



BOWMANS

THE VALUE OF KNOWING



**A BRIEF GUIDE TO
DOING BUSINESS IN
SOUTH AFRICA, 2021**



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Foreword

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

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

We hope you find it useful.

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

Alan Keep
Managing Partner

The contents of this guide are for reference only and should not be considered to be a substitute for detailed legal advice. It is correct as at July 2021.



Introduction



The Country at a Glance

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

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

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

Cultural and religious influence in business

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

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

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

Infrastructure and transportation

The transport infrastructure in South Africa is modern and developed, with further plans for development over the next 10 years, expedited by structural reforms linked to improvements in public investment management and greater private-sector participation in infrastructure development.

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

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

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

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

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

Telecommunications

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

Public services

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

Due to dense population in the cities, increased urbanisation and ageing power stations, there is significant pressure on electricity supply at peak times, which has led to major energy concerns and intermittent black-outs, known as 'load shedding'. In recent developments, President Ramaphosa announced that the Electricity Regulation Act will be amended to allow private generation to develop up to 100MW of power without requiring a licence from the energy regulator.

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

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

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

General Considerations

1. What is the legal system in South Africa?

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

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

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

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

COVID

The World Health Organisation (WHO) categorised the severe acute respiratory syndrome novel Coronavirus 2 (COVID-19) as a pandemic. Pursuant to this, on 15 March 2020, President Cyril Ramaphosa declared a national state of disaster in South Africa in terms of the Disaster Management Act, 2002, as amended (DMA). Since that date, government has announced bold measures to contain the spread of the virus in South Africa.

The country currently operates under a five level risk adjusted strategy to the pandemic with special measures for certain "hotspots" aimed at curtailing the spread of the virus while at the same time opening the economy as much as possible. The risk level (level 5 being the highest alert level, corresponding to the most drastic lock-down measures and Level 1 resuming normal activity) is determined with reference to the level of infection and capacity of the healthcare system at any particular place and time.

For a more detailed analysis of the fast moving laws in this space, please have reference to our COVID portal, accessible [here](#).

Developments relevant to foreign investment

South Africa welcomes foreign investment, in both the public and private sectors and in all spheres of the economy. Although the country faces social challenges in respect of unemployment, a large current account deficit, a volatile currency and slowing demand for commodities, there is significant scope for foreign direct investment in the fast-moving consumer goods, financial services, hospitality, pharmaceuticals, resources, retail, and telecommunications and information technology sectors.

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

Government has emphasised policies and programmes to further encourage foreign investment. To this end, the Department of Trade and Industry and Competition (DTIC) offers a wide range of incentive schemes to encourage the growth of competitive new enterprises and the creation of sustainable industries.

The Promotion and Protection of Investment Act 22, 2015 (the PPI Act) was passed by Parliament on 3 November 2015.

The PPI Act provides for the protection of investors and their investments. 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. Importantly, the PPI Act provides a foreign investor with the same rights that a domestic investor enjoys. It states that foreign investors will be treated no less favourably than domestic investors.

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. The DTIC has however defended the PPI Act, 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 DTIC has also stated that the PPI Act is in keeping with international trends, in that countries are increasingly terminating bilateral investment treaties and introducing legislation to deal with investments internally.

South Africa is also a member of, or party to, many international bodies, cooperation agreements, treaties and other instruments that deal with foreign investment. As an example, the commencement of the AfCFTA Trade Protocol this year has already generated interest from investors, which is set to continue as the remaining protocols are finalised and become operational. Key protocols include that in trade in goods, trade in services, dispute settlement, competition policy, intellectual property and investment. Experts expect that in addition to the traditional aims of protecting, promoting and liberalising investments, investment facilitation (i.e. measures to enable and expedite investment) will be a key element of the protocol. If fully implemented, the AfCFTA will significantly increase intra-continental trade and economic growth.

The Minister of Finance and Government/National Treasury are continually looking at even more ways to encourage investment into South Africa and to streamline possible areas which may have caused delays or created a barrier to investment in the past. From an exchange control perspective for example, the key shift which National Treasury is implementing is a move away from the “restrictive” approach that disallowed any capital flows without permission, to a “progressive”, pro-investment allowance of all capital flows, save for a limited list of risk-based capital flow measures.

The commencement of the Protection of Personal Information Act

The majority of the provisions of the Protection of Personal Information Act (POPIA), South Africa’s data protection legislation, came into force on 1 July 2020. Among other things, POPIA deals with the conditions for the lawful processing of personal information; the requirements for the treatment of special personal information and children’s personal information; the prior authorisation of certain processing activities; the cross-border transfer of personal information; the duties and responsibilities of information officers; direct marketing by means of unsolicited electronic communication; and reporting and notification of data breaches.

POPIA provided organisations with a transitional period of 1 year within which to ensure compliance with POPIA. The transitional period has since lapsed and the majority of the substantive provisions of POPIA became enforceable on 1 July 2021. This means that both private businesses and organisations and public bodies that process personal information must ensure that they comply with POPIA.

