amount on the disposal of a small business when a person is over age 55: R1.8 million (until 2012: R900 000)
- The maximum market value of assets allowed for a small business disposal for business owners over 55 years: R10 million (until 2012: R5 million).

Double Taxation Agreements

- The tax liability of a foreign company depends on the nature of the income derived by it, as well as the existence of a double taxation agreement.
- South Africa has agreements with most of its trading partners to prevent double taxation of income accruing to South Africa taxpayers from foreign sources, or of income accruing to foreign taxpayers from South African sources.
- In terms of these arrangements a foreign resident will be taxed in South Africa only if it conducts business through a permanent establishment in South Africa (there are a few exceptions such as withholding taxes).

Note: Any person who is deemed to be a resident of another state through the application of a double tax agreement will not be treated as a South African resident.

Headquarter company regime

- The headquarter company regime (HQC) aims to reduce the tax cost of operating a headquarter company in South Africa. For example, it exempts companies from withholding dividends tax and tax on interest and royalties on income flowing through them from foreign subsidiaries.

Employee Tax

- Where a subsidiary or branch of foreign-owned company hires employees in South Africa, it must register as an employer with SARS.
- See page 32 for the administrative and taxation consequences of hiring employees in South Africa.

Transfer Duty

- is calculated on the value of the immovable property (purchase price or market value whichever is the highest, and is payable within six months after the transaction is entered into.
- will be exempted when the seller is a registered VAT vendor.

Transfer duty is calculated as follows:	
R0 – R750 000	0%
R750 001 – R1 250 000	3% of the value above R750 000
R1 250 001 – R1 750 000	R15 000 plus 6% of the value over R1 250 000
R1 750 001 - R2 250 000	R45 000 plus 8% of the value over R1 750 000
R2 250 001 +	R85 000 plus 11% of the value over R2 250 000

Donations Tax

- Donations Tax is payable by any individual living in the Republic of South Africa, or any South African company or one managed or controlled in the Republic, on the value of any gratuitous disposal of property including the disposal of property for inadequate consideration and the renunciation of rights. Donations tax is payable within 3 months after the donation at a flat rate of 20%. Certain donations are exempt, and non-residents are not liable for donations tax.

Dividends Tax

Dividends tax is a tax levied on the shareholder at a rate of 15% on dividends paid. However, where a dividend in specie is paid, dividends tax is a tax levied on the company declaring the dividend.

Dividends tax is normally withheld by the company paying the dividend and is payable at the end of the month following the month in which the dividend was paid.

Dividends tax exemptions

A dividend is exempt from dividends tax if the beneficial owner is:

- A SA company
- The Government and various quasi government institutions
- Public Benefit Organisations
- Environmental rehabilitation trusts
- Pension, provident and similar funds
- Medical Schemes
- A shareholder in a registered micro business (only the first R200 000 of dividends paid during a particular year of assessment).

Secondary Tax on Companies ('STC') credits

If a company has STC credits at the effective date of the Dividends Tax regime these STC credits must be used before or on 31 March 2015 (i.e. within 3 years from the effective date).

Securities Transfer Tax

- The tax is imposed at a rate of 0.25% on the transfer of listed or unlisted securities. Securities consist of shares in companies or member's interests in close corporations.

Capital Incentive Allowances

The Capital Incentive Allowance is a reduction in the amount of tax payable, offered as an incentive for investment in large-scale projects (that increase the country's production capacity and stock of capital). A certain percentage of the capital asset's cost is allowed as capital allowance during the accounting period in which it was purchased. This amount is greater than the depreciation charge on the asset during that period. Some examples:

Urban development zone allowance

The capital allowances will apply until 31 March 2014 to buildings in an urban development zone.

The refurbishment of existing buildings entitles the taxpayer to an allowance of 20% straight-line over 5 years, whilst the construction of a new building entitles the taxpayer to an allowance of 20% in the first year and 8% thereafter provided that the building commenced after 21 October 2008. Where the building commenced prior to that date the annual allowance is 5%.

An enhanced allowance will be considered for private developers who improve another party's land, subject to anti-avoidance measures.

Low-cost residential units qualify for higher allowances. A low cost residential unit is a building whose cost does not exceed R200 000 or an apartment whose cost does not exceed R250 000.

The refurbishment of such units may be written off over 4 years, whilst new units may written off: 25% in year 1, 13% in years 2 – 6, and 10% in year 7.

There are allowances for **residential units**, subject to certain criteria (including that it is used solely for the purposes of trade). There is a special depreciation allowance (for certain assets used for trade, for example, **plant and machinery** used directly in a process of manufacture). Certain **farming and plant equipment**, assets used for the production of bio-diesel or bio-ethanol or assets used for the production of electricity from wind, sunlight, gravitational water forces or biomass may be written off 50% in year 1, 30% in year 2 and 20% in year 3.

