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Our Firm

Bowmans is a leading Pan-African law firm. Our track record of providing specialist legal services, both domestic and cross-border, in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With six offices in four African countries and over 400 specialised lawyers, we are differentiated by our geographical reach, independence and the quality of legal services we provide.

We draw on our unique knowledge of the African business environment and in-depth understanding of the socio-political climate to advise clients on a wide range of legal issues. Our aim is to assist our clients in achieving their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. We have been named African Legal Adviser by DealMakers for the last three consecutive years and South African Law Firm of the Year for 2016 by the Who’s Who Legal. Most recently, we won the Technology, Media and Telecommunications Team of the Year Award at the prestigious African Legal Awards hosted by Legal Week and the Corporate Counsel Association of South Africa in 2017. The firm was also ‘highly commended’ in the African Law Firm of the Year – Large Practice and Litigation and Dispute Resolution Team of the Year categories.
Our Footprint in Africa

We provide integrated legal services throughout Africa from six offices (Cape Town, Dar es Salaam, Durban, Johannesburg, Kampala and Nairobi) in four countries (Kenya, South Africa, Tanzania and Uganda).

We work closely with leading Nigerian firm Udo Udoma & Belo-Osagie, and Mozambique-based boutique firm, Taciana Peão Lopes & Advogados Associados. We also have strong relationships with other leading law firms across the rest of Africa.

We are representatives of Lex Mundi, a global association, with more than 160 independent law firms in all the major centres across the globe. This association gives us access to the best firms in each jurisdiction represented.
South Africa is a heterogeneous country in terms of culture and religion and is known for its diversity of people.
SECTION I – THE COUNTRY AT A GLANCE

A. SOUTH AFRICA

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

Within its borders lie huge opportunities for foreign direct investment, driven in part by the tremendous growth in opportunities on the African continent, from which South Africa, through its well-developed infrastructure, financial services, telecommunications and legal systems, is well placed to benefit.

B. LANGUAGES

South Africa has 11 official languages: Afrikaans, English, Ndebele, Northern Sotho, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

C. EXCHANGE RATE

Over the past year, South Africa’s currency, the Rand (ZAR) has steadily lost value against the US Dollar (USD), and currently (October 2015) trades at approximately ZAR 13 to USD 1.

The Rand/ Euro exchange rate has similarly dropped, and is currently approximately ZAR 15 to EUR 1 (October 2015).

D. CLIMATE

South Africa’s climate ranges from Mediterranean in the southwestern corner of South Africa to temperate in the interior and subtropical in the northeast.

E. CULTURAL AND RELIGIOUS INFLUENCE IN BUSINESS

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

There are distinct differences in business culture when comparing the different institutional relationships. Business-to-the-public services can vary, but the business-to-business culture is generally very professional and of an international standard.

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

F. INFRASTRUCTURE AND TRANSPORTATION

The transport infrastructure in South Africa is modern and developed with further plans for development over the next 10 years. There are a number of options for travelling within South Africa, including domestic flights, buses and trains.

Due to its size, South Africa has a number of airlines that provide a domestic service among the country’s 10 principal airports. Airports Company South Africa is responsible for operating these airports. The three major international airports in the country are Johannesburg, Cape Town and Durban.
A number of airline companies operate direct flights to Cape Town, Durban and Johannesburg from Asia, Australia, major European cities, the Middle East and the United States, as well as from other African countries.

South Africa’s road network totals some 73 000 kilometres of paved roads and approximately a further 680 000 kilometres of local unpaved roads. Travel by car or bus is a cheaper alternative to travelling by air and is generally safe and affordable.

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

**G. TELECOMMUNICATIONS**

Telecommunications is one of the fastest growing sectors of South Africa’s economy, driven by explosive growth in mobile phone use and broadband connectivity. With a network that is 99.9% digital and includes the latest in fixed-line, wireless and satellite communication, the country has the most developed telecoms network in Africa.

South Africa has four licensed mobile operators: 8ta (a subsidiary of the parastatal Telkom, which is the only licensed provider of public switched telecommunications services), Cell C, MTN and Vodacom (majority owned by UK’s Vodafone). Mobile penetration is estimated at more than 10%, one of the highest rates in the world.

**H. PUBLIC SERVICES**

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

Due to the dense population in the cities, increased urbanisation and ageing power stations, there is significant pressure on electricity supply at peak times, which has led to major energy concerns and intermittent blackouts, known as ‘load shedding’.

South Africa has several primary-energy resources in abundance, including coal, wind and solar. There is also a potentially large gas resource base and an opportunity to tap into the region’s large-scale hydropower prospects. In addition, the South African Government has nuclear plans, which are being promoted to ensure security of supply and to lower the country’s carbon emissions.

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

Water is supplied by local municipalities and is normally charged based on household consumption. Water supplies are of good quality and tap water is drinkable.
The Department of Trade and Industry (DTI) offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries.

More information on the various initiatives can be found at www.investmentincentives.co.za

**Inflation**

The inflation rate in South Africa was recorded at 4.6% in August 2015.

**Incentives and restrictions on foreign investment**

There are few restrictions on foreign investment in South Africa, with tax breaks and incentives for small enterprises, strategic industrial projects and exporters.

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

In addition to this, the Land Holdings Bill (in draft form) will propose to limit foreign nationals’ ownership of land, with foreign nationals being restricted from buying agricultural land in South Africa. The Bill has yet to be tabled in Parliament, and has been met with substantial controversy.

**De facto restrictions on investment**

The Promotion and Protection of Investment Bill was tabled in Parliament on 27 July 2015. The Bill, which is anticipated to become legislation imminently, regulates the protection of foreign investors. It is intended to promote investment by modernising the current investment regime and achieving a balance of rights and obligations that will apply to all investors when investing in South Africa.

Importantly, it provides a foreign investor with the same rights as a domestic investor and provides that foreign investors will be treated no less favourably than domestic investors. There has been controversy surrounding the protection standards, such as the ability to seek recourse from an international tribunal and guaranteed market-related compensation for any expropriation. However, the DTI has defended the Bill, saying that South Africa has one of the highest levels of investor protection and foreign investors will always benefit from the legal protection of property rights granted by the South African Constitution.

The Bill is currently under review and is likely to be amended in due course.

**South Africa’s major economic sectors**

South Africa’s economy was traditionally rooted in the primary sectors – the result of a wealth of mineral resources and favourable agricultural conditions. But recent decades have seen a structural shift in output.

<table>
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<tr>
<th>Key sectors that contribute to the gross domestic product are:</th>
<th>% of GDP</th>
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<tr>
<td>Agriculture, forestry and fishing</td>
<td>2.3%</td>
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<tr>
<td>Mining and quarrying</td>
<td>7.9%</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>12.5%</td>
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<tr>
<td>Financial, real estate and business services</td>
<td>19.8%</td>
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B. DIPLOMATIC RELATIONS

South Africa is active in the United Nations, the African Union and the Commonwealth of Nations, and has established diplomatic relations with the members of these organisations in the post-apartheid era, as well as with many other countries.


Travel restrictions

There are no travel restrictions in South Africa. Immigration controls are discussed under Section XVI.

C. GOVERNMENT

The Electoral System

Elections are held at national, provincial and municipal levels and follow a five-year cycle, with national and provincial elections held simultaneously and municipal elections following two years later. The electoral system is based on party-list proportional representation. No change in the present Government is anticipated.

Political Stability

The present Government is stable, with the African National Congress (ANC) currently holding a majority of 62.1% in the National Assembly. Over the past decade this majority has diminished slightly, with the official opposition, the Democratic Alliance (DA), increasing its support base. Though the ANC continues to enjoy a large majority in the legislature, the last decade has seen an increase in service delivery protests.

The Judicial System

Section 165 of the Constitution of the Republic of South Africa (Constitution) enshrines the independence of the courts by providing that no person or organ of state may interfere with the functioning of the courts. To this end, the courts are empowered to apply the Constitution and the law impartially and without fear, favour or prejudice.

In addition, the doctrine of separation of powers creates a system of checks and balances whereby the three arms of Government (namely, the Legislature, the Executive and the Judiciary) are separated in order to ensure good governance, prevent the abuse of power and enhance State efficiency.

Thus in principle, the judicial system is impartial as it is structurally organised in such a way that the Judiciary should not be influenced by the other arms of Government in relation to its functions and responsibilities. While there have been instances, particularly within the last few years, where the independence of the Judiciary has been brought into question, the general perception is that the South African judicial system is alive and that it has successfully managed to maintain its independence and impartiality.

The Legislative System

The Constitution is the supreme law of South Africa and provides for a separation of powers among the three branches of Government, namely the Legislature (Parliament, provincial legislatures and municipal councils), the Executive Authority and the Judicial Authority.

Chapter four of the Constitution sets out the national legislative process and determines that Parliament is the national legislature of South Africa. Both Houses of Parliament (the National Assembly and the National Council of Provinces) play a role in this process.

The National Assembly, as the national legislature, has legislative authority (the power to make laws) in the national sphere of Government. Consequently, the National Assembly has the power to pass new laws, to
amend existing laws, and to repeal old laws. The same power is exercised by provincial legislatures in the provincial sphere of Government in respect of provincial laws, and by municipal councils in the local sphere of Government in respect of municipal by-laws.

D. DISPUTE RESOLUTION

With regard to commercial disputes, parties to a contract may choose which law governs the contract. However, there are a number of South African laws which provide for situations in which South African courts have exclusive jurisdiction. For example, the Bills of Exchange Act 34, 1964 identifies certain circumstances in which South Africa has exclusive jurisdiction over contracts relating to bills of exchange.

Strictly speaking, the Judiciary is an independent branch of Government which is subject only to the Constitution and it exercises its function based on the law. However, in the resolution of disputes, the courts do take into account matters of public policy, and thus the dispute resolution methods in South Africa are not completely devoid of all political influence, although they can be categorised as mainly non-political.

Alternative dispute resolution

The following types of alternative methods of dispute resolution are available:

- Arbitration – this is an adjudication process which takes place pursuant to an agreement between the parties to a dispute, referring that dispute for final determination to an independent tribunal appointed by or on behalf of the parties.

- Mediation – this is a dispute resolution process through which a third party acceptable to all parties to a dispute helps to bring the parties to an agreed solution. The mediator usually has no decision-making powers and cannot impose a binding conclusion or settlement on the parties.

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

Time taken to resolve disputes

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

It is also important to note that South African courts have a significant backlog of cases, which can create delays in court processes. However, significant steps have been taken to expedite the dispute resolution process, such as the introduction of interlocutory courts to hear “side issues” that arise in the process of resolving disputes. These steps are aimed at facilitating the efficiency of the courts in hearing matters.

Alternative dispute resolution methods, such as arbitration and mediation, are increasingly becoming the preferred methods of dispute resolution for parties who wish to settle disputes in a shorter time frame. This is particularly so due to the fact that parties have more control over the judicial process and are able to agree on their own time frames and deadlines for the submission of pleadings and evidence.

Accordingly, a matter can take anything from eight months (in instances where the matter is simple and the parties are co-operative) to five years or more (in instances where the matter is complex, the parties are unco-operative, or the matter has been taken on appeal to its highest appealable point – the Supreme Court of Appeal or Constitutional Court, depending on the nature of the matter and the lower court in which it originated).
The enforcement of foreign judicial decisions in South Africa

It is possible to enforce foreign judgements in South Africa by registering the judgement with a local court under the Enforcement of Foreign Civil Judgements Act 32, 1988. However, the scope of this Act is extremely narrow and only applies to judgements from countries designated by the Minister of Trade and Industry as published in the Government Gazette. Thus far, only Namibia has been designated (See Government Gazette Number 17881 published on 1 April 1997).

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

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

- the judgement:
  - was final and conclusive;
  - was not obtained by fraud or in any manner opposed to natural justice; and
  - does not contravene the Protection of Businesses Act 99,1978. (This Act requires that the consent of the Minister of Trade and Industry be obtained before certain foreign judgements can be enforced. The Act would appear not to include loans from, or guarantees to, foreign lenders. However, only two judgements to date which deal with the Act support that analysis.);
- the enforcement of the judgement is not contrary to public policy in South Africa; and
- the foreign court in question had jurisdiction and competence according to applicable rules on conflicts of laws.

A foreign judgement will probably not be recognised in South Africa if the foreign court exercised jurisdiction over the defendant solely by virtue of an attachment to found jurisdiction or on the basis of domicile alone. South African courts will not enforce foreign revenue or penal laws.

The enforcement of South African judgements abroad

Generally, there are no provisions in South African law prohibiting the enforcement of foreign judgements abroad. Therefore, in order to enforce a domestic judgement abroad, a party must consult the laws of the particular foreign jurisdiction for guidance. There are certain instances, however, particularly with reference to the Enforcement of Foreign Civil Judgements Act 32, 1988 where South Africa has agreed to reciprocal enforcement of civil judgements with certain countries. Zimbabwe is one such example.

Various tribunals

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

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

South Africa has a single national courts system throughout all of its nine provinces.
Can the investor choose to be subject to the country’s jurisdiction or not?

Parties to a contract may agree on the governing law of the contract. Therefore, an investor can choose to be subject to the country’s jurisdiction or not, subject to certain limitations in respect of matters regarding over which South Africa has exclusive jurisdiction.

E. ENVIRONMENTAL CONSIDERATIONS

The level of concern for the natural environment has steadily increased globally. South Africa has mirrored this trend as is evident from the rise in international treaties and national legislation, the powers afforded to environmental regulators and the increase in non-Governmental organisations.

The environmental rights enshrined in the Constitution and relevant national and provincial legislation are the basis for environmental policy. South Africa has wide-ranging legislation which aims to protect the environment, including laws, regulations and by-laws.

Strict environmental regulation and increasingly rigorous enforcement makes environmental compliance a key consideration to doing business in South Africa. As in many international jurisdictions, specialised counsel is required to effectively manage corporate environmental risks and decision-making.

Environmental regulations

Please refer to Section VIII, Part C.

F. INTELLECTUAL PROPERTY

The laws protecting intellectual property

Protection of various different aspects of intellectual property is provided by way of the following legislation:

Trademarks

- Trade Marks Act 194, 1993
- Trade Mark Regulations, 1995
- Merchandise Marks Act 17, 1941

Patents

- Patents Act 57, 1978
- Patent Regulations, 1978

Designs

- Designs Act 195, 1993
- Design Regulations, 1999

Copyright

- Copyright Act 98, 1978
- Copyright Regulations, 1978
- Registration of Copyright in Cinematograph Films Act 62, 1977
- Registration of Copyright in Cinematograph Films Regulations, 1980

Miscellaneous

- Counterfeit Goods Act 37, 1997
- Performers’ Protection Act 11, 1967
- Plant Breeders’ Rights Act 15, 1976
- Plant Breeders’ Rights Regulations, 1977

Notably, South Africa does not conduct a substantive examination of filed patent applications. Thus, as long as the necessary formalities are in place, an application will be accepted and granted in the form in which it was filed. The onus therefore remains on the applicant to ensure that its patent application remains in a valid form.

International treaties

South Africa subscribes to the following international treaties and agreements:
South Africa is also a signatory to the following treaties or conventions, but has not yet acceded:

- Trade Mark Law Treaty
- WIPO Copyright Treaty
- WIPO Performances and Phonograms

**Regulatory guidelines for licences**

*Please refer to Section VIII, Part F.*

**Royalties**

Royalties payable by a South African resident entity to a foreign party require prior approval. Royalties are divided into two categories: royalties associated with a process of manufacture; and other royalties.

With regard to royalties associated with a process of manufacture, the South African Reserve Bank (SARB) has delegated its authority to the DTI. This means that applications for approval of such royalties must be submitted to the DTI. The DTI further distinguishes between royalty agreements covering consumer goods and those for intermediate and capital goods. The DTI generally restricts the royalty rate to:

- Six percent of ex-factory selling price for intermediate and capital goods; and
- Four percent of the ex-factory selling price for consumer goods.

Royalties in excess of this threshold can be motivated and approved on an exceptions basis. However, in practice, royalties exceeding 8% are rarely approved.

With regard to other royalties, applications for approval must be submitted to the Financial Surveillance Department of the SARB (FinSurv) itself. FinSurv is more flexible than the DTI in relation to the royalty rate and does not apply the 4% to 6% guidelines applied by the DTI.

As a result, royalties of much higher rates are sometimes approved.

Parties applying for approval are generally required to submit an opinion from an independent transfer pricing specialist that the proposed royalty is acceptable for South African transfer pricing purposes (i.e. that the royalty has been determined on an arm’s length basis). Also, there is a considerable onus placed on local office bearers, who are required to confirm that the South African company has received and benefited from the intellectual property in question.

*Please also refer to Section V, Part C.*

**Competition laws**

Competition laws do in principle apply to licences. However, in so far as there are competition law concerns, a firm may specifically apply to the Competition Commission for an exemption from the provisions applying to prohibitive practices in terms of section 10 (4) of the Competition Act 89, 1998.
SECTION III – INVESTMENT INCENTIVES

A. EXPORT INCENTIVES AND GUARANTEES

The main Government body tasked with assisting exporters is the DTI. Various incentives are provided to South African firms to export their products internationally.

The DTI has set up the Export Marketing and Investment Assistance (EMIA) scheme, which compensates exporters for the costs involved in developing export markets for South African products and services, and is administered by Trade and Investment South Africa’s (TISA) export promotion unit.

The EMIA scheme offers exporters incentives and financial assistance with market research, trade missions and showcasing products and services at international exhibitions, among other things. Costs covered can include exhibition fees, stand construction, travel and daily allowances.