Some other developments that mirror international trends

Similar to many other jurisdictions, we are also seeing increased focus on (i) Environmental, social and governance (ESG) issues, for good reason with its impact on obtaining financing; investment strategies; shareholder and other activism; and disclosure requirements; (ii) our competition/antitrust laws as they pertain to public interest considerations and separately online intermediation platforms; and (iii) responses to the international threat of cybercrime and data breaches.



Establishing a Business



Business Vehicles

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

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

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

Limited liability companies

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

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 memorandum of incorporation (MOI) provides otherwise.

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

An investor may either incorporate a new limited liability company with the Companies and Intellectual Property Commission (CIPC), or it may purchase a so-called 'shelf company'.

Incorporating a new limited liability company

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

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

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

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

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

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

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

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

Purchasing a 'shelf company'

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

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

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

Timeframe

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

The timeframe applicable to the incorporation of a limited liability company is usually about 11 to 25 business days, depending on the backlog faced by the CIPC and the complexity of the limited liability company's MOI.

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 company.

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

Costs

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

People

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

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 representative taxpayer.

We are anticipating changes to our Companies Act later this year, which we have been told is likely to contain new requirements for worker representation on boards. This however remains to be seen.

Personal liability companies

A profit company is a personal liability company if it meets the criteria for a private company 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, attorneys and engineers, whose business activities are regulated by an authority that does not permit its individual members to enjoy the protection of limited liability.

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

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

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 non-South African director's nationality and passport number.

All companies, including personal liability companies, must have a public officer who resides in South Africa.

Partnerships, general or limited

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

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

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

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

Sole proprietorships

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

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

There is no legal framework applicable to sole proprietors.

Joint ventures

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

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

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

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

All companies are required by law to file their annual returns with the CIPC within a certain period of time each year. The CIPC uses this information to ensure that it is in possession of the latest information on the company and to determine whether the company is conducting business activities. Companies that are required to be audited are required to submit a copy of their annual financial statements together with the annual return. There are proposed amendments to the Companies Act that will result, if promulgated, in companies having to submit their share registers and beneficial shareholder registers with the CIPC at the time of filing their annual returns, though that is not yet in force.

Company management structure and key liability issues.

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

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

In terms of Section 72(3) of the Companies Act and the MOI, the board can however delegate this authority, whether expressly or impliedly, to any person, whether it is to a single director, a board appointed committee or employees. Such delegation does not absolve the board from its responsibilities, which ultimately remains accountable for all decisions taken on its behalf.

Investment Incentives

5. What grants or incentives are available to investors?

South Africa is firmly focused on foreign direct investment and has a range of incentives available for various industries and economic activities that government has prioritised. For example, special incentives apply in respect of investments made in a number of designated special economic zones. These incentives include a reduced corporate tax rate, a building allowance and employment tax incentives.

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

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

Foreign Investment

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

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 that limits foreign ownership, there are a number of strategic sectors in which regulations affecting foreign entry or ownership are commonly found. These include for example: agriculture and fisheries, broadcasting and print media, business services (e.g. accountancy, legal services), defence and aerospace, energy, financial services, natural resources, nuclear energy and materials, real estate, telecommunications and transport.

Broad-based black economic empowerment

Broad-based black economic empowerment (**B-BBEE**) is a central part of the Government's economic transformation strategy. The formulation of policy and legislation to achieve B-BBEE has been driven by the Office of the Presidency together with the DTI.

A multi-faceted approach to B-BBEE has been adopted with a number of components that aim to increase the numbers of Black people (being South African citizens who have been racially classified as African, Coloured or Indian) who manage, own and control the country's economy, and to decrease racially-based income inequalities.

The B-BBEE Act, and the Codes of Good Practice published under it, is the principal legislation through which B-BBEE is measured. Various sector-specific codes have been published detailing the way that B-BBEE must be measured for businesses operating in particular sectors. Relevant sectors include tourism, marketing, advertising and communications, information communication and technology, forestry, property, construction, agriculture, financial services, defence, chartered accountancy,

aviation, domestic aviation, maritime transport and services industry, rail, road freight, taxi, public sector transport, bus commuter and coach services sector and the forwarding and clearing sub-sector.

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

The closer an enterprise is to reaching a particular target, the more points it will achieve for that element of B-BBEE. The more points a business achieves in total across each of the individual elements, the higher its B-BBEE status level will be, which translates into a procurement recognition level. Where a business presents any information in relation to its B-BBEE score, for example in the context of a tender response, this must be supported by a certificate issued by an accredited verification agency. The certificates issued by the verification agencies are valid for 12 months. A business's B-BBEE score will be determined on the basis of its activities during the previous financial year and its ownership and management structures and staff profile as at the date of measurement.