Industrial buildings (subject to certain criteria),

Hotel buildings

Commercial buildings.

Learnership allowances

With effect from 1st January 2010 an annual and completion allowance of R30 000 was introduced, without any reference to the learner's remuneration.

The deduction claimable for disabled learners will be set at R50 000 for both annual and completion allowances.

Where a learnership is terminated before a period of 12 full months the employer will be entitled to a pro rata portion of the annual allowance, regardless of the reason for the termination of the learnership. The completion allowance for a learnership of 24 months or more will be based on the number of consecutive 12 month periods completed × R30 000 (R50 000 for disabled learners).

Wear and Tear Allowances

There are several provisions in the Income Tax Act, 58 of 1962 (the "Income Tax Act") that allow a deduction from taxable income for the benefit of taxpayers investing in assets to be used in carrying on a trade.

Section 11(e) provides for a Wear and Tear allowance. Wear and tear can be calculated on a straight-line basis provided:

The taxpayer complies with certain requirements:

- Adequate records must be maintained
- The method must be applied to all assets in the same class
- The taxpayer must be able to provide a detailed schedule of assets disposed of, including date of acquisition, tax value in the previous tax year, the price on disposal or scrapping, the final written down value of the asset to be reflected at R1, the records must be maintained so that each asset's value can be established at any point in time
- The asset must be used in the taxpayer's trade.

Interpretation note 47 sets out write-off periods that are acceptable to SARS.

The acquisition of "small" items at a cost of less than R7 000 per item may be written off in full during the year of acquisition.

There are special wear and tear rules for Small Business Corporations.

Green Taxes

Carbon dioxide vehicle emissions tax

New passenger cars will be taxed based on their certified CO_2 emissions. With effect from 1 April 2013, for passenger cars, the tax will rise from R75 to R90 for every gram of emissions per kilometre above 120 g CO_2/km. In the case of double cabs it will increase from R100 to R125 for every gram of emissions per kilometre above 175 g CO_2/km.

Plastic bag levy

The levy will rise from 4 cents to 6 cents per bag from 1 April 2013.

Incandescent light bulb levy

The levy is to be increased from R3 to R4 per bulb from 1 April 2013.

"Environmental" Deductions/allowances

- Section 12B Deduction in respect of certain machinery, plant, implements, utensils and articles used in framing or production of renewable energy
- Section 37B Deductions in respect of environmental expenditure
- Section 37C Deductions in respect of environmental conservation
- Section 11D Deduction for research and development costs
- Section 12 K Exemption for Certified Emission Reductions
- Section 12 L Special Allowance for Energy Efficiency Savings

Tax allowance for energy-efficiency savings

The Department of Energy has released a new tax allowance for Energy-efficiency savings Regulation. The Regulation stipulates that any company holding a certificate that can prove their energy savings are genuine, can submit the certificate to claim an allowance from SARS. The allowance is as contemplated in Section 12L (2) of the Income Tax Act, 1962.

Customs duties

- An importer/exporter has to register with SARS to obtain a customs code number.
- Goods imported into, or exported from, South Africa are liable for VAT and customs duty, subject to the availability of rebates and refunds.
- Direct exports (where the South African seller supplies the goods) are subject to VAT at 0% and indirect exports (where for example the client of a South African seller arranges for the delivery of goods to the client's customer in the country to which the goods are exported) are subject to VAT at 14%.
- If goods are imported from one of the countries falling within the Common Customs Area (Namibia, Botswana, Lesotho and Swaziland) they are exempt from custom duty but not VAT.

Other key facts on Taxation in South Africa:

- Partnerships are not recognized as separate entities for income tax purposes. Each individual partner is taxed separately on his share of the partnership profits.
- There is no group taxation in South Africa – each company is taxed as a separate taxpayer.
- The financial year end for individuals is end of February every year. Companies may select their own financial year end.
- Companies who derive their income from mining, gold mining, oil and gas, and farming may receive special dispensations.

- Branches of foreign companies and South African subsidiaries are treated as resident and subject to exchange control.
- Investment may be in the form of share capital only or share and loan capital.
- Where the investment is in the form of loan capital, exchange control approval is required.

Interest

- Interest on a loan from the holding company is remittable, provided that the rate of interest is reasonable in relation to the currency of the loan, and the loan was previously authorised.
- The rate will be reduced where the foreign shareholder lends the funds.
- On 1 July 2013 withholding tax on interest paid to non-residents became effective. This is a significant change as interest paid to non-residents has historically been exempt from tax in South Africa. In addition, the existing withholding tax on royalties paid to non-residents will be overhauled effective from the same date with the effect that this tax will be more closely aligned with the dividends tax and with the new withholding tax on interest.