Assistance is divided between individual and group offerings and each scheme has its own defined criteria. Those who qualify for EMIA assistance include:

- South African manufacturers and exporters;
- South African export trading houses representing at least three small, medium and micro enterprises (SMMEs) or businesses owned by historically disadvantaged individuals (HDIs);
- South African commission agents representing at least three SMMEs or HDI-owned businesses; and
- South African exports councils, industry associations and joint action groups representing at least five South African entities.

Additional incentive schemes applicable to certain categories of exporters include the following:

- Sector Specific Assistance Scheme (SSAS) – the SSAS is a reimbursable 80:20 cost-sharing grant offering financial support to export councils, joint action groups and industry associations. The scheme has a sub-programme specially designed to assist emerging exporters. Eligible enterprises are non-profit business organisations in sectors and sub-sectors of the industries prioritised by the DTI.

- Automotive Investment Scheme (AIS) – the AIS is an incentive scheme designed to grow and develop the automotive sector through investment in new and/or replacement models and components that will increase plant production volumes, sustain employment and/or strengthen the automotive value chain. A sub-programme of this scheme is the People-carrier Automotive Investment Scheme (P-AIS) which provides a non-taxable cash grant of between 20% and 35% of the value of qualifying investment in productive assets approved by the DTI.

- Critical Infrastructure Programme (CIP) – the CIP is a cost-sharing grant for projects designed to improve critical infrastructure in South Africa. The grant covers qualifying development costs from a minimum of 10% to a maximum of 30% towards the total development costs of qualifying infrastructure. It is made available to approved eligible enterprises upon the completion of the infrastructure project concerned.

- Film Incentives – the South African Government offers a package of incentives to promote its film production and post-production industry.
• the Foreign Film and Television Production and Post-Production incentive attracts foreign-based film productions to shoot on location in South Africa and conduct post-production activities. This incentive contributes towards creating employment, enhancing the country’s international profile and increasing the country’s creative and technical skills base;
• the South African Film and Television Production and Co-Production incentive aims to assist local film producers in the production of local content. A sub-programme of this incentive is the South African Emerging Black Filmmakers incentive, which aims to assist big productions and thus contribute towards employment creation; and
• the South African Emerging Filmmakers incentive which is available to South African black-owned qualifying productions.

• Manufacturing Investment Programme (MIP) – the MIP is a reimbursable cash grant for local and foreign-owned manufacturers who wish to establish a new production facility, expand an existing production facility or upgrade an existing facility in the clothing and textiles sector.

• Furthermore, provision is made in the Customs and Excise Act 91, 1964 (Customs Act) for general refunds to exporters, as well as a large number of specific drawbacks and refunds of customs and excise duties. These concessions are available to manufacturers as well as to merchants who import goods for re-export.

In respect of export financing, the Industrial Development Corporation (IDC) makes financing available at reduced rates for selected expansion schemes that are expected to result in increased foreign exchange earnings. The IDC further provides financing of credit for exporters of capital goods at reduced rates.

In addition, Governmental insurance is provided by the Export Credit Insurance Corporation (ECIC), an agency of the DTI. The ECIC provides export credit and foreign investment insurance cover on behalf of the Government. The ECIC aims to facilitate South African export trade by underwriting export credit loans and investments outside the country to enable South African contractors to win capital goods and services’ contracts in other countries.

The Credit Guarantee Insurance Corporation further offers exporters insurance covering domestic or international debtors, which means exporters are protected against non-payment.

For more information, visit the South African Revenue Service (SARS) and DTI websites www.sars.co.za and www.thedti.gov.za.

B. FOREIGN INVESTOR GRANTS AND SUBSIDIES

Grants and subsidies are available for a range of activities and are not limited to one sector of the economy.

The application process and the duration thereof will vary depending on the type of grant applied for. Investors may apply both to institutions in the private sphere and to Government through the DTI, which offers a wide range of incentive schemes. More information on the various Government investment initiatives can be found at www.investmentincentives.co.za.
C. FOREIGN INVESTOR TAX INCENTIVES

There are no national tax incentives aimed specifically at foreign investors. There are also no regional tax incentives which, for example, offer beneficial tax rates to taxpayers conducting business in certain areas.

There are, however, national tax incentives aimed at encouraging specific types of investment in certain areas, such as, for example, special deductions in respect of the erection or improvement of buildings in urban development zones.

SECTION IV – FINANCIAL FACILITIES

A. FINANCIAL INSTITUTIONS

South Africa’s financial services sector, backed by a sound regulatory and legal framework, is sophisticated, boasting dozens of domestic and foreign institutions providing a full range of services, including commercial, retail and merchant banking, mortgage lending, insurance and investment.

The South African banking system is well developed and effectively regulated, comprising a central bank, the SARB, as well as a few large, financially strong banks and investment institutions, and a number of smaller banks. Many foreign banks and investment institutions have operations in South Africa.

The non-banking sector is overseen by the Financial Services Board (FSB), an independent body, responsible for the regulation of financial markets and institutions, including insurers, fund managers and broking operations.

The National Credit Regulator is responsible for regulating the South African credit industry, including the registration of credit providers, credit bureaux and debt counsellors. It is responsible for enforcing compliance with the National Credit Act 34, 2005, and is focused on developing an accessible credit market to meet and promote the needs of people who are marginalised, especially economically.

Bank accounts

It is not necessary for an investor to open a bank account in the country.

Requirements for opening a bank account

The requirements may vary slightly from bank to bank, but the following basic documentation is required:

Personal account (resident)

To open a resident bank account as a foreign national, it is necessary to:

• declare all the funds or foreign assets brought into the country;
• complete the Foreign National Declaration and Confirmation of Employment by a South African Employer form;
• provide a written declaration that foreign assets will not be given to a third party resident in South Africa; and
• provide the bank with copies of:
  • valid passport;
  • work or study permit;
  • proof of address in South Africa such as utility bill; and
  • copies of recent statements from bank in the home country or solid evidence of banking history.
Personal account (non-resident)

To open a non-resident account it is necessary to provide:

- at least the minimum opening deposit;
- a certified copy of the non-resident’s passport authenticated at his/ her overseas bank; and
- bank statements from the last three months.

Business account (South African company)

To open a business account for a South African company, it is necessary to provide:

- the Certificate of Incorporation;
- constitutional documents of the company: Memorandum of Incorporation (MOI) or Memorandum and Articles of Association;
- any certificate of change of name of company (if applicable);
- identification documents of directors, signatories, principal executive officer, shareholders with 25% or more voting rights and persons acting on behalf of company;
- proof of physical or trading address of business; and
- bank statements of business (if existing) from the last three months.

Business account (external company)

To open a business account for an external company, it is necessary to provide:

- the certificate of registration or constitutional documents of the external company;
- proof of listing of a company listed on a foreign stock exchange (if applicable);
- the official incorporation documents from relevant foreign country;
- notice of person authorised to accept service on behalf of external company;
- trade name and physical business/ head office address (in foreign country and in South Africa) verification documents;
- contents of register of directors, auditors and officers;
- identification documents of directors, signatories, Manager of Affairs in the Republic, shareholders with 25% or more voting rights and persons acting on behalf of company;
- the last three months bank statements of business (if existing); and
- information in respect of the source of income and the type of activities that can be expected on the account.

Bank account restrictions

Depending on the investor’s visa, the type of bank account which the investor may maintain may be limited. While on a tourist visa, the investor may only open a non-resident bank account, which has all the features of a normal banking account but cannot generally receive deposits in South African Rands (ZAR). There are exceptions to the rule, such as if the investor owns a property.

If the investor has a valid visa confirming temporary or permanent residency then he or she or it may open a resident’s account, which is in essence a ‘normal’ bank account with no special restrictions.

The South African banking system

South Africa has a well-developed and regulated banking system. The banking sector is controlled by the country’s central bank, the SARB. It comprises a number of large and financially sound commercial banks and investment institutions.

Investment and merchant banking remains the most competitive front in the industry, while the country’s ‘big five’ banks – ABSA, Capitec,
FNB, Nedbank and Standard Bank – dominate the retail market.

The banks are regulated by the Banks Act 94, 1990, a piece of legislation based largely on Australian, British and Canadian legislation.

In recent years, South Africa has amended its exchange control and financial market regulations specifically to attract investors from other countries.

The South African stock market

The Johannesburg Stock Exchange is an established exchange which is currently ranked the 19th largest stock exchange in the world by market capitalisation. It is also the largest exchange on the African continent.

Bank loans

Bank loans are possible. However, the requirements for applying for a loan differ from bank to bank.

SECTION V – EXCHANGE CONTROLS

A. BUSINESS TRANSACTIONS

The Exchange Control Rulings define these concepts as follows:

A ‘resident’ is defined to mean “any person (ie: a natural person or legal entity) who has taken up permanent residence, is domiciled or registered in South Africa. For the purpose of the Rulings, this excludes any approved offshore investments held by South African residents outside the CMA. However, such entities are still subject to exchange control Rules and Regulations.”

A ‘non-resident’ means “a person (ie: a natural person or legal entity) whose normal place of residence, domicile or registration is outside the CMA.”

The term ‘national’ is not defined in the Rulings, but ‘foreign nationals’ are defined as “natural persons from countries outside the CMA who are temporarily resident in South Africa, excluding those on holiday or business visits.”

The ‘CMA’ is the Common Monetary Area consisting of Lesotho, Namibia, South Africa and Swaziland.”

Restrictions on conducting business with nationals, residents or non-residents

South African residents are subject to exchange controls in terms of the Exchange Control Regulations, issued under the Currency and Exchanges Act 9, 1933.

The Financial Surveillance Department (FinSurv) (previously known as the Exchange Control Department) of the SARB is responsible for the day-to-day administration of exchange controls.

All of the major South African banks have also been appointed to act as authorised dealers in foreign exchange (Authorised Dealers). Authorised Dealers may buy and sell foreign exchange, subject to conditions and within limits prescribed by FinSurv.

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

No South African resident is thus entitled to enter into any transaction in terms of which capital (whether in the form of funds or otherwise) or any right to capital is directly
or indirectly exported from South Africa without the approval of either FinSurv or, in certain cases, by an Authorised Dealer. If an application has to be submitted to FinSurv, one should generally expect a delay of at least three or more weeks, while transactions which can be approved by an Authorised Dealer can often be approved within a couple of days.

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

**Reporting requirements**

All cross-border payments have to be conducted via Authorised Dealers, who are obliged to report all cross-border foreign exchange transactions to FinSurv.

**Investor loan restrictions**

There is no restriction on a non-resident investor receiving loans from another non-resident. However, it is not common for approval to be granted for loans by residents to non-residents:

- Prior FinSurv approval is required for loans by South African corporates to non-residents, which approval will usually only be granted in exceptional circumstances.
- Individuals may, as part of their overall discretionary limit of ZAR 1 million per year, grant loans to non-residents.

In addition, the ‘local borrowing restrictions’ may impact negatively on the ability of an ‘affected person’ to raise South African financial assistance:

- Briefly summarised, a local company will be an ‘affected person’ (as defined) if a non-resident owns 75% or more of the capital or voting rights in the local company.
- Until 2009, an affected person could borrow locally up to a limit of 300% of the Rand value of funds introduced from offshore, provided that this limit was 100% in the case of investment in residential properties and financial transactions such as portfolio investments, securities lending, hedging and repurchase agreements.
- Since the relaxation of the local borrowing restrictions in 2009, an affected person may now borrow locally without restriction to finance foreign direct investment into South Africa or for domestic working capital, subject thereto that the 100% limit would still apply to investments in residential properties and to financial transactions such as portfolio investments, securities lending, hedging and repurchase agreements. However, an increase in the local participation in a non-resident controlled entity increases its ability to borrow locally.

Residents may borrow funds from non-residents, but prior exchange control approval is required to ensure that the resident borrower will be able to remit interest and to repay the capital offshore. Depending on the nature and the terms of the loan, the loan could either be approved by an Authorised Dealer, or by FinSurv.

For example, in the case of a shareholder’s loan to the South African subsidiary of a non-resident parent, such loan could normally be approved by the Authorised Dealer itself, unless the terms of the loan fall outside the SARB guidelines issued to Authorised Dealers, in which case an application to FinSurv would be required.

**B. INVESTMENT CONTROLS**

**Restrictions on direct investment**

Exchange controls do not apply to non-residents, but non-residents may be impacted indirectly as acquisitions of South African assets and transactions with a resident may require
exchange control approval. For example, if a non-resident investor acquires shares in a South African company, the non-resident should comply with certain formalities in order to protect its investment:

• In terms of the exchange control regulations, no person is entitled to transfer South African shares from or into the name of a non-resident without exchange control approval.
• The approval generally is a formality which can be granted by an Authorised Dealer and is evidenced by the endorsement of the share certificate in the name of the non-resident with the words “non-resident”. However, approval to FinSurv may be required in certain circumstances.
• This endorsement ensures that sale proceeds of the shares, which belong to a non-resident, can be transferred abroad. It is also a requirement for the remittance of profits (see below).
• Insofar as listed shares are concerned, these are dematerialised and are freely tradable, subject to the brokerages or South African sellers (through their Capital Securities Depository Participants or CSDPs) ensuring that full consideration is received from South African non-residents for the sale of such shares.

Also, should a non-resident investor make loans to a South African resident, it is important that prior approval is obtained. Such approval is necessary in order for the Authorised Dealer involved to permit the payment of interest and repayment of capital to the non-resident creditor.

If a non-resident carries on business in South Africa, it is likely that the non-resident will be required to register as an external company with the South African Companies and Intellectual Property Comission (CIPC) (please refer to the information in Section VII, Part H).

An external company is often referred to as a “branch”. A “branch” is generally regarded as a resident from an exchange control perspective, even though it does not constitute a separate legal person.

There are no restrictions on indirect investments in South Africa from an exchange control perspective. Investors also need not make declarations regarding the nature of their investment from an exchange control perspective.

C. MONEY TRANSFER

There is a free determination of exchange rates in South Africa.

Restrictions on the transfer of money into or out of the country

All cross-border flows of funds require exchange control approval. Although non-residents technically are not subject to exchange controls, it is important for a non-resident to consider the impact of exchange controls on its investments and/or other business dealings with residents. For example:

• When acquiring shares, the non-resident endorsement of the shares is required before dividends can be remitted. An Authorised Dealer would also generally require evidence that the dividend is made from realised or earned profits.
• If a loan is made to a resident borrower, prior approval for the loan should be obtained in order to ensure that the resident borrower would be entitled to pay interest and repay capital as per the terms of the loan (as approved).
• Any cross-border licence agreement in terms of which a non-resident provides know-how or other intellectual property to a resident would require exchange control approval by FinSurv. The exchange control
approval ensures that royalties will be freely remittable offshore. Generally, approval will be granted where the royalties are for an arm’s length amount. Any advance payments of royalties, even if such payments may be recouped from future royalties payable, are invariably declined. The SARB is also not in favour of minimum payments should the royalty not reach a certain amount during a specific period – the royalty payable should be in proportion to the production or sales achieved.

- Should a non-resident render services to a resident, it is advisable to consider the basis on which fees are charged before services are rendered, to determine whether the resident would be able to make payment on such basis.

**Restrictions on the remittance of profits**

The remittance of profits does not require approval from FinSurv or an Authorised Dealer. There are, however, formalities that need to be complied with, which include the submission by non-listed companies to an Authorised Dealer of an auditor’s certificate confirming, inter alia, that the profit distribution is made from realised or earned profits.

**Reporting requirements**

All cross-border payments have to be conducted via Authorised Dealers, who are obliged to report all cross-border foreign exchange transactions to FinSurv.

**Hard currency**

Hard currency can be taken out of the country but it is subject to restrictions. For example, South African residents may not import or export SARB notes, or bank notes of the other CMA countries, in excess of ZAR 25 000 per person. The same applies to visitors to South Africa.

Restrictions also apply to the export of Krugerrand coins. For example, residents may export Krugerrand coins of up to ZAR 30 000 as gifts to non-residents, while non-resident visitors may export up to 15 Krugerrand coins, provided that they can prove that the coins were purchased with foreign currency.

**SECTION VI – IMPORT/ EXPORT REGULATIONS**

**A. CUSTOMS REGULATIONS**

South Africa is a member of the General Agreement on Tariffs and Trade (GATT). Customs values are set by the GATT valuation code. The GATT agreement involves six valuation methods which must be applied in strict hierarchical order.

The methods, in order of precedence, are:

- the transaction value of the goods (ie the price actually paid or payable);
- the transaction value of identical goods;
- the transaction value of similar goods;
- the ‘deductive’ method (where the customs value is derived from the selling price of the imported goods in South Africa);
- the ‘computed’ method (where the value is derived from the built-up cost of the imported goods); and
- the so-called ‘fall back’ method, being one of the other five methods applied more flexibly.

However, most goods are valued using method one, which is the actual price paid or payable by the buyer of the goods. The ‘free on board’ price forms the basis for the value, but allows for certain deductions (such as interest charged on extended payment terms) and additions (such as certain royalties).
Customs officials pay particular attention to:

- the relationship between the buyer and seller;
- payments outside of the normal transactions (such as royalties and licence fees); and
- restrictions that have been placed on the buyer.

These factors can result in the price being increased for the purpose of determining customs value, directly affecting the duty payable.

The Customs and Excise Division (Customs) of SARS requires proof of the value of the imported goods, and may query which of the above prescribed methods were used to determine the customs value.

South Africa is a founding member of the World Trade Organisation (WTO) and has entered into the following trade agreements:

- Agreement between the Government of the Republic of South Africa and the Government of the United States of America regarding Mutual Assistance between their Customs Administrations.
- Southern African Customs Union Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland (SACU).
- Southern African Development Community Free Trade Agreement (FTA). SADC comprises Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. However Angola, the Democratic Republic of Congo and Seychelles have yet to join the SADC FTA even though they are members of SADC.
- Free Trade Agreement between SACU and the European Free Trade Association (EFTA). EFTA comprises Iceland, Liechtenstein, Norway and Switzerland.
- Preferential Trade Agreement between SACU and Southern Common Market (Mercosur). Mercosur comprises Argentina, Brazil, Paraguay and Uruguay.