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

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

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

Exchange Controls

7. Are there any exchange controls or currency regulations?

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

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

- A 'resident' means any person (i.e. a natural person or legal entity) who has taken up permanent residence, is domiciled or registered in South Africa. For the purpose of the Currency and Exchanges Manual for Authorised Dealers (Manual), this excludes any approved offshore investments held by South African residents outside the Common Monetary Area consisting of Lesotho, Namibia, South Africa and eSwatini (CMA). Such entities are, however, still subject to Excon Rules and Regulations.
- A 'non-resident' means a person (i.e. a natural person or legal entity) 'whose normal place of residence, domicile or registration is outside the CMA'.
- The term 'national' is not defined in the Manual, 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 Financial Surveillance Department of the South African Reserve Bank (FinSurv), previously known as the Exchange Control Department of the South African Reserve Bank is responsible for the day-to-day administration of exchange controls.

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

The purpose of exchange controls is, 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, and expressly including intellectual property (IP)) or any right to capital is directly or indirectly exported from South Africa without the approval of either FinSurv or, in certain cases, an Authorised Dealer.

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

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

The Minister of Finance has announced that Government/National Treasury are looking at ways to encourage investment into South Africa and to streamline possible areas which may have caused delays or created a barrier to investment in the past.

From an exchange control perspective, the key shift which National Treasury wishes to implement is a move away from the "restrictive" approach that disallowed any capital flows without permission, to a "progressive", pro-investment allowance of all capital flows, save for a limited list of risk-based capital flow measures.

National Treasury has indicated that these reforms will result in the phasing out of current Exchange Control Regulations to be replaced with new regulations under the Currency and Exchanges Act, 1933 which promises to modernise the capital flow management framework.

To date, only certain reforms have been introduced as a means of accelerating specific dispensations/areas, such as emigrations from South Africa by residents and relaxations to the so-called "loop structure" rules, with the a promise of wider reforms to follow. Accordingly, the existing rules and procedures relating to any potential flows of capital out of South Africa must still be complied with as normal for the time being.

That said, the possibility of reforms aimed at reducing burdens to investment and regulatory compliance is certainly welcomed news for future investment/investors.

Import/ Export Regulations

8. Are there any import/ export regulations?

Any person, whether located in South Africa or not, who imports or exports goods or removes bonded goods must apply for registration/ a licence on the prescribed DA 185 Form and respective annexures, in accordance with the Customs Act.

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

A foreign importer, exporter or licensed remover may apply for registration/ a licence if represented by a registered agent. Such registered agent is:

- a natural person, as a reference to a natural person ordinarily resident in South Africa at a fixed physical address in South Africa; or
- 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 that 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. Meat, fish, tea, certain textile products and certain firearms, however, attract rates of duty calculated either as a percentage of the value or as cents per unit (for example, per kilogram or metre). 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 is the quota on clothing imports from China which endured for a few years. The permits were administered by the DTI and were policed by the South African Revenue Service (SARS). There are safeguard duties imposed on a number of products.

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

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

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

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

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

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.

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 to export certain goods out of South Africa. The International Trade Administration Act 71, 2002 (ITA Act) gives the International Trade Administration Commission (ITAC) the authority to control the movement of goods into and out of South Africa by way of permits.

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

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.

Operating a Business



Employment

9. What are the main laws regulating employment relations?

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

- Labour Relations Act, 1995;
- Basic Conditions of Employment Act, 1997;
- Employment Equity Act, 1998;
- National Minimum Wage Act 2018;
- Skills Development Act, 1998;
- Skills Development Levies Act, 1999;
- Unemployment Insurance Act, 2001;
- Unemployment Insurance Contributions Act, 2002;
- Compensation for Occupational Injuries and Diseases Act, 1993; and
- Occupational Health and Safety Act, 1993.

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

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

- the full name and address of the employer, the name and occupation of the employee or a brief description of the work for which the employee is employed, the place of work and, where the employee is required or permitted to work at various places, an indication of this, and the date on which employment began;
- the employee's ordinary hours of work and days of work, the employee's wages or the rate and method of calculating wages, the rate of pay for overtime work, any other cash payments that the employee is entitled to, any payment in kind that the employee is entitled to and the value of such payment in kind, how frequently remuneration will be paid, and any deductions to be made from the employee's remuneration;

- the leave to which the employee is entitled, the period of notice required to terminate employment and if the employment is for a specified period, the date of termination of employment, and any period of employment with a previous employer that would count towards the employee's period of employment; and
- a description of any council or sectoral determination which covers the employer's business and a list of any other documents that form part of the contract of employment and where a copy of such documents may be obtained.

Applicants for employment are not without protection. 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 consistent with the provisions of Chapter 3 of the Employment Equity Act, or if it is required for the inherent requirements of the job.

11. Is there a minimum wage?

Yes. The National Minimum Wage Act, which came into effect on 1 January 2019, provides that every worker is entitled to payment of a wage in an amount not less than the national minimum wage. Currently, the national minimum wage amount is ZAR 21.69 per hour (as of 1 March 2021), which applies to all workers across all sectors, except for farm workers, domestic workers, workers on an expanded public works programme and learners who have concluded a learnership agreement in terms of the Skills Development Act, who are entitled to different minimum wage rates.