Royalties

- Licence agreements must be approved by the Department of Trade and Industry.
- Acceptable rates vary from 2% to 4% for manufacture of consumer goods and up to 6% for capital goods.
- Minimum and/or up-front payments (even if recoupable) are not allowed, unless there is immediate benefit, for example, training.
- The payment is subject to a withholding tax of 12% (unless the rate is reduced or eliminated in terms of a double tax agreement).

Immovable Property: Exchange control/withholding tax

A “foreign buyer” is a:

- non-resident (natural or legal entity) whose normal place of residence, domicile or registration is outside of SA.
- A SA resident who has lived abroad for more than **5** years, regardless of whether or not he/she has emigrated, is treated as a non-resident (for purposes of obtaining finance to purchase property in SA).
- Illegal aliens are prohibited from buying immovable property in SA.
- All other non-residents are not restricted from owning property in the country, however, they are subject to certain restrictions in regard to obtaining finance to buy property in SA, in that a non-resident may borrow up to **50%** of the purchase price on application to the SA Reserve Bank. However, if a non-resident has brought money in to the country over an extended period of time, this criterion may be waived subject to Reserve Bank approval.

Foreign sellers/Withholding Tax

- All funds introduced from outside SA to acquire fixed property within SA may be repatriated together with any profit, on resale of the property, provided that:
  - The non-resident can prove that funds for purchase were remitted from overseas
  - The required CGT deduction is made; (non-residents will not qualify for the R2 million exemption if their primary residence is not in the country)
  - Purchasers of property from non-resident sellers (and their estate agent and/or transferring attorney) are obliged to retain a percentage of the selling price and pay it to SARS as a deposit for the Seller's liability for CGT
  - If the buyer is a SA resident, (s)he must pay it within **14 days** from the date on which the amount was so withheld, and if the buyer is a non-resident, within **28 days**
  - Aim: to ensure the efficient collection of CGT from non-residents who are often not registered as SA taxpayers and whose connection in the country is tenuous. The payment acts as an advance against the non-resident's income tax liability for the year of assessment in which the property is sold
  - The purchaser, estate agent and transferring attorney may not be guided by whether any CGT is payable – the two deciding issues are the price and the fact that the seller is a non-resident
- The actual tax rate depends on whether the non-resident seller is:

a natural person* – 5%	a company – 7.5%	a trust – 10%

  * includes a special trust

- The tax is not charged on the full selling price all at once, but rather on each payment as and when it is paid from the buyer to the seller (if an instalment sale is concluded)

  [Note: payment of a deposit does not trigger the withholding tax]
- The foreign seller will be required to register as a South African taxpayer (and the withholding tax would then be set off against the final tax liability due to SARS)
- The law effectively holds the purchaser, estate agent and conveyancing attorney responsible for the withholding tax to be paid to SARS, as follows:

Duties of the Purchaser

- The obligation arises if the purchaser knew (or should reasonably have known) that the seller is a non-resident, to deduct the amount from each payment to the seller and pay it across to SARS within the required time period (interest will be levied for late or non-payment).
- The purchaser is personally liable to pay the amount to SARS irrespective of whether or not it was withheld from the Seller.

Duties of the Estate agent or Conveyancer

- Where the agent or conveyancer knew (or should reasonably have known) that the seller was a non-resident, (s)he has the responsibility of notifying the purchaser in writing.
- Should the agent or conveyancer fail to give such notice, the withholding obligations will fall upon them with the purchaser for the amount that is required to be withheld and paid to SARS – although their liability will be limited to their fees or other payments due in respect of services rendered in relation to the transaction.

Who is a "Non-resident" Seller

- In practice it is often difficult to determine whether a seller is a non-resident or not for tax purposes, and it may become a feature of the sales process to require sellers to sign a formal declaration or affidavit on their residency status, in order to clear up any questions regarding residency for tax purposes.
- The obligation on the purchaser is to withhold the tax and the obligation on the estate agent/conveyancer is to notify the purchaser in writing of the non-resident status of the seller.
- The purchaser, estate agent or conveyancer may recover the amount paid in terms of this section from the seller.

SARS directive for Seller

- The seller may apply to SARS for a directive to prevent or reduce the withholding tax payable, and, where SARS is satisfied that the seller has sufficient other assets or security in SA, it may issue such a directive. The seller must then provide the purchaser with proof thereof. Once the purchaser has the directive, (s)he need only withhold an amount equal to the amount set out in the directive.

Note: this withholding tax is **not** payable on properties with a selling price of R2 million or less.

Forex exchange rates

Average exchange rates for a year of assessment*

Year of assessement for the 12 months ending:	Euro	Japanse Yen	UK Pound	US Dollar
February 2014	13,3464	0,1003	15,7974	9,9993
February 2015	14,1358	0,1012	17,7890	10,9515
*The term "average exchange rate" is defined in section 1(1) of the Income Tax Act and means in relation to a year of assessment, the average exchange rate determined by using the closing spot rates at the end of applied consistently within that year of assessment.				