The Customs Act and the International Trade and Administration Act 71, 2002 (ITAC Act) together with their respective rules and regulations are the two principal pieces of legislation that govern the general movement of goods into and out of South Africa.

In terms of the Customs Act, a prospective importer must be registered as a customs client and thereafter obtain an import licence from Customs in order to import goods into South Africa.

The movement of goods into and out of South Africa is policed by SARS. The basic function that SARS performs at the points of entry and exit into and out of South Africa is to detect and detain. SARS polices contraventions of the tax legislation in South Africa, as well as other legislation such as the health and medicines control legislation and environmental legislation, to name a few.

Every importer of goods must lodge a declaration to Customs before the goods are imported into South Africa. A separate declaration must be presented in respect of each importer and in respect of each importing
vessel, aircraft or vehicle and must, among others, indicate whether the import of goods is subject to a specific permit or certificate. Customs must then check whether the relevant conditions have been adhered to. Supporting documents are not submitted at the time of applying for importation but must only be submitted upon request by Customs.

The Customs Act imposes customs duties which are located in schedules to the Customs Act, listed according to the World Customs Organisation’s (WCO) Harmonised System of Tariff Classification. Import duties and tariffs are usually calculated as a percentage of the value of the goods. However meat, fish, tea, certain textile products and certain firearms attract rates of duty calculated either as a percentage of the value or as cents per unit (for example, per kilogram or metre). Additional ad valorem excise duties are levied on a wide range of luxury or non-essential or luxury items such as arcade games, firearms and perfumes. The schedules provide the tariff heading for the relevant product which is the code that is used throughout the rest of the schedules. It will also indicate whether any ordinary customs duty is payable and, if so, at what rate as well as the preferential rate if the goods are imported within one of the trade agreements.

Goods that are produced or manufactured in Botswana, Lesotho, Namibia or Swaziland attract no duty when imported into South Africa for consumption or use because these countries are part of SACU.

In addition, unless a commodity is listed in the Value-Added Tax Act 89, 1991 (VAT Act) as being exempt, VAT is also payable on all imported goods, including goods that are imported from SACU countries.

For more information, refer to the SARS website: www.sars.gov.za.

B. EXPORTS

In terms of the Customs Act, a prospective exporter must be registered as a customs client and thereafter obtain an export licence from Customs in order to export goods out of South Africa.

The movement of goods into and out of South Africa is policed by SARS. The basic function that SARS performs at the points of entry into and exit out of South Africa is to detect and detain. SARS polices contraventions of the tax legislation in South Africa, as well as other legislation such as the health and medicines control legislation and environmental legislation, to name a few.

Every exporter of goods must, before the goods are exported from South Africa, lodge a declaration to Customs. A separate declaration must be presented in respect of each exporter and in respect of each exporting vessel, aircraft or vehicle and must, among others, indicate whether the export of goods is subject to a specific permit or certificate.

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

An export permit is required in order to export certain goods out of South Africa. The ITAC Act gives ITAC the authority to control the movement of goods into and out of South Africa by way of permits. The Minister of Economic Development may prescribe by notice in the Government Gazette that no goods of a specified class or kind, or no goods other than goods of a specified class or kind may be (a) exported from South Africa; or (b) exported from South Africa, except under the authority of, and in accordance with the conditions stated in a permit issued by ITAC.
Export control measures or restrictions are applied to enforce health, security and safety and technical standards that arise from domestic laws and international agreements and are limited to those that are allowable under the relevant WTO Agreements.

South Africa also subscribes to, supports and participates in several international agreements and arrangements pertaining to controls regarding the non-proliferation of weapons of mass destruction, conventional arms and dual use goods.

South Africa does not currently impose export duties.

**C. FOREIGN TRADE REGULATIONS**

South Africa currently does not have any trade sanctions against any country. If this were to be implemented, the decision would be taken by the Department of Foreign Affairs and implemented by SARS. However, as a member of the United Nations, it abides by the United Nations’ Security Council Resolutions.

Any complaint regarding a trade barrier should be lodged with the relevant enquiry point. The Department of Agriculture (and to a certain extent, the Department of Health) is responsible for sanitary and phytosanitary (SPS) issues while the South African Bureau for Standards (SABS) deals with technical barriers to trade (TBT).

The relevant body would then consider the technical nature of the matter and notify the International Trade and Development Division (ITEDD), a division of the DTI about the trade concern in question. Any consultations will then take place with ITEDD and the relevant technical committee.

Feedback on the outcome of any consultations will be given to the Agricultural Trade Forum (in SPS matters), which is chaired by the Minister of Agriculture, or to the DTI (in TBT matters). South Africa engages in bilateral consultations with the trading party concerned with a view to resolving foreign trade barriers. Failure to resolve an issue through bilateral consultations can lead to a formal lodging of a trade concern, for instance, at the WTO SPS Committee meetings or a formal declaration of a dispute under the relevant trade agreement.

**D. IMPORTS**

Licensing requirements in terms of the Customs Act are found in Schedule 8.

Any person, whether located in South Africa or not, who imports or exports goods or removes bonded goods must apply for registration/licensing on the prescribed DA 185 form and respective annexures. If the importer, exporter, remover is not located in South Africa, he or she or it has the additional obligation to nominate a registered agent.

A foreign importer, exporter or licensed remover may apply for registration or licensing if represented by a registered agent.

Such registered agent is:

- a natural person, as a reference to a natural person ordinarily resident in South Africa at a fixed physical address in South Africa;
- a juristic person, as a reference to a juristic entity:
  - which is incorporated, registered or recognised in terms of the laws of South Africa or of another country; and
  - that has a place of business at a specific physical address in South Africa.

The registered agent is liable for the fulfilment of all obligations imposed on either the importer, exporter or licensed remover.
If the applicant is a foreigner and is not represented by a registered agent or has not yet nominated a registered agent, his or her application must be entertained but suspended until a nominated and approved registered agent has been appointed and approved.

The Customs Act imposes customs duties which are located in schedules to the Customs Act and are listed according to the WCO’s Harmonised System of Tariff Classification. Import duties and tariffs are usually calculated as a percentage of the value of the goods. However, meat, fish, tea, certain textile products and certain firearms attract rates of duty calculated either as a percentage of the value or as cents per unit (for example, per kilogram or metre). Additional ad valorem excise duties are levied on a wide range of luxury or non-essential items such as arcade games and perfumes.

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

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

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

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

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

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

E. MANUFACTURING REQUIREMENTS

As a general rule, it is not required that the manufactured product must contain ingredients or components which are found or produced locally. Imported goods may be used to manufacture. The requirement to use locally produced goods may arise if the manufacturer wishes to participate in an incentive scheme that may have local content requirements.

If imported parts are declared for importation for manufacturing purposes to be incorporated into a final product then they must be incorporated into the final product. If there is a change in the purpose for the importation or what is intended with the imported goods and this affects the tax status of the imported goods, the customs authority must be approached to amend the
initial declaration to ensure that the correct position is declared.

**F. PRODUCT LABELLING**

**Labelling requirements**

The importation into or the sale in South Africa of specified goods is prohibited unless:

- A trade description in accordance with the Consumer Protection Act 68, 2008 is applied thereto clearly stating:
  - the country in which they were manufactured, produced or adapted;
  - that imported greige fabric was used (if imported fabric is used to produce dyed, printed or finished fabric in South Africa); or
  - “Made in South Africa from imported materials” for locally manufactured products using imported materials.
- Such goods conform to the South African national standard for fibre content and care labelling in accordance with Government Notice No. 2410 of 2000.
- A trade description is applied to it stating clearly whether the goods have been reconditioned, adapted, rebuilt or remade.
- A trade description is applied thereto stating “Made in South Africa” if the goods were wholly assembled or made in South Africa.
- The goods are correctly labelled.

Labelling requirements are applicable in respect of certain clothing, leather goods, shoes and textiles listed in the Harmonised Customs Tariff. They also apply to used or second-hand products which are imported for domestic consumption.

Products originally exported as from the date of implementation of the regulation and re-imported, which are intended for sale in the local market must be subject to labelling requirements as well.

There are also exclusions and exemptions that apply in respect of certain goods.

**SECTION VII – STRUCTURES FOR DOING BUSINESS**

**A. GOVERNMENTAL PARTICIPATION**

Generally, the Government will not seek to participate in the ownership or operation of an entity in South Africa.

The Government participates at an ownership level in State-Owned Enterprises (SOEs) and engages with the private sector through Public-Private Partnerships (PPPs) and investment through SOEs in private companies.

There is no requirement that private companies or public companies that are not SOEs have any degree of State ownership, regardless of the industry in which they operate.

SOEs are registered companies listed as “public entities” in Schedule 2 or Schedule 3 of the Public Finance Management Act 1, 1999 (PFMA). These include, for example, the Public Investment Corporation and the National Empowerment Fund.

While SOEs may own shares in public or private companies in South Africa, the SOE will hold shares in the ordinary course, on the same basis as other shareholders in that entity. Again, there is no requirement in any particular industry that an entity be owned or part-owned by an SOE.

Entities may also engage in PPPs with public institutions. A PPP is a contract between a public sector institution or a municipality and a private party, in which the private party assumes substantial financial, technical and
operational risk in the design, financing, building and operation of a project. The private party may perform an institutional or municipal function, or use State or municipal property for its own commercial purposes. Although there may be commercial incentives for an entity to engage in PPPs, there is no requirement to do so for any particular industry.

Although Government will not seek an ownership stake as such in an entity established in South Africa, broad-based black economic empowerment (B-BBEE) legislation and regulations may influence how an entity structures its ownership. Although the B-BBEE regulatory framework does not impose black ownership targets on businesses as a matter of law, it does create incentives for increasing black ownership for entities wishing to do business with the State, or intending to provide goods and services to other entities doing business with the State.

**Restrictions on capitalisation**

From a tax perspective, the South African ‘thin capitalisation’ rules (which form part of the transfer pricing rules as provided for in section 31 of the Income Tax Act 58, 1962 (ITA)) could effectively restrict the amount to be advanced to a subsidiary by way of share capital.

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

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

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

According to SARS, the arm’s length amount of a debt is the lesser of the amount that could have been borrowed and the amount that would have been borrowed in a transaction between independent persons. SARS will consider a taxpayer to be thinly capitalized if, among other factors, some or all of the following circumstances exist:

- the taxpayer is carrying a greater quantity of interest-bearing debt than it could sustain on its own;
- the duration of the lending is greater than would be the case at arm’s length; and
- the repayment or other terms are not what would have been entered into or agreed to at arm’s length.

The thin capitalisation rules should be considered taking into account section 23M of the ITA, which was introduced after the draft interpretation note on thin capitalisation was published. This section provides for a limitation of interest deductions in respect of debts owed to persons not subject to tax under Chapter II of the ITA. This section contains a formula which restricts the interest deduction to a percentage of ‘adjusted taxable income’ as defined in the section.
Investor's tax consequences

This would depend on the nature and structure of the investment. Please refer to Sections XII and XIII.

B. JOINT VENTURES

Joint ventures are permitted in South Africa.

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

There are no registration or incorporation procedures specific to joint ventures. Depending on the legal structure that a joint venture takes, specific registration or incorporation procedures will need to be adhered to. See the relevant section below in this regard.

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

C. LIMITED LIABILITY COMPANIES

Limited liability companies are permitted. Although there are various structures for doing business available to investors who wish to establish a corporate presence in South Africa, the most common form of structure used is a limited liability company, which is governed by the Companies Act 71, 2008 (Companies Act). The most common type of limited liability company in South Africa is the private company (as opposed to a SOE or a public company).

The Companies Act provides that a person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that the Companies Act or the company’s MOI provides otherwise. The MOI is the founding document of the company and it sets out the rights, duties and responsibilities of shareholders, directors and third parties in respect of the company.

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

Incorporating a new limited liability company initially requires the reservation of a company name at the CIPC. If the name is available, a name reservation certificate is issued to the incorporators of the new limited liability company which is valid for a period of six months.

In order to incorporate a limited liability company, a notice of incorporation (NOI) must be filed with the CIPC in terms of which the ‘incorporator’ of a company informs the CIPC of the incorporation of that company, for purposes of having it registered. An ‘incorporator’ means a person who incorporated a company (an incorporator may either be a natural person or a juristic person). A NOI must be filed in a Form CoR 14.1 and must be accompanied by a copy of the constitutional documents of the company. Alternatively, the NOI may be filed electronically.

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

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

The first incorporator of the company to be incorporated immediately becomes a director of the company upon the company being successfully registered at the CIPC. However, the first incorporator only serves until a sufficient number of other directors satisfy the requirements of the Companies Act or the company’s MOI have been first appointed or first elected. Thus if the company to be incorporated will have a director who is not the same person as the incorporator, the director (and not the incorporator) will be the sole director of the company once incorporated.

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

Alternatively, an investor may purchase a so-called ‘shelf company’, which is an existing limited liability company purchased ‘off the shelf’ from an authorised shelf company supplier. The existing shelf company information (including information relating to the shareholders, directors and officers of the company) can then be amended with the new company information provided by the investor. Shelf companies incorporated in accordance with the Companies Act generally have no shares in issue when they are purchased. The existing or newly appointed directors will need to pass a resolution to issue the first shares in the company to the investor. The new company information will then be filed and registered with the CIPC.

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

**Time-frame**

The time-frame applicable to the incorporation of a limited liability company is usually about 15 to 20 business days, depending on the backlog faced by the CIPC and depending on the complexity of the limited liability company’s MOI.

A complex MOI may require a greater degree of consideration from the CIPC which can then take up to 80 business days to register the limited liability company.

A shelf company is already registered. The process to register the relevant amendments to the shelf company information usually takes between 10 to 15 business days.

**Costs**

The estimated costs of incorporating a limited liability company are ZAR 300 (exclusive of Value Added Tax (VAT) and disbursements) to reserve a name, and a further ZAR 2 400 (exclusive of VAT and disbursements) to lodge and register the relevant company secretarial documents with the CIPC.

The cost of purchasing a shelf company and amending the relevant company information is approximately ZAR 4 200 (exclusive of VAT and disbursements).

These estimates do not include legal fees which may be incurred in the completion of documentation and general oversight of the incorporation process.

**Requirements regarding South African nationals**

There is no requirement that a South African national be a participant, manager or director of a limited liability company. The Companies Act only requires that a company’s records of
directors include each director’s nationality and passport number, if he or she is not South African.

Section 246 of the Tax Administration Act 28, 2011 (TAA) provides that every company carrying on a business or having an office in South Africa must at all times be represented by a ‘public officer’ who serves as the company’s tax representative. This public officer must be a South African resident.

**Tax consequences**

A company that is tax resident in South Africa will be subject to income tax on its taxable income.

On the understanding that the investor will be a shareholder in the company, the shareholder will presumably receive dividends and also interest if he or she or it has granted a shareholder loan to the company.

• **Dividends withholding tax**

Dividends declared by a tax resident company (or by a non-resident company if the share in respect of which the dividend is paid is listed on the JSE) are subject to dividends tax at a rate of 15% on the amount of any dividend declared and paid.

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

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

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

Exemptions from, and reduced rates of dividends tax, require an exemption or reduced rate declaration to qualify for such a concession.

• **Interest withholding tax**

A new withholding tax on interest came into effect on 1 March 2015 and provides for tax to be withheld at a rate of 15% in respect of interest received by or accrued to a non-resident that is not a controlled foreign company (CFC).

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

• interest received or accrued in respect of any Government debt instrument;
• interest received or accrued in respect of any listed debt instrument (which includes any loan, advance, debt, bond, debenture, bill, promissory note, etc.);
• interest received or accrued in respect of any debt owed by a domestic bank or the SARB;
• interest paid or payable by a headquarter company, subject to certain specified criteria; and
• if a foreign individual was physically present in South Africa for more than 183 days in aggregate during a particular year, or at any time during that year carried on business through a permanent establishment in South Africa.
The sections dealing with withholding tax on interest also contains specific provisions designed to deny the exemption to back-to-back financing arrangements designed to circumvent the interest withholding tax.

The amount of interest withholding tax could also be reduced in terms of an applicable DTA. An exemption or reduced rate declaration is required to qualify for exemptions from, and reduced rates of, interest withholding tax.

D. LIABILITY COMPANIES, UNLIMITED

A profit company is a personal liability company if it meets the criteria for a private company (see Part C above) and the company’s MOI states that it is a personal liability company.

In order to be classified as a private company under the Companies Act, the company’s MOI must prohibit it from offering any of its securities to the public. There must also be a restriction on the transferability of its securities. The present and past directors of a personal liability company will be jointly and severally liable, together with the company, for any debts and liabilities that are or were contracted during their respective periods of office.

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

The registration or incorporation of personal liability companies

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

Please refer to Section VII, Part C for information on the process of registration or incorporation of private companies.

A personal liability company’s name must end with the expression ‘Incorporated’ or ‘Inc.’.

The incorporation procedure (and time-period concerned) is the same as that applying to a limited liability company (please refer to Section VII, Part C).

Costs

The same costs associated with the incorporation of a limited liability company apply (please refer to Section VII, Part C above).

There is no requirement that a South African national be a participant, manager or director of a personal liability company. The Companies Act only requires that a company’s records of directors include each director’s nationality and passport number, if they are not South African. All companies, including personal liability companies, must have a public officer who resides in South Africa (please refer to Section VII, Part C).

E. PARTNERSHIPS, GENERAL OR LIMITED

Partnerships are a recognised and permitted form of business structure under South African law.