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

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

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

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

In the event of potential redundancies, the employer is required to consult with the potentially affected employees in a meaningful, joint consensus-seeking manner on its proposals before making any decisions to retrench employees. Where employees are members of a trade union, the employer must consult with the trade union on the proposed redundancies, irrespective of whether the trade union is formally recognised by the employer as a collective bargaining agent or not.

In circumstances where a business is acquired as a going concern, section 197 of the Labour Relations Act regulates the employment consequences. In these circumstances, the employment contracts of the employees predominantly assigned to the business being acquired transfer, automatically by operation of law, to the new employer. The new employer is required to recognise the employees' past service with the old employer and to employ the employees on terms and conditions of employment that are on the whole no less favourable to what the employees enjoyed at the old employer (except where the employees' terms are regulated by a collective agreement, in which event the new employer must comply with the terms of the collective agreement as they are). It is possible to contract out of the automatic transfer provisions, but such an agreement cannot be concluded only between the two employer entities – the written agreement of the employee concerned is required. As section 197 provides for the automatic transfer of employment contracts, no consultation is required with the transferring employees or their representative trade union, but it is of course good industrial relations practice to keep employees informed of potential changes.

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

All employees, irrespective of their level of remuneration or seniority, have the right to not be unfairly dismissed. Any dismissal must be both substantively and procedurally fair. Substantive fairness relates to the reason for the dismissal, and procedural fairness concerns the manner in which the dismissal is effected. There are four broad grounds for dismissal that are recognised by the Labour Relations Act:

- misconduct of the employee;
- incapacity of the employee related to poor work performance;
- incapacity of the employee related to ill health; 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 to terminate her or his services is taken.

Certain reasons for dismissal are automatically unfair and employers are accordingly not permitted to rely on such reasons to justify a dismissal. These reasons include participation by the employee in a lawful strike, the employee's pregnancy or intended pregnancy, a going concern transfer or a reason related to a transfer contemplated in section 197 of the Labour Relations Act, or that the employer unfairly discriminated against an employee on a wide range of grounds, such as race, gender, age, religion, language, marital status or family responsibility. Nevertheless, a dismissal based on age is permissible if the employee has reached the normal or agreed retirement age; and a dismissal based on any of the prohibited grounds is fair if it is based on an inherent requirement of the particular job.

On dismissal, an employee is entitled to:

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

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

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

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

Remedies for unfair dismissal

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

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

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

15. Are redundancies and mass layoffs regulated?

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

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

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

Employees are entitled to the following amounts in the event of retrenchment:

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

A lump sum benefit on termination of employment qualify for beneficial tax rates if such termination is due to redundancy.

16. Discrimination

Section 9 of the South African Constitution guarantees the right to equality and prohibits unfair discrimination. The Employment Equity Act gives effect to this right in the employment context. All employers are accordingly prohibited from discriminating unfairly against an employee (or applicant for employment) in any employment policy or practice on a wide variety of grounds, including race, sex, gender, age, religion, HIV status and family responsibility. Differentiation on one or more of these grounds is permissible if required by the inherent requirements of the job, or for purposes of taking affirmative action measures in accordance with the provisions of Chapter 3 of the Employment Equity Act. Harassment on any of the listed grounds is prohibited. In terms of section 6(4), a difference in terms and conditions between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any of the listed grounds constitutes unfair discrimination.

Disputes regarding alleged discrimination must be referred to the Commission for Conciliation, Mediation and Arbitration within 6 months of the date of the alleged discrimination. If the dispute cannot be resolved at conciliation, the aggrieved party may refer it to the Labour Court for adjudication, or, in certain limited circumstances, to arbitration under the auspices of the CCMA. The Labour Court and CCMA have wide powers to remedy unfair discrimination, including making awards for damages in respect of proven patrimonial loss or compensation in respect of non-patrimonial loss such as injury to feelings.

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

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

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

Tax

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

Income tax and capital gains tax

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

A foreign incorporated company should be treated as a resident of South Africa, unless its 'place of effective management' is in South Africa. The ordinary corporate income tax rate of 28% is calculated on the taxable income of a corporate taxpayer, after taking into account all available exemptions, deductions and other relevant provisions. The corporate income tax rate is due to be decreased to 27% for tax years commencing on or after 1 April 2022.

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

A company is subject to CGT at an effective rate of 22.4%, being the corporate CGT inclusion rate of 80% multiplied by the corporate income tax rate of 28%. The corporate CGT rate will thus reduce to 21.6% once the corporate income tax rate has been reduced to 27%.

A non-resident would thus, as a general rule, not be subject to South African income tax unless it derives income or gains from a South African source. Even so, if the non-resident is resident in a jurisdiction which has entered into a DTA with South Africa, its business profits would, as a general rule, only be exposed to South African income tax if the non-resident had a PE in South Africa and then only to the extent that such business profits are attributable to the PE.