Source: www.sars.gov.za

- The Department of Trade and Industry (DTI) provides financial support to qualifying companies in various sectors of the economy. Financial support is offered for various economic activities, including manufacturing, business competitiveness, export development and market access, as well as foreign direct investment.
- Some of these Incentives can be summarised as follows: (more detail provided on the DTI website: www.thedti.gov.za):

SMME Development Incentives	Industrial Development-Related Incentives	Women Economic Empowerment Incentives	Trade, Export and Investment Incentives
Black Business Supplier Development Programme (BBSDP)	Business Process Services Initiative (BPS)	Bavumile	**Critical Infrastructure Programme (CIP):** cost sharing cash grant for projects designed to improve critical infrastructure in South Africa
Co-operative Incentive Scheme (CIS)	Capital Projects Feasability Programme (CPFP)	Isivande Women's Fund	**Export Marketing and Investment Assistance (EMIA):** assist South African exporters by organizing National Pavilions to showcase local products at international trade shows
The Technology and Human Resources for Industry Programme (THRIP)	Clothing and Textile Competitiveness Enhancement Programme (CTCIP)		**Automotive Investment Scheme (AIS):** to grow and develop the automotive sector through investment in new and/or replacement models and components
Incubation Support Programme (ISP)	Manufacturing Competitiveness Enhancement Programme (MCEP)		Section 12i Tax Allowance Incentive (12i TAI) The 12i Tax Incentive is designed to support Greenfield investments (i.e. new industrial projects that utilise only new and unused manufacturing assets), as well as Brownfield investments (i.e. expansions or upgrades of existing industrial projects). The new incentive offers support for both capital investment and training

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SMME Development Incentives	Industrial Development-Related Incentives	Women Economic Empower-ment Incentives	Trade, Export and Investment Incentives
	Enterprise Investment Programme (EIP): cash grant for local and foreign owned manufacturers who wish to establish a new production facility in South Africa, expand or upgrade an existing production facility		Film and Television Incentive
	Foreign Investment Grant (FIG): compensates qualifying foreign investors for costs incurred in moving qualifying new machinery and equipment from abroad to South Africa		Foreign Film and Television Production and Post-Production Incentive
	Production Incentive (PI)		South African Film and Television Production and Co-Production Incentive
	Sector Specific Assistance Scheme (SSAS)		
	Support Programme for Industrial Innovation (SPII): promotes technology develop-ment in industry in South Africa by providing financial assistance for the development of innovative products and/or processes		Other export incentive schemes are also available from various government or semi-government organisations. **The Tourism Support Programme (TSP):** a reimbursable cash grant to support the development of tourism entities that will create jobs and increase geographic spread of the tourism industry in South Africa
	SEDA Technology Programme (STP)		

Source: www.thedti.gov.za

Trade marks
Definition Trade marks must be capable of distinguishing the goods or services of one undertaking from those of other undertakings It is a brand name, a slogan or a logo
Registration Registered with the South African Registrar of Trade Marks. A trade mark can only be protected as such and defended under the Trade Marks Act 1993, if it is registered. Unregistered marks can be defended in terms of the common law. The registration procedure results in a registration certificate which has legal status, allowing the owner of the registered trade mark the exclusive right to use that mark
Length of protection Trade marks are registered for ten years but can, on application, and payment of a renewal fee, be renewed for an unlimited number of additional ten-year periods
Rights of holder The right holder is entitled to prevent unauthorised use of an identical or substantially similar mark used in the same type of industry as that in which the trademark has been registered
Enforcement and remedies **Trade Marks Act 1993** Where there has been an infringement, the High Court can: • Grant interdicts • Order the removal of the infringing mark or the delivery up of the products containing the mark • Award damages. The Commission administers the Register of Trade Marks, which is the record of all the trade marks that have been formally applied for and registered in South Africa
Patents
Definition An invention is patentable when it is a product or process that is new, involves an inventive step, or a new way of doing something, or offers a new technical solution to a problem. It must be capable of being used or applied in trade and industry or agriculture, and must not be specifically excluded from protection as a patent
Registration Registered with the South African Registrar of Patents South Africa is one of **142** countries that is a member of the Patent Co-operation Treaty (PCT). This Treaty allows an individual to file an international application as well as a national application. The international application will designate countries in which the applicant seeks protection. Extra fees are payable for this type of registration