In South Africa, a partnership is an association of two or more persons formed by contract to carry on a business for the acquisition of gain. Being an unincorporated entity in South Africa, a partnership does not have a legal personality independent from the partners themselves.

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

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

**Costs**

There is no fixed fee attached to the formation of a partnership, as a partnership is created through private agreement between the partners. The partners will likely incur legal costs in relation to the drafting of the partnership agreement and oversight of the legal process.

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

**Investor’s potential liability**

As a partnership does not have separate juristic personality, the rights and liabilities of a partnership are the rights and liabilities of the partners themselves. A creditor cannot, while the partnership still exists, bring an individual claim against a partner for payment of the partnership debts. Once the partnership has been dissolved, however, each individual partner can be sued by a creditor for the full amount of the partnership debt (ie upon dissolution, each partner is jointly and severally liable for the partnership debts).

Partners are also vicariously liable for delicts committed by another partner while acting in the ordinary course of the partnership business or while acting on his/her co-partners’ authority.

**Investor’s tax consequences**

A partnership is not a ‘person’ for income tax purposes (ie the partnership itself is not taxed, but the partners are taxed in their personal capacities).

Section 24H of the ITA further contains a deeming provision in terms of which, “where any trade or business is carried on in partnership, each member of such partnership shall, notwithstanding the fact that he may be a limited partner, be deemed for purpose of this Act to be carrying on such trade or business”.

The section further deals with the accrual of income which has been received or accrued ‘in common’ by the partners, and provides that such income shall, notwithstanding the relevant partnership agreement, be deemed to have been received by or accrued to the partners individually.

Provision is also made for how allowances or deductions should be dealt with in the context of limited partners.

However, in terms of section 51 of the VAT Act, where any body of persons, whether corporate or unincorporate (but excluding a company), carries on an enterprise, such body shall be deemed to carry on the enterprise as a person separate from the members of such body, and the body would have to register as a vendor separately from any registration of any of its members.

**F. PARTNERSHIPS, UNDISCLOSED**

There are two types of undisclosed partnerships under South African law: the anonymous partnership and the partnership en commandite.

In both of these cases, it is agreed amongst the partners that some of the partners will remain undisclosed to the outside world, that they will not actively participate in the management of
the partnership business and that they will only be liable to their co-partners (and not to the partnership’s creditors).

The difference between the two types of undisclosed partnerships is that in the case of a partnership en commandite, an undisclosed partner is liable only to the extent of the capital he or she has actually contributed, whereas an undisclosed partner to an anonymous partnership is liable for their full pro rata share of partnership losses or liabilities.

As with all partnerships under South African law, both types of undisclosed partnerships arise on the basis of contractual agreement between the partners.

**Partnership contribution**

*Please refer to Section VII, Part D for information on the costs attached to forming a partnership.*

Like ordinary partners, undisclosed partners must make a contribution to the partnership - monetary or otherwise - and such undisclosed partners share in the partnership’s profits.

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

**Investor’s potential liability**

Anonymous partners are liable to the extent of their pro rata share of partnership losses. However, because anonymous partners are not known to third parties and are not held out as partners to the public, they are not directly liable to third parties for the partnership debts. Rather, they are liable only to their partners for their proportional share of partnership losses.

Although undisclosed partners to a partnership en commandite are also liable only to their partners, they are distinguished from anonymous partners by the fact that they are liable only to the extent of the specific amount of capital contributed to the partnership.

**G. SOLE PROPRIETORSHIPS**

There is nothing prohibiting an investor from carrying on business as a sole proprietor under South African law.

**Establishment of a sole proprietorship**

In terms of South African law, a sole proprietorship is not a separate legal entity and there is no need to register a sole proprietorship. Such a business has no existence separate from the owner (who is called the proprietor) and as a result there is no legal framework applicable to the registration or establishment of a sole proprietorship. If a sole proprietor wishes to trade under a business name (as opposed to his or her personal name), the name will need to be registered with the CIPC.

**Time-frame**

There is no legal framework applicable to sole proprietors. However, should the sole proprietor wish to trade under a business name, as opposed to in his or her personal name, the registration process for the name usually takes two to four weeks, depending on backlogs experienced by the CIPC.

**Costs**

There is no legal framework applicable to sole proprietors and therefore there are no costs or fees involved.
**Investor’s potential liability**

Because a sole proprietorship does not enjoy separate legal personality, the investor (ie the proprietor) will enter into all transactions in his/her personal capacity. As such, the investor will be held personally liable for any liabilities that may accrue in respect of the sole proprietorship.

**Tax consequences**

A sole proprietor is subject to normal tax in his personal capacity. Please refer to Section XIII.

**H. SUBSIDIARIES, BRANCHES AND REPRESENTATIVE OFFICES**

The establishment of a branch, subsidiary or representative office

In terms of South African law, a foreign entity may establish a corporate presence in South Africa through a local subsidiary taking the form of a private limited liability company, or through an external company (commonly known as a ‘branch office’).

Some of the key differences between a local subsidiary and an external company include:

- An external company is regarded as merely being an extension of the foreign entity, and would accordingly not have a legal existence in South Africa separate to that of the foreign entity. As a result, any liabilities incurred by the external company would be attributed to the foreign entity and not to the local external company.

- The regulation of external companies is less onerous under the Companies Act and the Companies Regulations, 2011 (Companies Regulations), with only certain provisions of the Companies Act being applicable to the regulation of external companies.

- A local subsidiary would be a separate legal entity to that of its parent company, the foreign entity, and it would have the capacity (barring any restrictions contained in its MOI) to enter into its own contracts, accept rights and incur obligations and transact its own business. As a result, should the local subsidiary incur any liabilities, whether financially, legally or otherwise, such liabilities would not be attributed to the foreign entity but rather remain ring-fenced in the local subsidiary company.

**Time-frame**

Please refer to Section VII, Part C for information on the registration/ incorporation of a subsidiary.

In terms of section 23 of the Companies Act, a company that is incorporated in another jurisdiction outside South Africa must register as an external company with the CIPC within 20 business days after it first begins to conduct business within South Africa.

The Companies Act prescribes that a foreign company will be regarded as conducting business within South Africa if that foreign company is:

- a party to one or more employment contracts within South Africa; or
- 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 activities within South Africa.
In order to register as an external company the following documents will need to be submitted to the CIPC:

- a CoR 20.1 Form – this notifies the CIPC that the company wishes to register as an external company and sets out various details relating to the external company, such as its registered address and jurisdiction of incorporation;
- a CoR 20.1A Form – this notifies the CIPC of the details of the external company’s directors;
- a CoR 21.1 Form – this notifies the CIPC of the external company’s representative authorised to accept the service of any documents on behalf of the external company; and
- a certified copy of the company’s founding documents and a copy of the company’s certificate of incorporation (or any other comparable document) – if these documents are in a language other than English a translated version of the documents must accompany the documents submitted to the CIPC.

The registration of an external company usually takes 25 business days to complete once the relevant documents have been submitted to the CIPC.

**Investors’ potential liability**

A subsidiary company incorporated in accordance with the laws of South Africa under the Companies Act is a separate legal entity in its own right. As such, an investor who establishes a subsidiary in terms of the Companies Act will not be held liable for the debts and obligations of its subsidiary company in the ordinary course.

If an investor registers an external company in terms of section 23 of the Companies Act, the company is regarded as an extension of the foreign entity, and would accordingly not have a legal existence in South Africa independent of the foreign entity. As a result, any liabilities incurred by the external company would be attributed to the foreign entity and not to the local external company.

The issue regarding the liability of agents of the investor (such as the directors of either the subsidiary or external company) has not been addressed in this document.

There is no requirement that a South African national be a participant, manager or director of a subsidiary company. However, companies, including branch offices, must have a public officer who resides in South Africa.

*Please refer to Section VII, Part C.*

**Non-resident tax consequences**

A non-resident company is subject to income tax in a similar manner to a resident company. The main tax difference is the fact that dividends tax is imposed in respect of dividends declared by resident companies. In the case of non-resident companies, dividends tax is only payable in respect of shares which are listed on a South African stock exchange. South Africa does not impose any tax on the distribution of profits by a branch.
I. TRUSTS AND OTHER FIDUCIARY ENTITIES

Trusts are recognised under South African law and are regulated by the Trust Property Control Act 57, 1988 (Trust Property Control Act). In terms of section 1 of the Trust Property Control Act, a ‘trust’ is defined as the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another person, the trustee, to be administered in accordance with the provisions of the trust instrument or to the beneficiaries designated in the trust instrument but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act 66, 1965.

Legal consequences of a transfer of assets to a trust or fiduciary

The usual consequences of the transfer of assets to a third party apply to trusts. As such, once assets have been transferred into the trust, the assets become the assets of the trust, which are to be administered by the trustee subject to the terms of the trust deed in terms of which the trust was created.

Investor as grantor, trustee or beneficiary

An investor can be a grantor in terms of a trust. An investor (natural or juristic) may also be a beneficiary in terms of a trust if the investor is adequately identified in the trust deed. Vague terms such as ‘my brother’ or ‘my business partner’ are not sufficient in this regard.

A company which has not yet been formed may be a beneficiary under a trust, but the rights bestowed will be contingent on the company’s formation and subsequent acceptance of the prospective benefit. A founder (ie grantor) of a trust may simultaneously be a founder and a beneficiary under the trust. A trustee may be the sole beneficiary as long as he or she is not also the sole trustee, as he or she cannot administer the trust property solely for him or herself. The fact that the trustees and the beneficiaries of a particular trust have identical interests insofar as the trust object is concerned does not invalidate the trust, nor does the fact that the trustees and the beneficiary are wholly owned subsidiaries of the same holding company.

SECTION VIII – REQUIREMENTS FOR THE ESTABLISHMENT OF A BUSINESS

A. ALIEN BUSINESS LAW

In South Africa, there is no formal alien business law, but certain industries do restrict foreign ownership of certain assets. For example, the airline industry and the Independent Communications Authority of South Africa (ICASA) legislation restrict foreign ownership to certain percentages. Also, public interest considerations under competition laws are increasingly used to restrict foreign investment by political role players in certain industries.

B. ANTITRUST LAWS

The relevant competition legislation is the Competition Act 89, 1998 (Competition Act). The Competition Act regulates both mergers and prohibited practices, namely:

- cartel activity, such as price fixing and bid rigging;
- vertically restrictive practices, such as minimum resale price maintenance; and
- abuses of dominance, such as excessive pricing, inducing suppliers or customers not to deal with competitors, or price discrimination.
The merger provisions of the Competition Act stipulate that when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of a business of another firm (eg through the purchase or lease of shares, or through the amalgamation or other combination of the entities), that transaction will constitute a merger.

Where there is a merger and the notification thresholds (see Filing requirements) are met, the merging parties must notify the merger to the competition authorities prior to implementation.

A newly formed entity will not be required to notify the competition authorities of its incorporation as that does not amount to a merger (ie there is no acquisition of control over the whole or part of a business of another firm). Put differently, greenfields entry into South Africa will not trigger the merger control provisions of the Competition Act.

Where an investor makes an investment in the form of, for example, purchasing shares in an established firm (ie brownfields entry), the merger provisions will apply if:

- positive control (eg acquiring the majority of the shares or the right to appoint the majority of the directors) or negative control (eg having the ability to veto strategic decisions such as those relating to the business plan or budget or the ability to materially influence the strategic direction of the firm concerned) is acquired over the firm in question; and
- the merger filing thresholds are met.

In respect of prohibited practices, an entity considering greenfields entry will need to be mindful of the provisions of the Competition Act in conducting its business.

Where brownfields entry is pursued, the new owner will inherit the competition law liabilities of the business being bought (unless these are specifically excluded by contractual mechanisms). This means that a new owner could be liable for past contraventions of the business. Generally, the maximum fine which may be imposed by the competition authorities is up to 10% of the turnover of the offending firm for the preceding financial year – however, not every prohibited practice attracts a fine for a first-time offence (eg price discrimination by a dominant firm).

Also note that cartel activity may in future be punishable through holding directors or managers of the firms involved criminally liable (although the relevant provisions have been promulgated, no effective date has yet been set, nor is it clear when such date will be set).

The Competition Act includes a prescription period for prohibited conduct and thereby limits the initiation of complaints in relation to such conduct to a maximum of three years after the conduct has ceased.

**Filing requirements**

Mergers in South Africa are classified as small, intermediate or large. The size of a merger is determined with reference to the South African turnover and asset values of the entire acquiring group and the target firm:

- For an ‘intermediate merger’, the acquiring group and the target firm must have combined South African assets or turnover of at least ZAR 560 million and the target firm must have South African assets or turnover of at least ZAR 80 million (any combination of assets or turnover can be used to arrive at the thresholds – essentially, the larger of turnover or assets is used in the calculation).
- For a “large merger” these values are ZAR 6.6 billion and ZAR 190 million respectively.
Intermediate and large mergers are required to be notified to, and approved by, the South African competition authorities before they may be implemented.

Transactions not meeting intermediate merger thresholds are regarded as ‘small mergers’. Small mergers may be implemented without prior notification and approval. However:

- Parties to a small merger may elect to voluntarily notify the merger to the Competition Commission (Commission).
- Within six months of implementation, the Commission can call upon parties to a small merger to notify it if the Commission is of the opinion that the merger might substantially prevent or lessen competition or that it cannot be justified on public interest grounds. In these circumstances, the parties cannot take further steps to implement the transaction until it has been approved by the competition authorities.
- When determining whether a merger can or cannot be justified on public interest grounds, the Commission or the Competition Tribunal (Tribunal) must consider the effect that the merger will have on
  - a particular industrial sector or region;
  - employment;
  - the ability of small businesses, or firms owned by previously disadvantaged persons, to become competitive; and
  - the ability of national industries to compete in international markets.
- In terms of the Commission’s 2009 Guideline on Small Merger Notification, the Commission will require the notification of a small merger if, at the time of entering into the transaction, any of the firms involved are:
  - subject to an investigation by the Commission for prohibited conduct (such as cartel conduct, resale price maintenance or abuse of dominance); or
  - respondents to pending proceedings referred by the Commission to the Tribunal.

Note that statutory filing fees payable for a large merger are ZAR 350 000. Filing fees payable for an intermediate merger are ZAR 100 000. There is no filing fees payable in respect of small mergers.

Parties to a notifiable merger which was implemented without approval may face an administrative penalty of up to 10% of their turnover for the preceding financial year, or they may be ordered to divest any shares/interests acquired (amongst others). No prescription period is applicable in these circumstances (ie competition authorities are not required to punish offending parties within a given period after their failure to seek approval).

C. ENVIRONMENTAL REGULATIONS

South Africa has a range of environmental legislation at a national, provincial and local authority level, with an environmental right enshrined in the Constitution of South Africa, 1996.

Many environmental statutes and local authority by-laws require authorisations, licences or permits to be obtained before particular activities can commence and, in some respects, may impose a duty of care that needs to be adhered to with respect to pollution and contamination. The application and relevance of the environmental laws and the authorisation requirements always need to be assessed in the context of the nature of the specific business and its location.

Generally, a breach of environmental laws may lead to criminal or administrative sanctions, with certain statutes potentially imposing a
strict liability regime in the context of pollution and contamination.

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

- National Environmental Management Act 107, 1998 – requires an environmental authorisation before many types of construction, expansion, decommissioning and other listed activities can commence, including certain activities associated with transformation of land use and with respect to the extraction and production of mineral and petroleum resources;

- National Water Act 36, 1998 – requires a licence or another form of entitlement for certain water uses, including abstractive water uses, various waste-related water activities that may impact on water resources as well as relating to physical impacts on or in proximity to water resources;

- National Environmental Management: Waste Act 59, 2008 – requires licensing of various listed waste activities or compliance with regulated norms and standards;

- National Environmental Management: Air Quality Act 39, 2004 – requires the licensing of various listed activities which result in atmospheric emissions; and

- Provincial and local authority (municipal) legislation – authorisations, licences or permits or agreements with the municipality are typically required for activities such as the storage of flammable substances, the discharge of effluent into municipal sewers and undertaking listed scheduled trades.

Apart from the direct compliance costs, such as required infrastructure or measures to contain or limit pollution or environmental impacts, when prescribed by law or contained in authorisations, licences or permits, there are typically costs associated with obtaining the relevant environmental authorisations, licences and permits as well as with complying with any conditions attached to these authorisations, licences and permits.

Certain environmental laws and authorisations may require holders to furnish the competent authorities with reports on environmental impacts of the activities at specified intervals, necessitating monitoring equipment to be installed at facilities, and may also include requirements for ongoing audits to assess the state of compliance with the relevant environmental legislation and authorisation conditions.

D. GOVERNMENT APPROVALS

Government approval in the form of licences/permits is required in respect of certain businesses and economic activity including:

- banking;
- distribution and sale of alcohol;
- financial services;
- fishing;
- healthcare services;
- insurance;
- manufacturing;
- manufacturing, marketing and sales of conventional arms;
- medical schemes;
- mining;
- pharmaceuticals;
- private education services (including pre-primary, primary, secondary and private higher education);
- telecommunications; and
- transport services.

Government approvals in the form of licences, permits and authorisations may be required from different Government bodies in each of the three levels of Government. For example, in the telecommunications sector, a mobile
network operator will require an electronic communications network service licence and an electronic communications service licence, together with applicable radio frequency spectrum licences. The operator will then require various additional permissions in order to build base stations and network. These would include approval from a provincial authority following an environmental impact assessment in order to build base stations, approval from the Civil Aviation Authority to build a base station above a certain height, and approval from the local municipality where the base station is located in terms of the national building legislation.

Applying for licences and permits

The process to apply for licences/permits required to undertake certain types of regulated activity, depends on the requirements under the applicable legislation.