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

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

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

Withholding taxes

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

Dividends tax

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

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

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

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

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

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

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

Interest withholding tax

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

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

- interest received or accrued in respect of any government debt instrument;

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

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

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

Value Added Tax

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

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

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

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

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

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

17. How are the following taxed?

Dividends paid to foreign corporate shareholders?:

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

Interest paid to foreign corporate shareholders?:

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

IP royalties paid to foreign corporate shareholders?:

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

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

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

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

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

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

According to the South African Revenue Services, 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. The South African Revenue Services will consider a taxpayer to be thinly capitalised if, among other factors:

- 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.

In its draft interpretation note, the South African Revenue Service indicated that they will consider transactions in which the Debt:EBITDA ratio exceeds 3:1 to be of greater risk. However, they emphasised that this ratio is not a 'safe harbour' rule.

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. The section provides for a limitation on interest deductions in respect of debts owed to persons not subject to tax under Chapter II of the ITA. It contains a formula that restricts the interest deduction to a percentage of 'adjusted taxable income' as defined in the section.

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

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

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

20. Are there any transfer pricing rules?

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

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

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

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

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

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

Employees' tax

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

An employer's employees' tax liability may be reduced in terms of the Employment Tax Incentive Act 26, 2013, which is intended to support employment growth by focusing on labour market activation.

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

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

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

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

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

Unemployment Insurance Fund contributions

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

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

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

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

Skills development levies

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

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

Compensation for Occupational Injuries and Diseases Act

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

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

Consumer Protection

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

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

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

Key aspects regulated by the CPA include:

- restrictions on unwanted direct marketing;
- consumers' rights to a cooling-off period after direct marketing;
- consumers' rights to cancel fixed-term agreements on two months' notice (on payment of a reasonable cancellation fee);
- consumers' rights to fair, just and reasonable terms and conditions (i.e. provisions which limit or exclude liability for gross negligence, which purport to waive any of the consumer rights conferred by the CPA or to avoid any of the obligations imposed on suppliers by the CPA, or which override the provisions of the CPA, are not permissible); and

- consumers' rights to fair value, good quality and safety (including strict liability for harm caused by defective products, and an implied warranty of quality). Where a product does not meet the standards imposed by the implied warranties, the consumer may return the product to the person who supplied it. The consumer may elect either to receive a refund of the purchase price or to have the particular product repaired or replaced. The consumer has this right for a period of six months from the date of purchase.

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

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

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

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

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

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

24. How are product liability and product safety regulated?

Product liability and product safety are regulated by the CPA in certain circumstances (please also see question 23), and by various other legislation depending on the sector (e.g. electronics, food and medicines).

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

Insurance

25. How is insurance regulated?

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

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

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

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

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

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

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

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

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

Data Protection

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

South Africa's first comprehensive data protection law, POPIA, came into force on 1 July 2020. POPIA provided organisations with a transitional period of 1 year within which to ensure compliance with POPIA. The transitional period has since lapsed and the majority of the substantive provisions of POPIA became enforceable on 1 July 2021. Regulations under POPIA have also been published and came into effect simultaneously with POPIA on 1 July 2021.

Prior to POPIA, the personal information of data subjects in South Africa was regulated in accordance with the common law and the Constitution of the Republic of South Africa Act, 1996.

In terms of the common law and constitutional right to privacy, data subjects have an objectively reasonable expectation of privacy which may not be wrongfully or intentionally interfered with. The provisions of POPIA are broadly regarded as a codification of the common law and constitutional right to privacy.

27. Are there laws protecting personal information?

Please also see question 26.

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

POPIA does this mainly by placing duties on responsible parties who decide the purpose and means by which personal information is processed. The responsible party may mandate an operator (also referred to as a "data processor" in other jurisdictions) to process personal information on its behalf. In such circumstances, the responsible party must conclude a written

agreement with the operator obliging it to keep the personal information confidential, to put in place appropriate security measures and to comply with the relevant provisions of POPIA.

POPIA does not fundamentally change the existing requirements imposed by the common law and constitutional right to privacy, but will improve the enforcement mechanisms to ensure the protection of personal information.

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

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

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

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

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

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

POPIA makes provision for eight conditions of lawful processing and regulates the following:

- when and how to share and otherwise process personal information (personal information must be collected for a specific, defined and lawful purpose relating to the activities of the responsible party, and personal information may only be processed if, given the purpose for which it is processed, the processing is adequate, relevant and not excessive);
- the obligation on the responsible party to ensure the integrity and continued accuracy and quality of personal information (personal information must be complete, accurate, not misleading and regularly updated);
- transparency and accountability on how personal information will be processed (limited to the purpose it was collected for);
- security safeguards, and who has access to personal information (there must be appropriate, reasonable technical and organisational measures and controls in place to track access and prevent unauthorised people, even within the same company, from accessing personal information);

- how and where personal information is stored (there must be adequate measures and controls in place to safeguard personal information to protect it from theft, or being compromised); and
- data subject participation (including the right of access to and correction of personal information, the right to know the purpose for which their information is being processed and the recipients of the information, and the right to prevent the use of their personal information for direct marketing purposes).