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Length of protection A patent can last up to **20 years**. It is important to pay an annual renewal fee to keep it in force. To maintain a patent in force a payment of a renewal fee is due every year starting from the expiring of the 3rd year from the date of filing until the patent expires. The patent expires after 20 years from the date of application	
Rights of holder A holder of a patent has the right to exclude others from making, using, exercising, disposing or importing the invention	
Enforcement and remedies **Patents Act 1978** The remedies available for infringement are: interdict, damages, delivery up of the infringing product. The Commissioner of Patents or the High Court deal with disputes	
Copyright	
Definition A copyright is an exclusive right granted by law for a limited perod to an author, designer, etc. for his/her original work. For a work to be eligible for copyright protection, it must be original and be reduced to material form	
Registration Generally a person who has written, printed, published, performed, sculpted, painted, filmed or recorded a work, is automatically the owner of the copyright to that work. Copyright is created by putting the words "copyright" or "copyright reserved" or "copyright ABC 2013" (i.e. copyright, followed by name and the year), or the copyright symbol, name and year e.g. © ABC 2013. You can obtain copyright protection in South Africa, if you are a South African or if your work was produced in South Africa. If you are not South African, you can obtain copyright protection provided the country you are a national of is part of the Berne Convention. The Berne Convention is an international agreement on copyright by which member countries grant each other copyright protection. Copyright for films/videos made for commercial use needs to be applied for formally, by way of the following documentation, obtainable free of charge, from the Copyright Office	
Length of protection The lifespan of copyright depends on the type of work protected: The copyright of literacy works lasts for 50 years after death of the author. The copyright of computer programs lasts for 50 years after the first copies were made available to the public. For sound recordings, the copyright lasts for 50 years from the day the work was first broadcast. For films, 50 years from the date the film was shown	
Rights of holder Copyright affords the author the exclusive right to stop others from copying or using his work without his permission. If somebody copies your work without your permission; this is called copyright infringement, which is a violation of author's rights. Author can also conclude license agreements with the users for his copyright works and enjoy royalties payment from the licensees	
Enforcement and remedies **Copyright Act 1978** If infringement occurs the author may sue the infringer. It is the responsibility of the author to prove ownership and also to sue in case of infringement	

Designs
Definition A registered design is generally used to protect the physical appearance of an article. The design may be aesthetic or functional. An aesthetic design must be new and original, and must be able to be produced by an industrial process. Beauty is in its shape, configuration or ornamentation. A functional design must be new and not commonplace in the art concerned. The shape or configuration is necessitated by the function, must be able to be produced by an industrial process. e.g. the design of a ring (jewellery) is generally dictated by aesthetic features
Registration Registered with the South African Registrar of Patents. Designs for articles that are not intended to be produced in large quantities by industrial process cannot be registered
Length of protection Registered aesthetic designs are protected for 15 years. Registered functional designs are protected for ten years. Registered designs have to be renewed annually before the expiration of the third year, as from the date of lodgment. To maintain a design in force a payment of a renewal fee is due every year starting from the expiring of the 3rd year from the date of filing until the design expires
Rights of holder Registration of a design grants to the right holder the right to exclude other people from making, importing, using or disposing of any article included in the class in which the design is registered, so that the right holder enjoys all the benefits relating to the design
Enforcement and remedies **Designs Act 1993** If a design right is infringed, a right holder can seek • An interdict • Delivery up of the infringing product • Damages • A reasonable royalty

Source: www.cipc.co.za

Tax Implications of Intellectual Property Ownership

Should income be generated or derived from patents and similar property, the owner may, over a period, deduct from taxable income, expenditure on:

- devising and developing an invention
- generating or making a design, trademark, copyright or similar asset
- registering or obtaining a patent, design registration or trademark, and
- acquiring from someone a copyright, design, patent, trademark or similar property.

Since South African tax law is based on the residence principle, income in a South African resident's hands, from foreign sources is taxable. The international structuring of intellectual property ownership and revenue flows is an advanced and complex subject and will require advice from specialists in this field.

General

- The Competition Act, 89 of 1998, as amended, (hereinafter referred to as "the CA") provides for the establishment of a Competition Commission in South Africa, which is responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers, and for the establishment of a Competition Tribunal responsible to adjudicate such matters, as well as a Competition Appeal Court.
- A knowledge of competition law is essential for any successful business operating in South Africa, especially when creating a business strategy, launching a new product or challenging competitors.
- The CA applies to all economic activity within, or having an effect within South Africa.
- The CA regulates both horizontal relationships (relationships between competitors) and vertical relationships (relationships in the supply chain). Agreements or practices by parties in either type of relationship are prohibited if they have the effect of substantially preventing or lessening competition in a market (subject to certain defences).

Restrictive practices and anti-competitive conduct

- Examples of 'restrictive practices' and 'anti-competitive conduct' are price fixing, predatory pricing and collusive tendering, all of which are prohibited.
- The CA also prohibits "abuses" by "dominant" firms (firms with a market share of 35% or more).

Control of mergers and acquisitions

- Mergers and acquisitions are controlled, in that the CA requires a notification and prior approval procedure for certain mergers and acquisitions, carries significant penalties for contraventions – and reaches beyond South Africa, applying to economic activity both in and having an effect in the country.