In general, an investor looking to establish a business in a regulated sector will have to apply to the applicable regulator or head of the applicable Government department. Examples of these are as follows:

- banking – the Registrar of Banks;
- financial services – the Financial Services Board;
- healthcare – the Department of Health;
- mining – the Minister of Mineral Resources;
- pharmaceuticals – the Medicines Control Council and South African Pharmacy Council;
- telecommunications – the Independent Communications Authority of South Africa; and
- transport services – provincial and local Government bodies.

Time-frame

The process to apply for licences/permits required to undertake certain types of regulated activity depends on the requirements under the applicable legislation.

Where no specific time period is stipulated in the applicable legislation within which a decision must be given, the relevant Government authority is in all instances required to make a decision within a reasonable period of time in terms of the general requirements of the Promotion of Administrative Justice Act 3, 2000 (PAJA).

Costs

The fees to apply for licences/permits required to undertake certain types of regulated activity are generally stipulated in the applicable legislation or in an invitation to apply, where a competitive process must be followed. In certain cases, an auction process may be followed for the awarding of licences.

E. INSURANCE

There is no obligation to carry insurance for the establishment of a business. To the extent that the business has any employees, it will be required to have compulsory:

- unemployment insurance fund payments for employees, and
- compensation for occupational injuries and diseases for the employees, which must be registered within seven days of employing the employees.

In addition, in particular instances it may be a requirement to obtain third party liability insurance.
SECTION IX – OPERATION OF THE BUSINESS

A. ADVERTISING

Entities may elect to become members of the Advertising Standards Authority (ASA), a voluntary body that adjudicates complaints based on the Code of Advertising Practice. The members of the ASA are required to adhere to this Code, as supplemented by individual codes, which are determined by the various member organisations or negotiated with Governmental institutions.

In addition, the CPA and the Electronic Communications and Transactions Act 25, 2002 impose restrictions on unwanted direct marketing, giving consumers the right to opt-out of such marketing.

B. ATTORNEYS

There is no legal requirement to have South African counsel but appointing local advisers with an on-the-ground understanding of the business environment is beneficial particularly when transacting in regulated industries.

The Bowman Gilfillan Africa Group is well represented in what are considered to be the hub jurisdictions in the key regions of the African continent. The firm has eight offices (Antananarivo, Cape Town, Dar es Salaam, Durban, Gaborone, Johannesburg, Kampala and Nairobi) in six countries (Botswana, Kenya, Madagascar, South Africa, Tanzania and Uganda).

The firm works closely with leading Nigerian firm, Udo Udoma & Belo-Osagie, which has offices in Lagos, Abuja and Port Harcourt, and has strong relationships with other leading law firms across the rest of Africa, such as Corpus Legal Practitioners in Zambia and AB & David in Ghana.

The Bowman Gilfillan Africa Group provides coverage of francophone OHADA jurisdictions across the continent (including Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo Republic, Gabon, Guinea, Ivory Coast, Mali, Niger, Rwanda, Senegal and Togo) from its office in Madagascar.

Attorneys’ fees

Attorneys’ fees differ substantially throughout South Africa based on, inter alia, the level of experience of the attorney. Generally fees are charged by reference to the time spent on a matter. While charge out rates are material considerations, they are not the only factor taken into account in determining fees, nor are they necessarily inflexible.

C. BOOKKEEPING REQUIREMENTS

- Locally incorporated company: A locally incorporated company will be required to keep books of account in terms of the Companies Act.
- External company: An external company is not required to keep local books of account in terms of the Companies Act as the branch office is an extension of the head office and will be accounted for accordingly.
- Sole proprietorship and limited liability partnership: Although neither of these business structures enjoy separate legal personality, they are still liable for any tax that may accrue to the business venture in the course of its business. As such, they are required to keep books of account.

In terms of Companies Regulations, public companies, whether listed on the stock
exchange or not, are required to prepare their accounts in terms of the International Financial Reporting Standards (IFRS).

In the case of any profit company with a public interest score of at least 350 points, the accounts are to be prepared in terms of IFRS. A company’s public interest score is based on, amongst other things, the number of its employees, its third party liability and its turnover.

If a profit company has a public interest score of less than 100 points and internally compiles its statements, then its books of accounts must be prepared according to the South African Statements of Generally Accepted Accounting Practice.

D. BUSINESS ETHICS/ CODES

The Broad-based Black Economic Empowerment Act 53, 2003 (BEE Act) is the principal legislation through which broad-based black economic empowerment (B-BBEE) is measured in South Africa. B-BBEE must be taken into account by any potential investor wishing to conduct business in South Africa. This is especially true where the potential investor wishes to deal with the South African Government and organs of State in its business dealings.

Government’s B-BBEE policy seeks to redress the inequalities created by apartheid in South Africa and to increase levels of participation in economic activities by black people. For this purpose, the Minister of Trade and Industry (the Minister), who is tasked with implementing the BEE Act, has published various Codes of Good Practice (Codes) under the BEE Act which must be taken into account by Government entities when dealing with the private sector eg awarding licences, granting concessions, selling state-owned assets, and entering into public-private partnerships.

The Codes include a B-BBEE Scorecard stipulating various measurement indicators on which companies’ B-BBEE performance is measured (ie ownership, management control, skills development, supplier and enterprise development and corporate social investment).

The overall number of points that an investor achieves across all these categories translates into a B-BBEE level - eg Level 1 (100+ points), Level 2 (between 95 and 100 points), with Level 1 being the highest and Level 8 being the lowest. An investor’s overall B-BBEE score is then taken into account by Government entities when engaging with the private sector (eg deciding which suppliers to procure goods and services from). Investors with high B-BBEE scores relative to their competitors are preferred in any Government procurement process.

Other than in certain State licensing, permitting and authorisation processes (eg in the gambling sector), there is no ‘hard law’ requiring that any private entity in South Africa must meet specific B-BBEE targets, implement a B-BBEE policy or achieve certain levels of ownership by black people. However, while there are no absolute requirements in relation to B-BBEE, any company wishing to do business in the South African environment must consider and develop its B-BBEE position. An entity that does not have a good B-BBEE rating, or does not strive to improve its B-BBEE rating, may be hampered in the conduct of its day-to-day business with Government, organs of State and private sector customers.
If the investor is a listed public company, it will be required to show its compliance with the provisions of King Code III (King Code) in its annual reports. JSE Listing Requirements require that the company adhere to certain aspects of the King Code. The King Code applies an ‘apply or explain’ approach, which means that a company is not required to apply the provisions of the King Code, but if it opts not to, it will be required to explain why it has not applied them.

The King Code is a set of guidelines applicable to the corporate governance of a company. As the King Code is a set of guidelines, it does not carry the force of law in South Africa and therefore non-compliance with the King Code is not an offence under South African law.

The King Code aims to set high standards for corporate governance in South Africa through the guidelines it sets out.

The King Code deals with nine topics relevant to the corporate governance of a company, such as ethics and corporate citizenship; boards and director governance; compliance; and IT governance.

E. CONSUMER PROTECTION LAWS

The Consumer Protection Act 68, 2008 (CPA) generally applies to transactions involving the supply of goods and services that occur in South Africa. If the investor’s operations involve the supply of goods or services (including education) to consumers in South Africa, the CPA will apply, unless the consumer is a juristic person whose asset value or annual turnover exceeds the prescribed threshold value.

Key aspects regulated by the CPA include:

- restrictions on unwanted direct marketing;
- consumers’ rights to cooling-off period after direct marketing;
- consumers’ rights to cancel fixed-term agreements on two months’ notice (on payment of a reasonable cancellation fee);
- consumers’ rights to fair, just and reasonable terms and conditions; and
- consumers’ rights to fair value, good quality and safety (including strict liability for harm caused by defective products, and an implied warranty of quality).

The Regulations to the CPA set out terms that are deemed to be unfair. For example:

- It is unfair, unreasonable and unjust to provide that the supplier alone has the right to determine whether goods or services conform to the agreement or to interpret the agreement.
- It is presumed unfair for a consumer contract to modify the normal rules regarding the distribution of risk to the detriment of the consumer.
- It is unfair, unreasonable and unjust to provide that the supplier can terminate an evergreen agreement without reasonable notice or at any point, where a similar right is not given to the consumer.

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

F. CONSTRUCTION

Costs of construction

Construction costs typically depend on the size, nature and complexity of the project. Other factors will play a major role in calculating this amount. These include: the purpose of the property; materials used; whether such construction is financed or done from a client’s
balance sheet; and specific requirements of the company. This therefore makes the exact cost very difficult to estimate.

**Permits**

The Construction Regulations, 2014 (Construction Regulations) require a client to obtain a permit for all construction works. A client is defined as “… any person for whom construction work is being performed”.

In terms of the Construction Industry Development Board Act 38, 2000 (CIDB Act), all contractors who intend on tendering for Government work must ensure that they are registered with the Construction Industry Development Board (CIDB) before they may take part in any Government procurement processes.

Further, each municipal area will have specific municipal by-laws prescribing the required authorisation/permits for construction works. The authorisations/permits required will depend on the nature and purpose of the construction. In the construction of power stations for instance, some municipalities may require certification from a structural engineer for the works.

**Construction regulations**

The Construction Regulations require a client to apply in writing to the relevant provincial director of the Department of Labour for a construction work permit where certain categories of construction work are to be carried out.

The application must be made at least 30 days before the client intends to carry out the works in a prescribed form which requires, amongst other things: details of the appointed agent, principal contractor, designer, construction manager, construction health and safety officer (if any) and contractors (if any).

Registration of a contractor and a project must be lodged at the CIDB.

**Time-frame**

For categories of construction works which require a construction work permit issued by the provincial director, the provincial director has 30 days from receipt of the application to issue the client with a written construction work permit and assign a site-specific number for each construction site.

The CIDB Regulations provide that the assessment committee must decide on the category of registration of the contractor and register that contractor accordingly within 21 working days from receipt of a duly completed application and the relevant fees.

In relation to the registration of projects at the CIDB, the CIDB Board must register the project concerned and supply the employer with a receipt of registration within 30 working days from receipt of the duly completed application.

Depending on the nature and complexity of the construction works, the impact of the construction works on the environment and the location of the construction works, time periods for obtaining the necessary municipal permits and authorisations will vary.

**Costs**

A contractor wishing to register at the CIDB must pay a fee ranging from ZAR 200 to ZAR 40 000, depending on the grading designation for which the contractor makes application.

In addition to fees prescribed by the CIDB, other fees associated with obtaining environmental and municipal permits must be considered. These will depend on the nature
and complexity of the construction works and the location of such construction works. The costs in relation to municipal authorisations/permits may be catered for in the contractor’s contract price should one be appointed to execute the construction works.

F. CONTRACTS

As a general rule, an investor is free to contract with third parties in South Africa, regardless of the country of incorporation of the investor. This can however be restricted in the constitutional documents.

It is possible for the law of another country to govern a particular contract.

G. PRICE CONTROLS

As a general rule, there are no price controls under South African law. However, in regulated industries, such as minerals and petroleum, the prices are subject to a degree of control and regulation by the applicable regulatory bodies. Although it does not regulate pricing per se, the Competition Act prohibits excessive or discriminatory pricing of goods or services to the extent that the investor is a dominant firm as defined in a particular sector.

I. PRODUCT REGISTRATION

In general, products need not be registered. However, some products are regulated and must be registered before being produced, imported, distributed or sold in South Africa. For example, medicines are subject to registration requirements in terms of the Medicines and Related Substances Act 101, 1965, and electronic communications equipment is subject to approval by ICASA in terms of the Electronic Communications Act 36, 2005.

Time-frame

The process to register a regulated product depends on the requirements under the applicable legislation. Where no specific time period within which a decision must be given is stipulated in the applicable legislation, the relevant Government authority is in all instances required to make a decision within a reasonable period of time in terms of the general requirements of PAJA.

Costs

The fees to apply for licences/permits required to undertake certain types of regulated activities are generally stipulated in the applicable legislation or in an invitation to apply if a competitive process must be followed.

J. REDUCTIONS OR RETURN ON CAPITAL

Capital may be repatriated while the corporation is still ongoing, subject, in certain instances, to exchange control approval being granted by the SARB.

K. SALE OF GOODS

As a general rule there are no restrictions on manner, time or place of sale of goods under South African law. However, should certain goods be subject to regulation (such as liquor, firearms, petroleum or prescription drugs), the manner, time and place of the sale of such goods may be restricted.

I. TRADE ASSOCIATIONS

Trade associations are organisations founded and funded by businesses that operate in a specific industry. Their main focus is on collaboration between companies and standardisation.
Some examples of trade associations are as follows:

- Aluminium Federation
- Business Process Enabling South Africa
- Industry Association for Responsible Alcohol Use
- Marine Finfish Farmers Association of South Africa
- Plastic Federation of South Africa
- South African Aerospace Maritime & Defence Industries Association
- SA Dairy Foundation
- South African Iron & Steel Institute
- South African Organic Sector Organisation
- South African Print & Packaging Export Council
- South African Stainless Steel Development Association
- South African Sugar Association
- South African Wind Energy Association

Costs

This depends on the particular association; in some instances, an investor may be obliged to pay the prescribed fee.

**Mandatory trade practices**

There are no mandatory trade practices in South Africa, though there are various sector specific permits/ licences required for engaging in business and compliance with local law is mandatory.

**SECTION X – CESSION OR TERMINATION OF BUSINESS**

The process and consequences of termination will depend on the legal nature of the business concerned. This section focuses on termination of private companies, trusts and partnerships.

**A. TERMINATION**

**Tax consequences**

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

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

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

**Costs**

- **Company:** The CIPC does not prescribe any fee to terminate a company by means of deregistration. The filing fee for Form CoR40.1 to initiate a solvent voluntary winding-up by the shareholders of the company is ZAR 250 and the filing fee for Form CM26 to initiate an insolvent voluntary winding-up by the shareholders of the company is ZAR 80. In the case of a voluntary winding-up, the Master of the High Court of South Africa (the Master) charges a fee ranging from ZAR 600 to ZAR 25 000, depending on the size of the estate of the company concerned. The liquidator’s fees will be paid out of the estate of the company. If the estate has no assets,
the liquidator will call upon the creditors to contribute to the winding up costs.

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

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

### Time-frame

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

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

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

### Forms of business in termination

- **Company**: During the process of termination, the company maintains its legal personality and its assets remain vested in it. Once the company has been dissolved it ceases to exist.

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

- **Partnership**: The partnership ceases to exist upon termination.

### Government approval or intervention

- **Company**: A company’s existence can only be terminated with Government (regulatory body) approval. A company may only be deregistered by:
  
  - the CIPC on its own accord (where a company does not comply with its obligations to file annual returns);
  - voluntarily by the board of directors of a company; or
  - involuntarily by application brought by a creditor or shareholder (note that this is a factual enquiry).

  The effective date of deregistration will be the date of removal of the company’s name from the register of companies maintained by the CIPC.

  A voluntary winding-up of a company is initiated by a special resolution of the shareholders, which resolution has to be filed with the CIPC for registration.

- **Trust**: A trust can only be terminated with Government (regulatory body) approval. Once the trust has been terminated in accordance with the trust deed, the Master must dissolve the trust and cancel the letters of authority issued to the trustees.

- **Partnership**: The partnership may be terminated without Government approval or intervention.

### Obligations on termination

- **Company**: During the liquidation process, the company’s creditors are allowed to prove claims at meetings of creditors. The creditors are paid pro rata in relation to the quantum of their claims against the company, subject to their ranking as creditors. Creditors include employees and any other independent creditor of a
company. Creditors can be classified as secured, preferent (employees and the SARS) and concurrent.

In terms of section 38 of the Insolvency Act 24, 1936 (Insolvency Act), all contracts of employment are automatically suspended when the company is placed into the liquidation process. Unless there is an agreement between the liquidator and employee(s) to continue with the employment contracts they will be automatically terminated 45 days after the appointment of the liquidator.

- **Trust**: Trusts are sequestrated in terms of the Insolvency Act and therefore the same provisions applicable to a company will apply.

- **Partnership**: Partnerships are also sequestrated in terms of the Insolvency Act and therefore the same provisions applicable to a company will apply.

### B. INSOLVENCY/ BANKRUPTCY

#### Extent of the investor’s liability

Section 19(2) of the Companies Act provides that a person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that the Companies Act or a company’s MOI provides otherwise.

One of the consequences of the separate legal personality of a company, and the fact that shareholders enjoy limited liability, is that as a general rule, shareholders’ estates will not be sequestrated in the event that a company is liquidated. However, in terms of section 424 of the old Companies Act 71, 1973 (which still applies in this context), a shareholder (investor) who was knowingly a party to conducting the business in a fraudulent or reckless manner may face personal liability.

Sections 83(2) and (3) of the Companies Act make it clear that the deregistration of a company does not affect the liability of any former director, shareholder or any other person in respect of conduct which took place before the company was removed from the register. Therefore, the claims of creditors and employees against such persons will remain alive, even once the company has been deregistered.

#### Choices regarding the restructuring of the business

The shareholder (investor) will have the following choices with regard to restructuring the business:

- **Business rescue**: Generally, these restructuring proceedings are initiated by the board of directors. However, in addition, the shareholder (investor) could apply to court, as an ‘affected person’, for the initiation of business rescue proceedings. Once business rescue proceedings are initiated, the business rescue practitioner takes control of the entire process, with the assistance of directors as and when required. Business rescue will be effective upon filing of the board resolution with the CIPC.

- **Compromise**: This process is also initiated by the board of the company unless the company is in liquidation, in which case, the process will be initiated by the liquidator. The shareholder (investor) would need to instruct the board of directors of the company to pass a board resolution to enter into a compromise with the creditors of the company. Once agreed to by a prescribed majority of the creditors and sanctioned by the court the compromise will be binding on all creditors (including dissenting ones), those who were absent at the meeting, and those who abstained from voting. There are minimum statutory requirements that must be met in terms of
such a compromise. The compromise does not affect any sureties of the company.