POPIA also regulates the transfer of personal information from South Africa to a foreign country. Such cross-border transfers are permitted inter alia with the consent of the data subject, or if the recipient of the information is subject to a law, binding corporate rules or a binding agreement that provides for an adequate level of protection that effectively upholds the principles contained in POPIA.

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

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

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

Second, if the data subject is a customer of the responsible party, direct marketing may take place if the responsible party has obtained the customer's contact details in the context of a sale or a product or service; if the purpose of the direct marketing relates to the responsible party's own similar products or services; and if the customer is given a reasonable opportunity to object, free of charge, from receiving direct marketing communications at the time when the information was collected, and on the occasion thereafter in which the customer receives marketing communications – thus an opt-out opportunity.

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

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

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

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

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

Fintech

28. Is fintech regulated? If so how?

At present, there are no fintech-specific laws or regulatory frameworks, which directly regulate fintech and fintech-related products and services.

Depending on the space in which the fintech is applied (e.g. financing, insurance or payments), the fintech provider will be required to conform to the existing regulatory framework and adapt the relevant fintech product or service accordingly.

South African financial services legislation is wide enough to apply to most existing fintech products and services. Examples of such legislation include the National Credit Act and the Financial Advisory and Intermediary Services Act (FAIS), both of which focus on the substance of the financial product or service provided, rather than the medium/ infrastructure used to provide it.

Currently, fintech providers are only required to have a licence if they provide fintech products or services that are essentially similar to existing regulated products or services, such as insurance, financial services and credit-lending.

There are also no specific fintech-related products or services that are currently prohibited in South Africa. Regulatory bodies, however, have cautioned against using fintech-related products or services that remain unregulated, such as privately investing and/ or trading in digital/ virtual tokens or cryptocurrencies.

South Africa's regulatory bodies are alive to the fast-paced developments in the fintech space and have adopted a pro-innovation stance. The most significant developments in the fintech regulation space are outlined below:

- In 2016, the Intergovernmental FinTech Working Group (IFWG) was established (comprising of members from a number of financial sector regulators) with the purpose of developing a common understanding among regulators and policymakers of financial technology developments as well as policy and regulatory implications for the financial sector and economy.
- Early in 2018, a joint working group was formed under the auspices of the IFWG to specifically review the position on cryptocurrencies. The working group is called the Crypto Assets Regulatory Working Group (CARWG).
- In January 2019, the CARWG published a consultation paper containing policy proposals for the development of regulatory responses (CARWG Consultation Paper), proposing its intended regulatory approach as regards priority areas, and heralding an initial focus on anti-money laundering, token-based transacting, capital raising, cryptographic derivative products and market provisioning.
- The IFWG Innovation Hub consists of a regulatory guidance unit, a regulatory sandbox unit, and the innovation accelerator. The regulatory guidance unit helps market innovators resolve specific questions regarding the policy landscape and regulatory requirements and provides a central point of entry for market innovators to submit enquiries related to fintech and innovation-oriented policies and regulations. The

regulatory sandbox unit provides market innovators with an opportunity to test new products and services that challenge the formulation or application of existing regulation under the supervision of relevant regulators. The innovation accelerator exists to provide a collaborative, exploratory environment for financial sector regulators to learn from and work with each other on emerging innovations in the industry. The IFWG Innovation Hub was recently launched in April 2020. At this stage, we can only comment on the intentions behind these platforms as it is too early to assess and comment on their efficacy.

- In January 2020, the IFWG published its first Fintech Landscaping Report (Fintech scoping in South Africa), the object of which was to obtain a "clearer understanding of the Fintech market to enable policymakers and regulators to better manage risk and enable innovation".
- The IFWG issued a Policy Position Paper on crypto assets in April 2020 that aimed to provide recommendations for the development of a regulatory framework for crypto assets.
- On 20 November 2020, the Financial Sector Conduct Authority (FSCA) published a draft Declaration (draft Declaration) that crypto assets be included as a 'financial product' as defined in section 1 of FAIS. The draft Declaration is intended to give partial effect to some of the recommendations contained in the IFWG Policy Position Paper on crypto assets published by the IFWG. The Declaration (once effective) would require any person furnishing advice or rendering intermediary services in relation to crypto assets to be authorised under FAIS as a financial services provider (FSP) and to comply with the requirements of FAIS. This will include crypto asset exchanges and platforms, as well as brokers and advisors. We note that by virtue of being authorised as an FSP, crypto asset service providers would be classified as 'accountable institutions' in terms of the Financial Intelligence Centre Act (FICA) South Africa's chief anti-money laundering legislation. We stress that this is a draft declaration, and it is expected to undergo various iterations before finally being enacted.