Cartel conduct

- Cartel conduct applies to parties in a 'horizontal relationship' (relationships between competitors), where three categories of conduct are per se prohibited. These are:
    - Directly or indirectly fixing a purchase or selling price or any other trading condition
    - Dividing markets by allocating customers, suppliers, territories or specific types of goods or services
    - Collusive tendering.

Remedies and enforcement

- The Competition Tribunal may impose administrative penalties for certain prohibited practices, or a contravention of or failure to comply with an interim or final order of the Tribunal or Competition Appeal Court. Such an administrative penalty may not exceed 10% of the firm's annual turnover in South Africa and its exports from South Africa, during the firm's preceding financial year.
- The CA also provides for criminal sanctions including breach of confidence, hindering the administration of the Act, failure to attend, failure to answer truthfully or fully, and failure to comply with the Act.
- Any person convicted of an offence in terms of the CA, is liable –
  a) in the case of a contravention of section 73(1) [contravening or failing to comply with an interim or final order of the Competition Tribunal or Competition Appeal Court] to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment, or
  b) in any other case, to a fine not exceeding R2 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.

Purposes and Policy of the Competition Act

In general, the CA seeks to maintain and promote competition in the South African market to:

- Provide all South Africans equal opportunity to participate fairly in the national economy
- Achieve a more effective and efficient economy in South Africa
- Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire
- Create greater capability and an environment for South Africans to compete effectively in international markets
- Restrain particular trade practices which undermine competitive economy
- Regulate the transfer of economic ownership in keeping with the public interest
- Establish independent institutions to monitor economic competition
- Give effect to the international law obligations of South Africa
- Promote employment and general socio-economic welfare
- Promote a greater spread of ownership within the economy, in particular by increasing the ownership of historically disadvantaged individuals
- Ensure that small business have an equitable opportunity to participate in the economy
- Expand opportunities for South African participation in world markets, while recognising the role of foreign competition within South Africa.

The Competition Commission

- Responsible for investigating and evaluating mergers and prohibited practices
- Makes recommendations on larger mergers to the Competition Tribunal

- It’s decisions may be appealed against to the Competition Tribunal and/or the Competition Appeal Court
- Competition authorities may weigh aspects of competitiveness vs. general public interest when arriving at their decisions or judgments.

As the preamble to the CA states, the South African people recognise that “an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans”.

Sources: www.compcom.co.za,

www.comptrib.co.za,

www.southafrica.info/business/investing/regulations/competition-policy.htm

21 Environmental law

There is increasing awareness in South Africa towards environmental issues and planning, in both the private and public sectors. One of the most important pieces of legislation of relevance is the South African Constitution.

The Constitution of the Republic of South Africa Act, 108 of 1996

Section 24 provides that everyone has the right to:

a) An environment that is not harmful to their health or well-being
b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation (ii) promote conservation (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

National Environmental Management Act, 107 of 1998

- To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state
- To provide for certain aspects of the administration and enforcement of other environmental management laws. This Act gives effect to section 24 of the Constitution.

National Forests Act, 84 of 1998

The preamble of the Act states that Parliament recognises that –

- everyone has the constitutional right to have the environment protected for the benefit of present and future generations
- natural forests and woodlands form an important part of that environment and need to be conserved and developed according to the principles of sustainable management
- plantation forests play an important role in the economy.

National Water Act, 36 of 1998

- Which acknowledges the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.

Water Services Act, 108 of 1997

The Preamble states that the Act is aimed at:

- recognising the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being
- acknowledging that there is a duty on all spheres of Government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable
- acknowledging that all spheres of Government must strive to provide water supply services and sanitation services sufficient for subsistence and sustainable economic activity
- recognising that in striving to provide water supply services and sanitation services, all spheres of Government must observe and adhere to the principles of co-operative government
- confirming the National Government's role as custodian of the nation's water resources.

National Energy Act, 34 of 2008

- To ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and poverty alleviation, taking into account environmental management requirements and interactions amongst economic sectors.
- It imposes a duty on any person who causes, has caused or may cause significant pollution or degradation to take reasonable measures to prevent, minimise and rectify significant pollution and environmental degradation. There is no stipulated threshold limit of pollution that triggers the obligation to remediate and no legislated standards to which contamination must be remediated, but what is required is the taking of reasonable measures. Non-compliance with the duty of care allows a competent authority to require that specified measures be taken (and if not taken, the competent authority may take those steps itself and recover the costs from various parties).
- The responsibility for environmental degradation is placed on directors of companies in certain instances.

Air Quality Act, 39 of 2004

- The ultimate outcome of the efficient and effective implementation of the Air Quality Act is ambient air that is not harmful to health and well being of all across the nation.

National Environmental Management: Biodiversity Act, 10 of 2004

Provides a regulatory framework to protect South Africa's valuable species, ecosystems and its biological wealth.