- **Scheme of arrangement**: The board can make an arrangement with the shareholders (investors) of the company by way of:
  - a consolidation of securities of different classes;
  - a division of securities into different classes;
  - an expropriation of securities from the holders;
  - exchanging any of its securities for other securities, a reacquisition by the company of its securities; or
  - a combination of any of these methods.

This restructuring mechanism is, however, not possible where the company is winding up its affair or under business rescue proceedings.

**SECTION XI – LABOUR LEGISLATION, RELATIONS AND SUPPLY**

**A. EMPLOYER/EMPLOYEE RELATIONS**

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

In general, South African employment law applies to all employees working in South Africa. Although choice of law clauses are recognised, these are only enforced where the chosen law is also the law to which the contract is most closely connected. In most instances, if the employee performs the work in South Africa and is paid here, South African law will apply. In certain circumstances, it may also apply to South African employees working abroad.

The main pieces of legislation regulating the employment relationship are:

- **Labour Relations Act 66, 1995 (LRA)**. This grants employees protection against unfair dismissal and unfair labour practices. It also regulates collective bargaining and the transfer of undertakings as a going concern.

- **Basic Conditions of Employment Act 75, 1997 (BCEA)**. This regulates most contracts of employment in relation to, among other things:
  - working hours;
  - leave;
  - the prohibition of child and forced labour;
  - the payment of remuneration; and
  - notice and payments on termination of employment.

Parties can agree different terms to those set out in the BCEA provided these are not less favourable to the employee than what the BCEA provides.

- **Employment Equity Act 55, 1998 (EEA)**. This Act prohibits unfair discrimination in any employment policy or practice on grounds such as age, gender, language, race and religion. The EEA also regulates the implementation of affirmative action measures (ie, measures which ensure that employees from designated groups – black people, women and people with disabilities – have equal employment opportunities and are equitably represented in the workplace).

- **Skills Development Act 97, 1998 (Skills Development Act)**. This Act aims to develop the skills of the South African workforce. It establishes Sector Education and Training Authorities (SETA) to develop and implement skills plans for each economic sector.
Skills Development Levies Act 9, 1999. This Act 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 SETAs. In certain circumstances, employers may claim rebates for the levies paid to a SETA.

Unemployment Insurance Act 63, 2001. This Act established the Unemployment Insurance Fund (UIF). The Unemployment Insurance Contributions Act 4, 2002 (Unemployment Insurance Contributions Act) requires employers and their employees to make contributions to the UIF.

Occupational Health and Safety Act 85, 1993 (OHSA). This Act provides for the minimum rights and duties of employers and employees in order to maintain a healthy and safe working environment.

Compensation for Occupational Injuries and Diseases Act 130, 1993. This Act provides a system of ‘no fault compensation’ for disablement or death caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. Employees are entitled to compensation regardless of whether the injury or illness was caused by the fault of the employer or any person.

The employer is relieved of liability for damages claims and in return is required to make regular contributions to the Compensation Fund.

B. EMPLOYMENT REGULATIONS

The hiring of South African nationals

Foreigners require work permits to work in South Africa. The Immigration Act 13, 2002 (Immigration Act) provides for various permits, the most commonly used of which are general work permits and intra-company transfer permits. General work permits are typically only granted if no suitable South African is available to perform the work concerned.

Minimum wage

There is no generally applicable minimum wage. Collective agreements (which are agreements between an employer or employers’ organisation on the one hand and trade union on the other hand) or Sectoral Determinations (which are determinations issued by the Minister of Labour regulating the terms and conditions of employment for particular sectors) may prescribe a minimum wage in respect of specified categories of workers.

Working hours

Employees who earn below the earnings threshold prescribed in terms of the BCEA (ZAR 205 433.30 per annum as at 31 May 2015) are entitled to the protection of the working hour provisions of the BCEA. These employees may not work more than 45 ordinary hours per week and more than 10 hours’ overtime per week. Employees are entitled to overtime pay at the rate of 1.5 times the employee’s ordinary rate of pay. By agreement, employees may be given time off in respect of overtime worked. The BCEA also prescribes a premium rate of pay in respect of work on Sundays and public holidays.
Employees who earn in excess of the prescribed threshold amount are not subject to the working hour provisions of the BCEA and may be required to work any reasonable hours that are required for the efficient performance of their duties.

**Employee leave**

The BCEA entitles all employees (irrespective of their level of remuneration and seniority) to a minimum of 21 consecutive days’ annual leave in respect of each annual leave cycle of 12 months’ continued employment. Employees who work a five-day work week are accordingly entitled to about 15 working days’ annual leave in respect of each annual leave cycle. It is fairly common for more senior employees to be granted leave in addition to the BCEA minimum.

Employees (who work a five-day week) are entitled to 30 days’ sick leave in respect of each three-year sick leave cycle.

The BCEA also provides for a minimum of three days’ family responsibility leave per annum, which may be taken in the event of the birth or illness of an employee’s child, or the death of a close family member.

Employees are entitled to four months’ maternity leave. Maternity leave is unpaid, but it is fairly common for employers to pay an employee’s normal salary or part thereof during a period of maternity leave in return for an appropriate work-back undertaking. Employees are entitled to claim maternity benefits from the UIF provided that they and their employers have contributed to the UIF and provided that the employer does not pay the employee’s full wage during the maternity leave period.

**C. HIRING AND FIRING REQUIREMENTS**

Investors are not required to employ a minimum number of people.

Foreigners must be in possession of valid work permits authorising them to work for the employer in South Africa. South African nationals are not required to hold certain positions in the company.

**Rules for hiring and dismissing employees**

Employers may not discriminate unfairly against applicants for employment on a wide range of prohibited grounds such as age, gender, HIV status, language, race and religion. An employer may, however, differentiate on the basis of the prohibited grounds if such differentiation is required for affirmative action purposes consistent with the provisions of Chapter 3 of the EEA, or if it is required for the inherent requirements of the job.

All employees, irrespective of their level of remuneration or seniority, have the right to not be unfairly dismissed. Any dismissal must be both substantively and procedurally fair. There are four broad grounds for dismissal:

- misconduct of the employee;
- incapacity of the employee related to poor work performance;
- incapacity of the employee related to ill health; and
- the operational requirements of the employer.

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

- accrued holiday pay;
- payment in lieu of notice, unless the employee is summarily dismissed or is required to work the notice period;
- severance pay of a minimum of one week’s salary for every completed year of service with the employer, but only if the dismissal is as a result of the employer’s operational requirements;
- any other amount to which the employee is contractually entitled such as a pro rata guaranteed bonus.

Notice periods are normally regulated in the employment contract. However, the BCEA provides for the following minimum notice periods:

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

It is fairly common for the employment contracts of more senior employees to contain longer notice periods, for example two to six months.

**Remedies for unfair dismissal**

An employee who is dismissed can bring a claim for unfair dismissal. The primary remedy in respect of a dismissal that is substantively unfair is retrospective reinstatement. Alternatively, the employee may be re-employed in other reasonably suitable work or be awarded compensation. Compensation is generally limited to 12 months’ remuneration. In certain circumstances, such as where the reason for the dismissal is that the employer unfairly discriminated against the employee, compensation of up to 24 months’ remuneration may be ordered.

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

**D. LABOUR AVAILABILITY**

Whether adequate skilled or unskilled labour is available for the anticipated business depends on the nature of the anticipated business.

**E. LABOUR PERMITS**

Foreigners are required to be in possession of valid work permits issued by the Department of Home Affairs. Apart from this, labour permits are not required.

Work permits are obtained on application from the Department of Home Affairs subject to meeting all the prescribed requirements. The process takes 30 to 60 days. Costs vary. Advice in this regard should be obtained from a registered immigration practitioner.

**F. SAFETY STANDARDS**

Safety standards are prescribed by the OHSA and the regulations issued in terms thereof. In certain circumstances, the Mine Health and Safety Act 29, 1996 applies.

**G. UNIONS**

Unions are recognised in South Africa and are active in all sectors of the economy. The political affiliation of the union will depend on the union concerned. There is no obligation on the part of the employer to organise unions. Depending on the business concerned, there may be mandatory collective bargaining arrangements. This will need to be determined on a case-by-case basis.
SECTION XII - TAX ON CORPORATIONS

A. DEDUCTIONS AND ALLOWANCES

Deductions are allowed either in terms of the so-called ‘general deductions formula’ contained in section 11(a) of the ITA read with section 23(g) thereof, or in terms of specific sections dealing with particular deductions.

The general deductions formula provides for a taxpayer to claim as a deduction against income:

- expenditure or losses;
- actually incurred during the year of assessment;
- in the production of income;
- to the extent that such moneys were laid out or expended for the purposes of trade; and
- provided such expenditure and losses are not of a capital nature.

Over the years, a substantial body of case law regarding the interpretation of the general deductions formula has developed.

In addition to the so-called general deductions formula, provision is made for a number of specific deductions or allowances in the ITA, for example:

- Depreciation allowances with respect to capital assets are generally determined by SARS depending on the type of asset being depreciated.
- There is a special depreciation allowance for new or used plant and machinery brought into use for the first time by a taxpayer, and used in a process of manufacture. The write-off period is either four or five years depending on the nature of the asset.

- 100% of the cost of manufacturing plant and machinery owned by or acquired and brought into use by a small business corporation (SBC) for the first time after 1 April 2001 may be deducted if it is used directly in the process of manufacture and for the purpose of the SBC’s trade. Other qualifying assets acquired by a SBC after 1 April 2005 enjoy a three-year write-off period.
- There are special allowances relating to, among other areas: mining, gas pipe lines, electricity transmission lines and railway lines, renewable energy and to investors in qualifying venture capital companies.
- Taxpayers investing in areas which are regarded as urban development zones are entitled to special depreciation allowances for the construction or refurbishment of buildings.
- Taxpayers can deduct a number of building allowances, including manufacturing buildings, commercial buildings and residential business units, all with a 20-year write-off period.
- Taxpayers can deduct 150% of their research and development expenditure, if the expenses were directly incurred in scientific and technological research and development activities in South Africa. Taxpayers may also depreciate the cost of buildings, machinery or plant, utensils and articles used for the purpose of such research and development over three years.

Major expenses excluded from deductibility

An expense will not be deductible if:

- it was not incurred in the production of income;
- it was not incurred for the purposes of trade; or
- it is of a capital nature.
Provision is further made for deductions to be non-deductible under specific circumstances, for example:

- Under certain circumstances payments of royalties or premiums for the use of intellectual property may not be tax deductible to the South Africa resident if the payment was made to a non-resident. In particular, if the intellectual property had been developed or previously owned by the South African resident, no deduction will be granted.
- Interest expense payable to a non-resident lender may potentially be non-deductible in terms of the thin capitalisation rules. Regard should also be had to section 23M of the ITA which limits the amount of interest that can be deducted where the creditor is in a controlling relationship with the debtor and the amount of interest so incurred is not subject to tax in the hands of the person to which the interest accrues.
- Other deductions specifically not allowed in the determination of taxable income include, among others, private and domestic expenses, provisions, insured losses, restraint of trade payments (except in specific circumstances).

**B. CALCULATION OF TAXES**

**The taxable base**

The taxable base is determined by calculating the taxable income of a person, which consists of:

- Gross income (see below)
- Less exempt income
  = Income

- Less all permissible deductions or allowances
- Plus all amounts to be included or deemed to be included in the taxable income of a person in terms of the ITA, such as taxable capital gains
  = Taxable income.

‘Gross Income’ includes, in the case of a resident:

- the total amount;
- in cash or otherwise;
- received by or accrued to or in favour of such resident;
- during the year or period of assessment;
- excluding receipts and accruals of a capital nature; and
- including certain specified amounts, irrespective of whether they are of a capital or revenue nature.

For a non-resident, ‘Gross Income’ is similar to that applicable to a resident, but subject thereto that it only includes amounts from a South African source.

‘Income’ is calculated by deducting from gross income any ‘exempt income’ as defined. Gross income which is exempt under the terms of a DTA is not ‘exempt income’ as defined.

‘Taxable income’ means the aggregate of:

- income less all permissible deductions or allowances; plus
- all amounts to be included or deemed to be included in the taxable income of a person in terms of the ITA, such as taxable capital gains.

**C. CAPITAL GAINS TAX**

A percentage of a taxpayer’s net capital gain for the year of assessment is included in the taxpayer’s taxable income for the year, which constitutes the taxpayer’s taxable capital gain.
The inclusion rate for natural persons or special trusts is 33.3%, while the inclusion rate for companies and normal trusts is 66.67%.

Taxable capital gains of individuals and companies are thus subject to the following effective rates:

- 18.67% for companies and close corporations;
- 13.33% (maximum rate) for individuals and special trusts; and
- 27.33% for normal trusts.

**D. FILING AND PAYMENT REQUIREMENTS**

Tax returns for companies must normally be submitted within 12 months after the company’s year-end.

Companies must submit their tax returns online, via the SARS e-filing system. In the case of resident companies, returns must be filed by the taxpayer even if they reflect a nil amount due.

Provisional taxpayers must, in addition to their annual income tax returns, also file provisional tax returns on a bi-annual basis. All companies, and certain individuals, constitute provisional taxpayers.

Provisional tax is not a separate tax, but is a system in which certain taxpayers are required to make advance tax payments in respect of normal tax payable for the year. It forms part of the normal income tax payable by these taxpayers and requires them to make advance payments of their tax during the year of assessment, in accordance with estimates of their liability.

The first provisional tax payment must be made six months after the beginning of a year of assessment and the second at the end of that year of assessment. Underestimation of taxable income in the second provisional tax return may result in the imposition of a 20% understatement penalty on the shortfall.

A provisional taxpayer may make a voluntary third provisional tax payment, known as a “top-up payment” within seven months after the year-end if that year-end is February, or within six months of another approved year-end. Any further income tax will be payable upon assessment.

**E. MISCELLANEOUS TAXES DUE**

**Securities transfer tax**

Securities Transfer Tax (STT) is levied on every transfer of a security and was introduced with effect from 1 July 2008 to replace stamp duty and uncertificated securities tax on the transfer of listed and unlisted securities respectively.

STT is payable on the transfer or redemption of any security at a rate of 0.25% on the greater of the market value or consideration payable.

There is no business licence tax.

There is no apprenticeship tax, but employers are obliged to pay a levy, known as a Skills Development Levy (SDL), which aims to fund education and training as envisaged in the Skills Development Act.

The collection and payment of levies are administered by the Commissioner. Every employer who pays or is liable to pay remuneration to employees, is required to pay the levy, subject to certain exemptions.

**F. REGISTRATION DUTIES**

The estimated costs of incorporating a limited liability company are ZAR 300 (exclusive of VAT and disbursements) to reserve a name and a further ZAR 2 400 (exclusive of VAT and disbursements) to lodge and register the
relevant company secretarial documents with the CIPC.

Registration duties due upon a transfer of corporate assets

There is no general registration duty due upon the transfer of corporate assets, but there is transfer duty on the transfer of immovable property at rates of up to 11% of the value of the property.

Other registration duties

• Employees’ Tax: Paragraph 15 of the Fourth Schedule to the ITA provides that every employer who pays remuneration to an employee who is liable for normal tax is obliged to register for employees’ tax. The application form that needs to be filled is the EMP101e. An employer is required to register for employees’ tax within 21 business days of becoming an employer unless none of the employees are liable for tax.

• Unemployment Insurance Fund Contributions: Section 10 of the Unemployment Insurance Contributions Act 4, 2002 (Unemployment Insurance Contributions Act) requires every employer who pays or is liable to pay remuneration to register for UIF contributions and to contribute to the UIF on a monthly basis. In this regard, employees are required to contribute 1% of their salary to the UIF (up to an annual remuneration limit), and their employers are required to match this amount. The annual remuneration limit is currently ZAR 178 464 per annum (ZAR 14 872 per month). Thus the maximum amount that an employee is currently required to contribute to the UIF is ZAR 148.72 per month. The employer is required to match this amount. The employer is required to deduct the employee’s contribution from the employee’s salary and to pay over both the employer and employee’s contribution. The application for UIF registration is made in the same EMP101e form referred to above. In circumstances where an employer is not obliged to register for tax in terms of the ITA the application to register for UIF contributions must be made directly to the Unemployment Insurance Commissioner.

• COIDA: Section 80 of the COIDA provides that an employer carrying on a business in South Africa is required to register with the Compensation Commissioner within seven days of the date on which it employed its first employee. Application for registration is made in the W.As.2E form. The Compensation Fund sends a notice of assessment setting out what amount the employer is required to pay.

G. SALES TAX OR OTHER TURNOVER TAX

Valued Added Tax (VAT)

South Africa applies a VAT system in terms of which VAT is levied on the supply of all goods and services by a registered VAT vendor at each stage within the production and distribution chain. Vendors collect output tax from their customers and are able to claim credits for input tax paid by them, with the effect that the tax burden is on the final consumer. VAT is also payable on the importation of goods and certain services to South Africa.

In terms of the VAT Act, VAT is payable on the supply of goods and/ or rendering of services by a registered VAT vendor, or on goods and certain services imported into South Africa.

Any person who carries on any enterprise in South Africa, and has taxable supplies that exceeds ZAR 1 million per annum is obliged to register as VAT vendor. There are certain
exemptions from VAT, and certain transactions are subject to VAT at 0% (referred to as ‘zero-rating’).

**Input and output VAT**

The VAT payable by a vendor is calculated as the difference between so-called ‘output VAT’ and ‘input VAT’:

- ‘Input VAT’ is the VAT payable by a vendor on the importation of goods or services by a vendor or on the supply of goods or services by another VAT vendor;
- ‘Output VAT’ is the VAT payable on the supply by a vendor of goods or services supplied by him or her in the course or furtherance of any enterprise carried on by him or her.