- On 11 June 2021, the IFWG, through the CARWG, published a Position Paper on crypto assets. Essentially, the Position Paper provides a roadmap for putting in place a phased and structured framework for regulating crypto assets through the regulation of crypto asset service providers (CASPs). It also serves to initiate the process for the individual financial sector regulators to implement the various recommendations contained therein which concern three main areas: anti-money laundering and combating the financing of terrorism, cross-border financial flows and application of financial sector laws.

The outlook for fintech innovation in South Africa is promising. It is driven by the market demand for innovative products and services; the proven capacity of innovators and suppliers to respond to the demand; and an inquisitive regulatory approach.

Much activity is centred on payment systems, money transfers and applications (mobile or otherwise) that obviate the need to hold, or transact via, a bank account held with a traditional bank. This has major implications for both exchange control as well as tax regulations, as fintech can be used to undermine them. To this end, we are seeing proposed amendments to legislation insofar as crypto assets and CASPs are concerned.

Environmental Law

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

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

Continuously evolving environmental regulation in South Africa combined with the escalating involvement of non-governmental environmental

organisations, associations and interest groups in monitoring, reporting and litigating on the environmental performance of companies (as well as with regard to responsibilities of government departments), means that environmental compliance, and the control and mitigation of environmental risks, has become increasingly important.

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

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

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

- National Environmental Management Act (NEMA):** requires an environmental authorisation to be obtained before many types of construction, development, expansion, closure or decommissioning and a range of other so-called 'listed activities' can commence. These include certain activities associated with the clearing of vegetation, transformation of land use, exploration for, extraction, production and mining of mineral and petroleum resources, as well as closure or decommissioning of certain activities, facilities, structures or infrastructure.
- National Water Act:** requires a licence or another form of entitlement (such as a general authorisation) for undertaking certain water uses, including abstractive water uses, various effluent and waste-related activities that may impact on water resources as well as activities entailing physical impacts on or in proximity to water resources.

- National Environmental Management: Waste Act:** requires licensing of various listed waste management activities or registration and compliance with regulated norms and standards for certain other listed activities, currently regulates residue deposits and residue stockpiles in the context of mining, production and related operations, and also imposes obligations regarding the reporting and handling and remediation of contaminated land. Contaminated sites may need to be reported to the environmental authorities and are potentially subject to remediation orders, being declared as remediation sites and recorded on the South African contaminated land register and with the Deeds Registry. The environmental authority may impose conditions that must be complied with in the transfer of ownership of remediation sites. Extended producer responsibility obligations are also being imposed in certain sectors, specifically the electrical and electronic equipment sector, the lighting sector and with regard to paper, packaging and some single use products.
- National Environmental Management: Integrated Coastal Management Act:** includes, among other things, various compliance obligations and restrictions with respect to activities within the coastal zone or that may impact on the coastal zone, such as relating to the use of coastal public property, marine and coastal pollution control (e.g. such as the requirement to obtain a permit for 'dumping at sea').
- National Environmental Management: Air Quality Act:** requires the licensing of various listed activities that result in atmospheric emissions, with specific minimum emission standards being prescribed for such activities, as well as dates being set by when compliance with the minimum emission standards must be achieved by operations. The Act also requires the reporting of emissions, includes various mechanisms for air pollution control (such as creating Priority Areas around the country where air quality management plans are in place), applies dust control regulations and establishes categories of 'controlled emitters', which also have regulated emission standards that must be complied with. Mechanisms for registration, measuring and reporting

regarding greenhouse gas emissions have been established in South Africa in light of the Carbon Tax Act and other anticipated tighter climate change related regulatory controls, including the pending Climate Change Act.

- National Heritage Resources Act:** creates various forms of heritage protection, including permitting requirements for impacts on heritage resources, and requires notification to, and approval from, the heritage authorities for certain types of specified development activities.
- Provincial and local authority (municipal) legislation:** authorisations, licences or permits or agreements with the municipality are typically required for activities such as the storage of flammable substances or dangerous goods, the discharge of effluent into municipal sewers, and undertaking listed scheduled trades. Permits are often required under provincial legislation for activities that impact protected animal or plant species, while noise control and specific waste related legislation also applies in certain provinces, among other environmental laws.

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

Comprehensive requirements are set in law regarding making financial provision for remediation of environmental damage associated with production, mining and related operations as well as relating to the closure of such operations.

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

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

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

Dispute Resolution

30. How are disputes resolved in South Africa?

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

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

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

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

Various tribunals

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

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

Time taken to resolve disputes

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

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

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

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

At the beginning of 2020, an online case management system 'CaseLines' was implemented in the busiest divisions of the High Court, situated in Johannesburg and Pretoria. The system enables litigants to file and upload pleadings and other documents electronically from which attorneys and the courts are able to access the relevant case and court documents online. As is the case around the world, the various divisions of the High Courts are, wherever possible, conducting court hearings remotely.

31. Are there any alternatives to litigation?

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

- **Arbitration:** an adjudication process that takes place pursuant to an agreement between the parties to a dispute, which refers that dispute for final determination to an independent tribunal appointed by or on behalf of the parties.
- **Mediation:** a dispute resolution process through which a third party acceptable to all parties to the dispute, helps to bring the parties to an agreed solution. The mediator usually has no decision-making powers and cannot impose a binding conclusion or settlement on the parties.