Overview

Six of the world's ten fastest growing economies between 2001 and 2010 were African countries, of which 2 were in Southern Africa. African countries are experiencing rapid growth, and the prediction is that this growth will continue. The Economist predicts that 7 of the top 10 fastest growing economies between 2011 and 2015 will be African countries.

Foreign direct investment into Southern Africa continues to surge, despite continuing political, developmental and social challenges in these countries. Entrepreneurs and potential investors need to weigh the challenges of investing in these regions against the potential profitability of an investment.

SADC

The Southern African Development Community (SADC), which was established in 1992, and comprises 15 member states. Its mission statement is to promote sustainable and equitable economic growth and socio-economic development through efficient, productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.

Member states

SADC is a regional economic community, comprising 15 member states as follows:

Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

SADC is committed to regional integration and poverty eradication within Southern Africa through economic development.

SADC Vision and Mission

SADC is committed to regional integration and poverty eradication within Southern Africa through economic development.

The SADC vision is to build a region in which there will be a high degree of harmonisation, and rationalisation, to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region.

The vision of SADC is one of a Common Future, a future within a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the people of Southern Africa.

In order to fulfill the SADC mission statement, member states are guided by the following principles, as stated in Article 4 of the SADC Treaty:

- Sovereign equality of all member states
- Solidarity, peace and security
- Human rights, democracy and the rule of law
- Equity, balance and mutual benefit, and
- Peaceful settlement of disputes.

Facts and figures

Member states	15
Year established	1992
Land area	554 919 km²
Total Population	277 million
Average life expectancy (2009)	55.1 years
Average HIV Prevalence Rate (2009)	12.6%
Average Government debt (2011, % of GDP)	40.4%
GDP Annual Growth Rate (2011)	5.14%
GDP (2010)	USD $575.5 Billion
Inflation (2011)	7.7%
Fiscal Balance (2012)	–3.6%

Source: http://sadc.int/about-sadc/overview/sadc-facts

Sector Contributors to GDP

For the SADC region, service sectors represent 51% of SADCs' GDP in the period 2000-2010 and thus are the main driver of regional growth. The industry sector represents 32% GDP contribution, and agriculture, 17% (for period between 2000 and 2010) [Source: World Development Indicators].

SADC Executive

SADC is led by the SADC Executive, comprising the following roles:

Executive Secretary: Tasked with all public and media relations, public affairs, protocol and special events management for the SADC Secretariat, and custodian of communications, branding and promotional strategies within SADC.

Deputy Executive Secretary: Regional Integration: Responsible for five directorates that address SADC's Regional Integration themes.

Deputy Executive Secretary: Finance and Administration: Responsible for administrative elements of the SADC's Secretariat.

Directorates and Units

Directorates and Units of SADC are organised into three major groups, each under the responsibility of a member of the SADC Executive.

Finance and Administration	Executive Secretary	Regional Integration
Directorate: Budget and Finance	Gender Unit	Directorate: Trade, Industry, Finance and Investment
Directorate: Human Resources and Administration	Internal Audit Unit	Directorate: Infrastructure and Services
Conference Services Unit	Macro-economic Convergence Surveillance Unit	Directorate: Food, Agriculture and Natural Resources
Procurement Unit	Public Relations Unit	Directorate: Policy, Planning and Resource mobilisation
Legal Unit	Management of Directorate: Organ on Politics, Defence and Security Co-operation	
Information and Communication Technologies Unit		

Tax Revenue

Tax revenue as a percentage to GDP varies widely across the SADC region. Angola has less than 0.5% tax revenue over the period 2005-2010, whereas Lesotho, Botswana and Swaziland have the highest tax revenue as % of GDP. In 2010, the highest tax revenue as a % of GDP was 36% (Lesotho), the lowest was Angola at 0.041% and the SADC average was 20%.

Trade

SADC total trade has followed a similar pattern to total world trade. Total SADC trade almost quadrupled between 2000 and 2011, although there was a sharp decline of more than 25% in 2009 as a result of the global economic crisis.

Exports and Imports

Main intra SADC trade export items include petroleum oils, agricultural products, electricity and some clothing and textile products. Main export items to the rest of the world consist of predominantly export of resources (e.g. coal, ferrochromium, manganese ores, platinum, as well as precious metals and diamonds), resource intensive manufactured goods, mainly for the automotive industry, some clothing and textiles, and tobacco.

The highest share of total SADC exports over time is to the Asia Pacific Market, followed by the EU market. Trade within Africa is the smallest and of this the majority is intra SADC trade (See table below).

Table: Overall direction of SADC Exports (2000–2010)

Regional Economic Community/ Continent	Asian Pacific Economic Cooperation (APEC)	European Union (EU)	Rest of World	Intra-SADC	Rest of Africa
% Export	45	27	15	10	3

Source: IMF DOT

Total intra SADC imports have grown steadily over the past ten years, more than tripling in total. As with intra SADC exports, imports also experienced a significant fall in 2009 due to the global recession.