The VAT Act contains detailed rules regarding the calculation of VAT payable and, more specifically, regarding the requirements for the deduction of input VAT. In particular, a deduction of input VAT on goods and/or services may only be claimed to the extent that such goods and/or services were acquired by the vendor in the course of making taxable supplies. A taxable supply is defined as any supply of goods or services by a vendor in the course or furtherance of his or her enterprise, which is chargeable with VAT, including VAT chargeable at the rate of 0%. It does not include exempt supplies.

This means that a vendor may claim input VAT on goods and/or services acquired for the purpose of making zero-rated supplies, but not for making exempt supplies.

**Tax rates**

VAT is levied at a rate of 14%, though some supplies are exempted from VAT, and others (such as the export of goods from South Africa) are zero-rated, which means that they are liable for VAT but at a rate of 0%.

**Filing and payment requirements**

The relevant reporting period for registered VAT vendors is referred to as a VAT period. The VAT period is determined based on the activities and turnover of the vendor and varies between one and 12 months.

- A vendor will have a one-month VAT period if the total value of its taxable supplies exceed ZAR 30 million;
- most smaller businesses will have a two-month VAT period;
- certain types of business such as farming enterprises can have a six-month VAT period; and
- in very specific circumstances, certain vendors may have a 12-month VAT period.

Registered VAT vendors are required to submit VAT returns and pay VAT within 25 days after the end of a VAT period.

A vendor must, as a general rule, account for VAT payable on an invoice basis, subject thereto that a specified group of vendors (such as public authorities or municipalities) may, on application to the Commissioner, account for VAT on a payment basis.

**H. SOCIAL SECURITY AND WELFARE SYSTEM CONTRIBUTIONS**

South Africa does not currently have a social security system, but it does operate a compulsory system of unemployment insurance. *(Please refer to Section XII, Part F.)*

In addition, employers are required to pay levies which are intended to contribute to skills development, referred to as SDL. *(Please refer to Section XII, Part E.)*
Retirement or pension contributions

Currently, neither employers nor employees are legally obliged to contribute to retirement and/or pension funds. In those instances where employers and/or employees contribute to retirement and/or pension funds, these contributions may qualify for deductions, subject to the limitations of the specific provisions.

Unemployment insurance contributions

Employers and employees are each required to make a contribution to the UIF to provide an income to employees in a number of instances such as unemployment or absence from work due to illness or while the employee is on unpaid maternity leave. Some benefits may also be provided to the dependants of a deceased contributor.

Contributors may qualify for the following types or benefits:

• unemployment benefits;
• illness benefits;
• maternity benefits;
• adoption benefits; and
• dependents’ benefits.

Every employer who pays remuneration to an employee is required to contribute to the UIF. Contributions are made by both the employer and the employee. The employer is required to withhold the employee contribution from the remuneration payable to the employee and to pay over such contribution together with the employer contribution, to SARS or to the Unemployment Insurance Commissioner (whichever applicable) on a monthly basis.

Filing and payment requirements

Returns reflecting the employees’ tax, UIF contributions and SDL, must be submitted on a monthly basis, by no later than the seventh day of the month following the month during which remuneration accrued to an employee.

An annual return, the EMP 501 reconciliation, must be filed within a specified period of time after the end of February each year. For example, the deadline for submission of payroll records for the 2015 year, was 29 May 2015.

I. TAX ON PROFITS

National income tax rates on profit

The taxable income of a company (resident or non-resident) is subject to income tax at a rate of 28%.

J. TAX TREATIES

According to the SARS website, as of 1 August 2015:

• South Africa had 73 comprehensive DTAs in force;
• it has signed but not ratified treaties with Cameroon, Hong Kong, Lesotho (renegotiated), Qatar;
• it has signed but not ratified a protocol with Cyprus;
• nine DTAs have been ratified by South Africa but not yet by the other country, namely Botswana, Chile, Gabon, Germany, Kenya, Mauritius, Norway, Sudan, Turkey (protocol); and
• the following comprehensive DTAs have been or are in the process of being negotiated or finalized but have not yet been signed:

• Africa: Malawi, Morocco, Mozambique, Namibia, Senegal, Swaziland, Zambia, Zimbabwe;
• Rest of the world: Austria, Belgium, Brazil, Cuba, Germany, Indonesia, Isle of Man, Kuwait, Luxembourg, Netherlands, Singapore, Switzerland, Syria, Thailand, United Arab Emirates, Vietnam.

There are no specific treaty-shopping rules, but it is possible that SARS may seek to apply
its general anti-avoidance rules to deny treaty benefits in a treaty-shopping situation.

**K. TERRITORIALITY RULES**

South Africa applies a residence-based income tax system, in terms of which South African residents are taxed on their worldwide income and non-residents are subject to income tax on income from a South African source.

Non-residents are subject to CGT on capital gains arising from the disposal of immovable property situated in South Africa or any interest or right in immovable property situated in South Africa, as well as in respect of the disposal by the non-resident of any asset which is attributable to a permanent establishment of that non-resident in South Africa.

**Tax on worldwide income**

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

The South African CFC rules may include an amount equal to a proportionate amount of the net income of a CFC in the income of resident shareholders. Several exemptions are available, essentially in respect of a substantial business presence of the CFC offshore.

Non-resident companies are taxed on income derived from South African sources as well as on capital gains in respect of South African immovable property or rights in immovable property and assets which are attributable to the permanent establishment of that company, unless a DTA exists which provides otherwise.

**L. TREATMENT OF TAX LOSSES**

Assessed tax losses of a taxpayer may be carried forward to the succeeding tax year and may increase an existing assessed loss or be set off against taxable income. Losses may be carried forward indefinitely, provided the company continues to trade.

A taxpayer may not set off an assessed loss incurred in carrying on a trade outside South Africa against any amount derived from carrying on trade in South Africa. It is thus important to distinguish whether a person has merely expanded his or her local trade abroad or whether a separate trade is being carried on outside South Africa.

Compromises or concessions reached with creditors have the effect of reducing the assessed loss in certain circumstances. A specific anti-tax avoidance provision in the ITA also counters the trading in assessed losses.

The ITA also provides for the ringfencing of assessed losses from secondary trades, with the consequence that losses from these secondary trades may not be set off against any income that a taxpayer generates, other than the income from such secondary trades. These activities include:

- any sport practised by that person or any relative;
- any dealing in collectibles by that person or any relative;
- animal showing by that person or any relative;
- farming or animal breeding, unless that person carries on farming, animal breeding or activities of a similar nature on a full-time basis;
- any form of performing or creative arts practised by that person or any relative; or
- any form of gambling or betting practised by that person or any relative.
There are also limitations on the use of losses created by transactions taking place between connected persons.

M. WEALTH TAX

There is no specific ‘wealth tax’, but the transfer of wealth is taxed by way of estate duty. Please refer to in Section XIII, Part E.

N. WITHHOLDING TAXES

The rate of withholding tax on dividends is 15%, though this may be reduced in terms of the provisions of an applicable DTA.

The rate of withholding tax on royalties is 15%, though this may be reduced in terms of the provisions of an applicable DTA.

The rate of withholding tax on interest is also 15%, though this may be reduced in terms of the provisions of an applicable DTA.

SECTION XIII – TAX ON INDIVIDUALS

A. ALLOWANCES

The taxable income of an individual is determined in a similar manner to the manner in which the taxable income of a company is determined.

However, the detailed application of the rules will depend on whether the individual is conducting an enterprise (sole proprietorship) or derives income from employment or from passive investments. For example, an individual who conducts an enterprise will be entitled to similar types of allowances available to a company conducting an enterprise, unless expressly excluded.

Individuals are subject to limitations in respect of the types of expenditure which may be claimed in respect of remuneration.

B. CALCULATION OF TAXES

The taxable base

The taxable base of an individual is determined in a similar manner to that set out in Section XII, Part B.

C. CAPITAL GAINS TAX

Capital Gains Tax applies. Please refer to Section XII, Part C.

D. FILING AND PAYMENT REQUIREMENTS

A year of assessment for individuals ends on the last day of February each year. For example, the 2015 year of assessment ran from 1 March 2014 to 28 February 2015.

Every year, SARS announces its ‘Tax Season’ during which individuals must submit their annual income tax returns. The tax season for 2015 opened on 1 July 2015 and the deadline for filing will depend inter alia on whether the taxpayer is a provisional taxpayer and/or on whether the taxpayer submits his/her return via e-filing.

Generally, individuals do not have to file income tax returns if they:

- earn only ‘normal’ remuneration below a certain threshold (ZAR 350 000 for the 2015 tax year), if employees’ tax was withheld from such remuneration; or
- receive income other than remuneration (eg investment income), below certain thresholds.

If an individual is obliged to register as a provisional taxpayer, he or she has to pay provisional tax and file provisional tax returns in a similar manner as set out in Section XII, Part D.
An individual will similarly be obliged to pay any further income tax upon assessment.

**E. INHERITANCE AND GIFT TAX**

Estate duty is a tax on the transfer of wealth, leviable on death. The duty is levied at the rate of 20% on the worldwide estates of deceased persons in respect of all property owned by residents and on South African property owned by non-residents.

Donations tax is imposed in respect of the gratuitous disposal of any property by a South African resident. Donations tax is as a general rule payable by the donor, not by the recipient, though the donor and recipient will be jointly and severally liable to pay donations tax if the donor fails to pay donations tax within the stipulated time period.

In other words, the mere presence of an individual in South Africa is not sufficient to subject him or her to inheritance or gift tax.

**Assets subject to tax**

Estate duty is levied on the worldwide estates of deceased persons in respect of all property owned by residents and South African property owned by non-residents. It is levied on the ‘dutiable amount of the estate’ exceeding ZAR 3.5 million.

Donations tax is imposed in respect of the gratuitous disposal of any property by a South African resident. If SARS is of the opinion that property has been disposed of for a consideration which is not adequate, the property will be deemed to have been disposed of under a donation (albeit that the actual consideration is deducted in calculating the donations tax).

**Tax rates**

- **Estate duty**: 20% on the dutiable amount of the estate.
- **Donations tax**: 20% on the value of any property donated.

**Allowances**

- **Estate duty**: A basic deduction of ZAR 3.5 million is allowed from the value of the net estate before calculating estate duty. Further deductions are allowed in respect of, for example, liabilities, bequests to public benefit organisations and property accruing to surviving spouses. The Davis Tax Committee has in the last year been considering South Africa’s tax system, and has released several interim reports with recommendations in respect of tax reform to the Minister of Finance. A report released during August 2015 contained a number of proposals regarding estate duty reforms, including doing away with the deductions in respect of property accruing to surviving spouses. However, the report at this stage contains only recommendations and no legislative amendments have been proposed in this regard yet.

- **Donations tax**: Certain donations are exempt from donations tax, including certain donations between spouses and donations to public benefit organisations or other charitable organisations. A natural person is entitled to an exemption on donations that are made during the year of assessment of up to ZAR 100 000. Non-natural persons are exempt from donations tax in respect of casual gifts up to a threshold of ZAR 10 000. Non-residents do not pay donations tax, even if they donate South African assets. Public companies which are residents of South Africa are also exempt from paying donations tax.
Payment and filing requirements

The executor of an estate must submit a return to the Commissioner, subsequent to which the Commissioner shall issue a notice of assessment reflecting the duty payable.

Donations tax must be paid by the end of the month following the month during which the donation takes effect, and the payment of the tax must be accompanied by a return.

F. REAL ESTATE/ HABITATION TAX

There is no real estate or habitation tax but all property owners (whether individuals, companies) are, however, obliged to pay municipal rates.

G. SALES TAX

VAT applies to individuals in a similar manner as it does to any other person; ie an individual conducting an enterprise may also (be required to) register as a VAT vendor, and customers who are individuals also pay VAT in respect of supplies made to them by a VAT vendor, or in respect of goods or certain services imported into South Africa.

H. STOCK OPTION, PROFIT SHARING AND SAVINGS PLANS

Taxation of stock option plans

Section 8C of the ITA deals with the taxation of equity instruments (which could include shares, options or contractual rights deriving their value from shares or options) acquired by virtue of the person’s employment.

These rules are aimed at ensuring that gains derived in respect of equity instruments which are subject to restrictions, are taxed as ordinary income and not as capital gains. There may also be an employees’ tax withholding obligation in respect of such gains. Please refer to Section XIII, Part N.

Taxation of profit sharing plans

If the profit sharing plans include equity instruments, the potential application of section 8C of the ITA must be considered. If a profit sharing plan does not involve equity instruments, but it is provided as part of the remuneration package of an employee or director of a private company, it will be subject to employees’ tax. Please refer to Section XIII, Part N.

Taxation of savings plans

Savings plans for individuals will generally be taxed as normal passive income (eg interest earned by individuals will be subject to normal income tax, subject to the exemption provided in respect of local interest income which is currently ZAR 23 800 for individuals).

However, a new tax-free savings account has been introduced with effect from 1 March 2015 in order to encourage saving by individuals. No income tax, CGT or dividend withholdings tax will be charged in respect of tax-free savings accounts. However, the tax-free savings account provides only limited planning opportunities, as the maximum annual investment is ZAR 30 000, while the maximum lifetime limit is ZAR 500 000.

I. TAXATION OF BENEFITS IN KIND

The Seventh Schedule to the ITA deals with the taxation of taxable fringe benefits. The Seventh Schedule inter alia stipulates to which extent benefits provided to employees will be taxable. It also deals with how such benefits should be valued. To the extent that a benefit constitutes a taxable fringe benefit, it will be included in the employee’s remuneration and will be subject to income tax at normal income tax rates. The employer will also be obliged to withhold employees’ tax in respect of such taxable fringe benefit.
Allowances provided to employees in order to enable such employees to incur business expenditure such as having to use their own vehicles for business purposes, or to pay for meals and incidental costs while on business trips away from home, are subject to different tax rules. The full amount of these allowances will not be subject to employees’ tax at the time when they are paid, but the final income tax liability in respect thereof will be determined on assessment.

**J. TAXES ON DIVIDENDS**

Dividends paid by resident companies generally qualify for an exemption, but dividends may in certain circumstances be excluded from the exemption. For example, if a dividend is received by or accrued to a person in respect of services rendered or to be rendered, or in respect of or by virtue of employment or the holding of any office.

**K. TAX ON INCOME**

National tax rates on income for residents

Individuals pay tax at progressive tax rates depending on their taxable income.

A year of assessment for individuals ends on the last day of February each year. For the 2015 tax year, ending on 28 February 2015, the maximum income tax rate was 40% of the taxable income where income exceeded ZAR 673 101 per annum.

For the 2016 tax year, the maximum marginal income tax rate was increased to 41%.

**Income tax for non-residents**

The same progressive income tax rates that apply to residents, also apply to non-residents.

**L. TERRITORIALITY RULES**

South Africa applies a residence-based income tax system, in terms of which South African residents are taxed on their worldwide income and non-residents are subject to income tax on income from a South African source.

Non-residents are subject to CGT on capital gains arising from the disposal of immovable property situated in South Africa held by that non-resident or any interest or right in immovable property situated in South Africa, as well as in respect of the disposal by the non-resident of any asset which is attributable to a permanent establishment of that non-resident in South Africa.

**Tax as worldwide income**

For residents, the answer is in principle yes, while for non-residents it is no.

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

Non-resident individuals are taxed on income derived from South African sources as well as on capital gains in respect of South African immovable property or rights in immovable property, unless a DTA exists which provides otherwise.

**M. WEALTH TAX**

Wealth tax is not applicable. Please refer to the information on estate duty and donations tax in Section XIII, Part E.
N. WITHHOLDING TAX

Resident employers must withhold employees’ tax (also referred to as Pay As You Earn or PAYE) from remuneration payable to employees.

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

Residents vs non-residents

There is, in principle, no difference in the way in which resident or non-resident employees are treated from a PAYE perspective, subject to the provisions of an applicable DTA.

However, the obligation to withhold employees’ tax only applies to resident employers, or to a non-resident employer with a representative employer in South Africa.

SECTION XIV – GENERAL TAX CONSIDERATIONS

When establishing any new company or restructuring any existing structure, both the specific as well as general anti-tax avoidance provisions should be taken into account not only to attempt to achieve the desired tax consequences, but also to ensure that there are no unintended tax consequences which may impact negatively on the commercial considerations.

Advance tax rulings

The TAA provides for a system of advance rulings. The stated purpose of this system is “to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of ‘advance rulings’”.

The system provides for different types of rulings, namely:

- binding private rulings;
- binding class rulings;
- binding general rulings; and
- non-binding private opinions.

Advance rulings may only be applied for in respect of proposed transactions (ie not in respect of transactions which have already been concluded or implemented). SARS may reject applications for advance rulings in the circumstances set out in section 80 of the TAA.

If an advance ruling applies to a person as provided for in section 83 of the TAA, then SARS must interpret or apply the applicable tax Act in accordance with such binding ruling. However, it does not bind the taxpayer. A taxpayer may thus choose not to apply the findings of the binding ruling, but this holds some risk as SARS will most likely still apply its view as set out in the advance ruling.

A non-binding private opinion does not have a binding effect upon either SARS or the taxpayer and may not be cited in any proceedings, other than proceedings which involve the person to whom the opinion was issued.
General anti-tax avoidance system

The ITA contains a number of anti-tax avoidance provisions, some specific and others general.

Specific anti-tax avoidance provisions aim to counter very specific arrangements described in the provisions which may avoid tax, while the general anti-avoidance rules (GAAR) in Part IIA of the ITA allow SARS to attack any “impermissible tax avoidance arrangement”. An impermissible tax avoidance arrangement is an arrangement which results in the avoidance, postpone or reduction of any tax liability, if its sole or main purpose was to obtain a tax benefit, and if the arrangement does not satisfy the “normality” criteria as set out in Part IIA.