Table: Overall direction of SADC Imports (2000–2010)

Regional Economic Community/ Continent	Asian Pacific Economic Cooperation (APEC)	European Union (EU)	Rest of World	Rest of Africa
% Import	45	27	15	13

Source: IMF DOT

Labour Market and Employment

The labour force participation rate measures the proportion of a country's working-age population working or actively looking for work. The lowest percentage of women participating in the work force is in Mauritius; South Africa and Namibia both have a relatively low percentage of working-age population, male and female, working or looking for work. The highest percentage of labour force participation for both female and male is found in Tanzania, (86% and 93% respectively).

Unemployment rates as a share of total labour force by gender are higher among females than males in all SADC countries. Unemployment among young women is especially high in South Africa, Namibia and Lesotho.

Sources and Useful websites

1. http://www.southafrica.info/
2. http://www.southafrica.info/about/facts.htm
3. http://www.statssa.gov.za/keyindicators/keyindicators.asp
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5. www.cipc.co.za
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8. www.southafrica.info/business/investing/regulations/competition-policy.htm
9. www.thedti.gov.za/financial_assistance/financial_assistance.jsp
10. http://en.wikipedia.org/wiki/Broad-Based_Black_Economic_Empowerment
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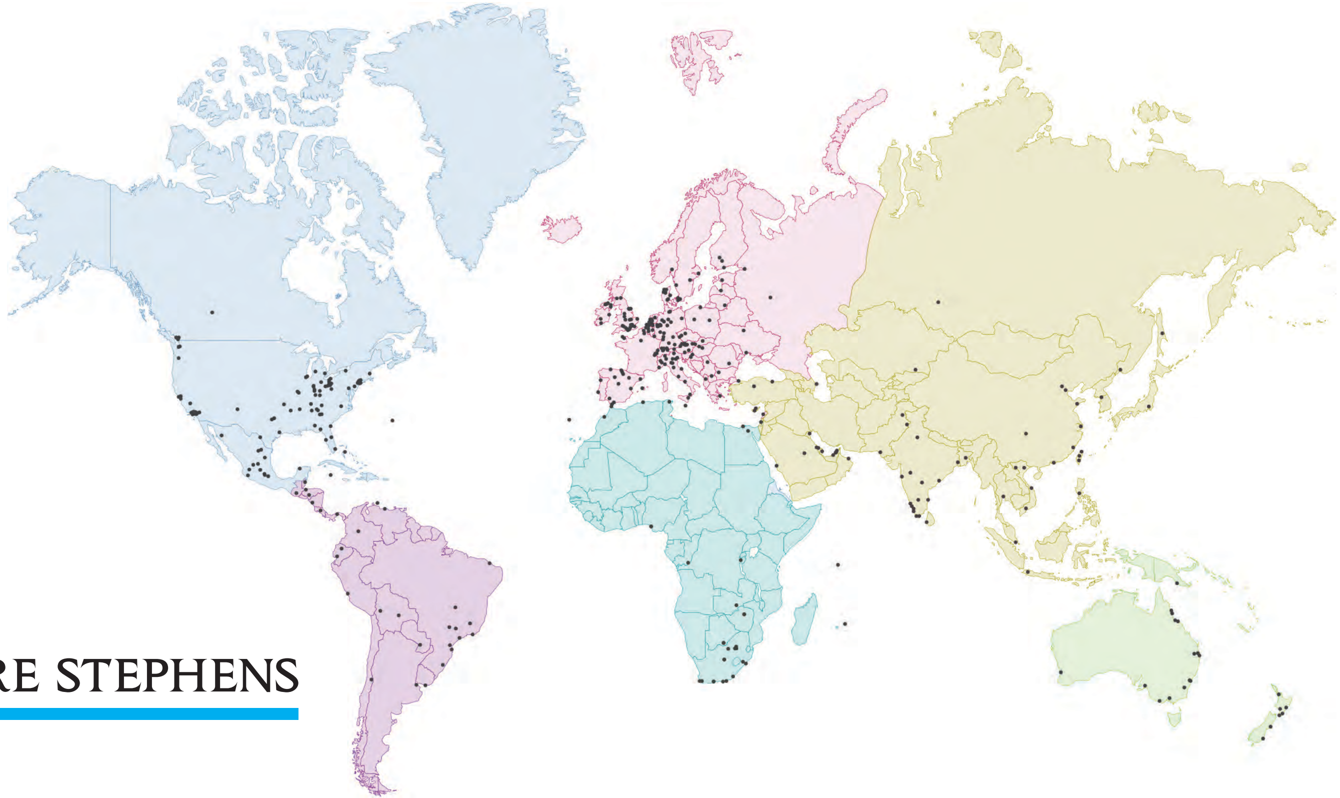
Notes



MOORE STEPHENS