Part B of Chapter 4 of the ITA contains detailed rules regarding reportable arrangements, in terms whereof certain arrangements must be reported to the Commissioner within 45 business days from the date that such arrangement qualifies as a reportable arrangement or the date from which the person becomes a participant to such arrangement. The relevant sections as read with the relevant ministerial notices list a number of specific types of arrangements which are reportable, and also list characteristics which will result in an arrangement being reportable.

SARS could also apply the common law doctrine of ‘substance over form’ to attack simulated/ artificial transactions.

The ITA contains transfer pricing rules which correspond to the rules applicable in most industrialised countries. SARS has issued a practice note on the application of the transfer pricing rules which is based on the OECD Transfer Pricing Guidelines for Multi-national Enterprises and Tax Administrations.

SECTION XV – IMMIGRATION REQUIREMENTS

A. IMMIGRATION CONTROLS

There are no immigration quotas.

Certain medical certificates and vaccinations are required in certain instances. Further information is available on the Department of Home Affairs website: www.dha.gov.za.

Entry permits

Entry permits are required. They must be applied for before entering the country. Visas are not issued at South African ports of entry. Airline officials are obliged to insist on visas before allowing passengers to board.

Immigration officials are obliged to put people arriving without visas onto flights back to their home countries.

Exit permits are not required.

B. IMMIGRATION REQUIREMENTS/ FORMALITIES

Resident permits

Residence permits are required. Permanent residence permits are divided into two main categories:

- **Direct residence:** This is issued to foreigners who have been on a work permit for five years and who have received a permanent offer of employment. In general, if a foreigner meets all the requirements, their spouse and children under 21 will likewise qualify for permanent residence.
• **Residence on other grounds:** This includes foreigners who:
  
  • have been made a job offer within certain conditions;
  • possess exceptional skills or qualifications;
  • intend to set up businesses in South Africa;
  • intend to retire in South Africa;
  • are financially independent;
  • qualify as refugees; and
  • are relatives of a South African citizen.

All immigration applicants older than 21 years of age must submit to a personal interview.

New regulations passed in terms of the Immigration Act state that one cannot change from a visitor’s visa to another type of visa. These applications for change of conditions must be made at a mission abroad (ie an embassy or consulate) where the applicant is an ordinary resident or holds citizenship.

A person wishing to immigrate permanently to South Africa should be of “good and sound character” and not follow an occupation in which there are already sufficient people available to meet the country’s needs.

Documentation is required in relation to the specific permit applied for. A list of the various permits as well as the documentation required is available on the Department of Home Affairs website: www.dha.gov.za.

**Time-frame**

This depends on the category of the application. Please see the indicative timeline set out under Section XV, Part C.

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**C. VISAS**

Visas are required by foreigners who wish to travel to, or stay in, the country. Residents of certain countries are exempt. A list of the countries whose residents do not require visas is available on the Department of Home Affairs website at: www.home-affairs.gov.za/index.php/immigration-services/exempt-countries.

The duration of the validity of the visa is dependent on the type of visa issued. An exhaustive list of available visas as well as the information pertaining to them is available at: www.vfsglobal.com/dha/southafrica/ and on the Department of Home Affairs website at www.dha.gov.za.

A visa application should be made at the nearest South African embassy, mission or consulate in the applicant’s country of residence, which will determine the outcome of the application.

**Required documents**

• **Visitors’ visas:**
  
  • Duly completed online form.
  • Valid passport which expires in no less than 30 days after the expiry of the intended date of departure from South Africa, and which has at least one unused page for entry/departure endorsements.
  • Proof of payment of the applicable fee.
  • A yellow-fever vaccination certificate (if required).
  • Statement and/ or documentation confirming the purpose and duration of the visit.
  • Two colour passport photographs.
  • A return or onward ticket if travelling by air.
• Proof of financial means to pay for living expenses while in South Africa in the form of bank statements, salary advances, undertakings by the host(s) in South Africa, bursaries, medical cover or cash available (including credit cards and travellers’ cheques).

It is worth noting that the Department of Home Affairs has recently enacted new regulations for those entering or leaving the country with minor children. The following additional documents must be provided in respect of minor children:

• proof of guardianship or custody or consent from the guardian in the case of an unaccompanied minor; and
• the minor’s unabridged birth certificate.

These additional requirements are, however, the subject of parliamentary debate and may be revised.

• Business visas:

• Duly completed online form.
• Valid passport which expires in no less than 30 days after expiry of the intended date of departure from South Africa, and which has at least one unused page for entry/ departure endorsements.
• Proof of payment of the applicable fee.
• A yellow-fever vaccination certificate (if required).
• Medical and radiology reports.
• A police clearance certificate from each country where of residence since the age of 18 years, including South Africa.
• A repatriation deposit, equivalent to the value of a return ticket to the country of origin/ permanent residence; which is refundable after the final departure or after the person has acquired a permanent residence permit.

• A certificate issued by a chartered accountant registered with the South African Institute of Chartered Accountants or a professional accountant registered with the South African Institute of Professional Accountants to the effect that the investor has at least ZAR 5 million which originated from abroad and is available to be invested as part of the business.
• Undertaking that at least 60% of the total staff complement to be employed in the operations of the business shall be South African citizens or permanent residents employed permanently in various positions.
• An undertaking to register (where legally required) with SARS, UIF, Compensation Fund for Occupational Injuries and Diseases, CIPC and the relevant professional body, board or council.
• A letter of recommendation from the DTI regarding the feasibility of the business and the contribution to the national interest of South Africa.

The documentation required for both visitors and business visas is subject to change – the most recent information is available on the Department of Home Affairs website at www.dha.gov.za.

**Time-frame**

This depends on the category of visa application. However the Department of Home Affairs advises of a minimum processing time of eight to 10 weeks for Temporary Residence Permit applications and eight to ten months for Permanent Residence Permit applications.
**Costs**

A table setting out the fees applicable to certain visa applications is set out below:

<table>
<thead>
<tr>
<th>Category</th>
<th>Application Fee (in ZAR)</th>
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<tbody>
<tr>
<td>Business Visa</td>
<td>1 520</td>
</tr>
<tr>
<td>Corporate Visa – Employer or Corporate Entity</td>
<td>1 520</td>
</tr>
<tr>
<td>Critical Skills Visa</td>
<td>1 520</td>
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<tr>
<td>General Work Visa</td>
<td>1 520</td>
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<tr>
<td>Intra Company Transfer Visa</td>
<td>1 520</td>
</tr>
<tr>
<td>Visitor Visa</td>
<td>1 520</td>
</tr>
</tbody>
</table>

These figures are updated annually.

**SECTION XVI – EXPATRIATE EMPLOYEES**

**A. COST OF LIVING AND IMMIGRATION**

The cost of living compared to other countries is significantly less than in the US, the UK or Europe.

**B. DRIVERS’ LICENCES**

The provisions of the National Road Traffic Act 93, 1996 permit a person to drive in South Africa with his/ her foreign driving licence, provided the licence meets the following requirements:

- the licence has been issued in an official language of South Africa, or a certificate of authenticity or validity issued in an official language of South Africa by a competent authority, or a translation of that licence in an official South African language, is attached to the licence; and
- the licence contains or has attached to it a photograph and the signature of the licence holder.

One may convert one’s foreign driving licence into a South African licence (provided the requirements above are met) by applying at a driving licence testing centre or apply for a South African licence by taking learner’s and driver’s examinations.

**Costs**

The cost of application is determined by the wtype of driver’s licence:

- **Heavy motor vehicle:**
  - Application: ZAR 200
  - Card issue: ZAR 140

- **Light motor vehicle:**
  - Application: ZAR 135
  - Card issue: ZAR 140

In order to obtain a learner’s licence the applicant must pass a written examination. To obtain a driver’s licence a practical examination must be passed. Both learner’s and driver’s examinations are conducted at driving licence testing centres.
C. EDUCATION

Types of schools

There are two types of schools: independent (private) and Government/State (public).

The quality of State schooling available varies considerably. Under the apartheid regime, schools were segregated with the schools for white children receiving the most funding and resources. This has largely been remedied since the appointment of our ANC-led government.

Costs

All State schools are publicly funded but may top up funds with fees, as agreed with parents or the board. Private schools charge fees, which they determine.

Enrolment requirements

The following documents are required for the child’s enrolment:

- Completed application form from the school.
- Official birth certificate.
- Immunisation card.
- If the child is moving from one school to another, his or her latest school report and a transfer card.

If the child is not a South African citizen, the following documents are also required:

- Study permit.
- Temporary or permanent residence permit or proof of application for permission to stay in South Africa.

Tax benefits

The payment of school fees by the employer constitutes a taxable fringe benefit for the employee and no deduction can be claimed by an employee in respect of school fees.

D. HOUSING

Housing is available for rent or purchase in South Africa. Various types of housing are available – investors would be well advised to contact estate agents operating in the cities or areas they intend to live in to discuss suitable housing options.

Tax relief in respect of housing

A subsidy in respect of a loan is expressly included as a taxable fringe benefit. However, the employer can provide an expatriate with residential accommodation, if the expatriate is away from his or her usual place of residence outside South Africa for a period not exceeding two years from the date of his or her arrival in South Africa. The value of the residential accommodation will be taxable to the extent that it exceeds ZAR 25 000 per month.

E. IMPORTING PERSONAL POSSESSIONS

Personal belongings may be imported normally as accompanied baggage in which case they must be declared through the traveller section and no formal customs registration will be required.

Personal belongings may also be shipped as cargo by an international moving company. If the personal goods are imported as cargo, the individual must be registered with customs and must ensure that a formal customs clearance document is submitted for the personal goods.
Import duties

The goods or effects may be imported into South Africa without the payment of customs duty and VAT in terms of rebate item 407.06 of Schedule No. 4 to the Customs and Excise Act, provided that the owner has been out of South Africa for a period of six months or longer.

Clearing through customs

The following will be required for the importation of personal effects and household goods:

- Inventory of the goods.
- P1.160 Declaration in respect of unaccompanied manifested household effects. DA 304 Item 407.06 Scheduling No. 4 to the Customs and Excise Act.
- SAD 500 Customs Declarations Form.

F. MEDICAL CARE

Medical care is provided free of charge or at a subsidised cost at specific Government hospitals and clinics.

South Africans are not required to pay any separate fee or contribution toward the provision of Government medical care. However, for various reasons, including under-resourcing at Government hospitals and clinics, many South Africans opt for private medical care instead.

The law provides for and regulates these private medical schemes and private hospitals.

All medical schemes in South Africa which are deemed to be conducting the “business of a medical scheme”, as defined in the Medical Schemes Act 131, 1998 (MSA), are obliged to register under the MSA and are accordingly regulated by the MSA. The Council for Medical Schemes (CMS) is a statutory body established in terms of the MSA to provide regulatory supervision of private health financing through medical schemes.

There are currently 97 medical schemes registered in South Africa with around 8 679 473 beneficiaries. Medical schemes provide medical insurance to an individual if such individual becomes a member of the scheme and makes the necessary contributions to the scheme. There are no statutory obligations on employers to contribute to a medical scheme on behalf of their employees. It is, however, common that employees employed in both the private and public sector in South Africa will be required, in terms of their conditions of employment, to become members of a medical scheme.

Other than the medical care provided at Government hospitals and clinics, there is not currently a comprehensive national health care system available which individuals are required to contribute to and through which they can access their healthcare. The Government is in the process of drafting a white paper on National Health Insurance. However, it is unclear when this policy document will be released.

G. MOVING COSTS

The costs will vary depending on the country from which the investor is relocating.

Tax allowances

Provision is made for the employer to pay the relocation expenses of the employee on a
The costs included in the relocation benefit are, those:

- of transporting the employees, the members of his or her household and his or her personal goods and possessions from his or her previous place of residence to the new place of residence;
- of hiring residential accommodation in a hotel or elsewhere for a period of up to 183 days, if such residential accommodation was occupied temporarily pending the obtaining of permanent resident accommodation; and
- as may be allowed by the Commissioner in respect of settling in permanent residential accommodation at his or her new place of residence. The Commissioner generally allows a tax-free settling-in allowance of an amount equal to up to one month's salary.

**H. TAX LIABILITY**

In terms of the South African residence basis of taxation, non-residents are subject to income tax on income from a South African source. The concept of ‘source’ is not defined in the ITA, but section 9 of the ITA deals with a number of types of income and stipulates when such amounts will be received by or accrued to a person from a South African source.

Should section 9 not deal with a specific type of income, regard must be had to the concept of source as developed in case law.

Section 9 does not deal with source in the context of services rendered. However, in accordance with case law guidelines, compensation for services rendered is from a South African source to the extent that the services are rendered in South Africa. An expatriate will thus in principle to pay income tax on remuneration received for services rendered in South Africa, except to the extent that relief is provided by a DTA (if applicable).

**Allowances available to expatriates**

There are no specific income allowances available to expatriates, other than the benefits referred to in Section XVI Parts D and G.

In terms of section 23(m) of the ITA, employees (which will include both resident and non-resident employees) may not claim expenditure relating to any employment of or office held by that person, as a deduction other than the types of expenditure as provided for in that section. These expenses are quite limited and include:

- contributions to a pension fund, provident fund or requirement annuity fund (subject to the limitations as set out in the relevant sections);
- any remuneration received by the taxpayer which has to be refunded by the taxpayer; and
- home office expenses to the extent that it is permissible in terms of section 23(b) of the ITA.

Contributions to a medical scheme also qualify for ‘tax credits’, but the credit amounts are very small and thus provide very limited relief.

UIF contributions are not payable with respect to expatriate employees who are obliged to return to their home countries at the end of their contracts.

**Tax treaties**

Most of these treaties contain a clause dealing with the taxation of income from employment, which stipulates that remuneration derived by an expatriate (who is tax resident in the other
contracting State) will be taxable only in the expatriate’s home country if:

- the expatriate is present in South Africa for a period or periods not exceeding 183 days in any 12-month period commencing or ending in the fiscal year concerned (Note: Some older DTAs refer not to a 12-month period commencing or ending in the fiscal year concerned, but provide that the relief will not apply if the expatriate is present in South Africa for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned);
- the remuneration is paid by or on behalf of a non-resident employer; and
- the remuneration is not borne by a permanent establishment which the employer has in South Africa.

I. WORK CONTRACTS

Employees should have an employment contract. If the employee is a foreigner, her or his work permit is likely to be valid only for a specified period. It is therefore fairly common for foreigners to be engaged only for limited periods of time.

J. WORK PERMITS

An investor must have a work permit to work in the country. An application for a work visa should be made at the nearest South African embassy, mission or consulate in that person’s country of residence. That embassy, mission or consulate will determine the outcome of the application.

If a person has entered South Africa on a tourist visa he or she will not be able to apply for a work visa inside South Africa as this is in contravention of the Immigration Act.

Documents required

- Duly completed online form.
- Valid passport which expires in no less than 30 days after expiry of the intended date of departure from South Africa, and which has at least one unused page for entry/ departure endorsements.
- Proof of payment of the applicable fee.
- A yellow-fever vaccination certificate (if required).
- medical and radiology reports;
- A police clearance certificate from each country where the person has resided since the age of 18 years, including South Africa.
- A repatriation deposit equivalent to the value of a return ticket to the country of origin/ permanent residence, which is refundable after final departure or on the issuing of a permanent residence permit;
- Proof of financial means to pay for living expenses while in South Africa in the form of bank statements, salary advances, undertakings by the host(s) in South Africa, bursaries, medical cover or cash available (including credit cards and travellers’ cheques).
- An undertaking to notify the Department when such foreigner is no longer employed or is employed in a different capacity or role.
- A certificate from the Department of Labour confirming that:
  - the applicant has qualifications or proven skills and experience in line with the job offer;
• despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
• the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in South Africa;
• the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in South Africa and is made conditional upon the general work visa being approved; and
• full particulars of the employer, including, where applicable, proof of registration of the business with CIPC.
• Confirmation, in writing, from the professional body, council or board recognised by SAQA, or any relevant Government department confirming the skills or qualifications of the applicant and appropriate post-qualification experience.

**Table of fees**

The fees applicable to certain permits follow on the right. The fee is payable in different currencies in different countries.

**Time-frame**

Applications to the South African representative abroad take an average of 15 to 45 working days from the date of submission.

Applications to the Department of Home Affairs in South Africa take an average of 30 to 90 working days from the date of submission.

<table>
<thead>
<tr>
<th>Category</th>
<th>Application Fee (in ZAR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>26(a) Worker</td>
<td>1 520</td>
</tr>
<tr>
<td>26(b) Spouse</td>
<td>0</td>
</tr>
<tr>
<td>26(c) Dependant(&lt;21)</td>
<td>0</td>
</tr>
<tr>
<td>26(d) Dependant(&gt;21)</td>
<td>1 520</td>
</tr>
<tr>
<td>27(a) Worker</td>
<td>1 520</td>
</tr>
<tr>
<td>27(b) Extraordinary Skills</td>
<td>1 520</td>
</tr>
<tr>
<td>27(c) Business</td>
<td>1 520</td>
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<tr>
<td>27 (d) Refugee</td>
<td>0</td>
</tr>
<tr>
<td>27(e) Retired</td>
<td>1 520</td>
</tr>
<tr>
<td>27(f) Financially Independent</td>
<td>1 520</td>
</tr>
</tbody>
</table>

General work permits are valid for the duration of the contract of employment. A general work permit will lapse if the holder fails to submit satisfactory proof to the Director-General that he or she is still employed along with proof of the terms and conditions of the job and the job description. Such proof must be submitted within six months of the work permit being issued and every year thereafter.
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