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

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

32. Are foreign judgements and international arbitration awards enforceable in South Africa?

The enforcement of foreign judgements

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

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

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

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

- the judgement remains effective in the country where it was issued

South African courts will usually not enforce foreign revenue or penal laws.

Arbitration law and the enforcement of arbitral awards

South Africa reformed its arbitration law in December 2017 with the enactment of the International Arbitration Act 15 of 2017 (the IAA).

The country now has two principal arbitration regimes: domestic arbitrations are regulated by the Arbitration Act 42 of 1965 and the common law, while the IAA governs international commercial arbitrations.

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

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

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

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

- South African arbitration law now incorporates the UNCITRAL Model Law on International Commercial Arbitrations (Model Law). This means that the Model Law, as adapted in Schedule 1 to the Act, will apply to international commercial arbitrations where South Africa is the juridical seat of the arbitration. This general rule is subject to the provisos that the dispute is capable of determination by arbitration in South Africa, and that the arbitration agreement is consistent with public policy.

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

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

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

The other important objectives of the IAA are to provide for the recognition and enforcement of arbitration agreements and arbitral awards, and to give effect to South Africa's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). The IAA repeals and amends the provisions of the previous legislation that dealt with the question of enforcement namely, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (repealed) and the Protection of Business Act 99 of 1978 (amended).

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

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

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

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

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

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

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

The most recent development is the publication by the Arbitration Foundation of Southern Africa ("AFSA") of its International Arbitration Rules which have been revised to reflect international best practice. AFSA is the leading arbitral institute in South Africa and its revised International Arbitration Rules will facilitate the continued growth of its international caseload and ensure that it keeps pace with developments of the rules of other major arbitral centres around the world.

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

Dissolving a Business

33. Are there any considerations in terminating a business?

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

Tax consequences

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

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

Section 47 of the ITA provides for roll-over relief on liquidation, winding-up or deregistration of a company in intra-group circumstances. This 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.

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

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

- the financial management, if the negligence or fraud of such person resulted in the failure to pay the tax;
- the shareholders, if they received assets within one year prior to the winding up of the company;

- a transferee who is a connected person to the taxpayer, who received an asset without consideration or for consideration below market value; or
- a person who assisted in the dissipation of assets.

Costs

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

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

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

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

Time-frame

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

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

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

Forms of business in termination

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

Partnership: The partnership ceases to exist upon termination.

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

Our Firm

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

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With eight offices in six African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

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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. Most recently, Mergermarket identified us as the number one legal adviser for Africa by number of completed deals in 2020.

At the inaugural IFLR1000 Awards for Sub-Saharan Africa (2020), we received 10 awards across four jurisdictions confirming our leadership when it comes to advising on multijurisdictional mergers and acquisitions in Africa.

At the African Legal Awards (2020), we won awards in three categories and were highly commended in a further four categories including African Law Firm of the Year - Large Practice.

We received awards in three out of four categories at the Dealmakers East Africa Awards (2019): top legal adviser in the M&A Category for both deal flow and deal value and advised on the Deal of the Year. In the Dealmakers South Africa Awards (2020), we were placed third for both transaction value and transaction volume in the General Corporate Finance Category and fourth for both deal value and deal volume in the M&A Category.

Our Footprint in Africa

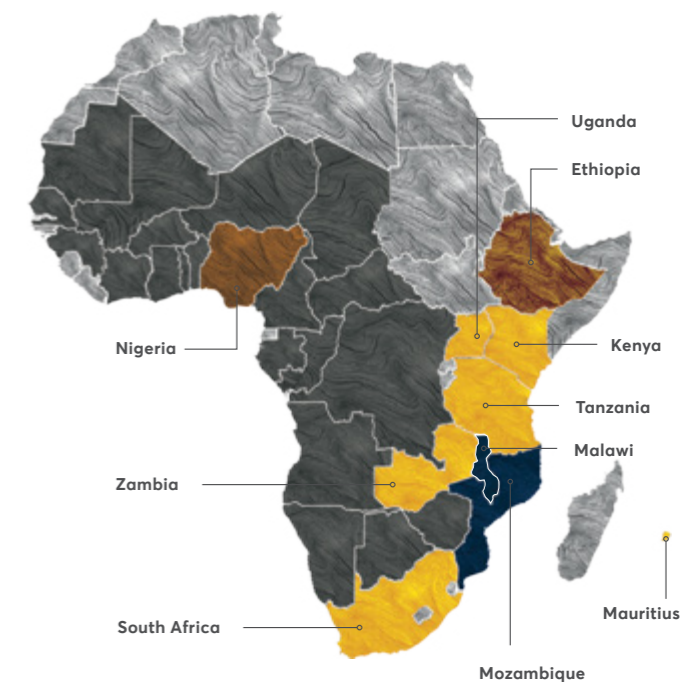
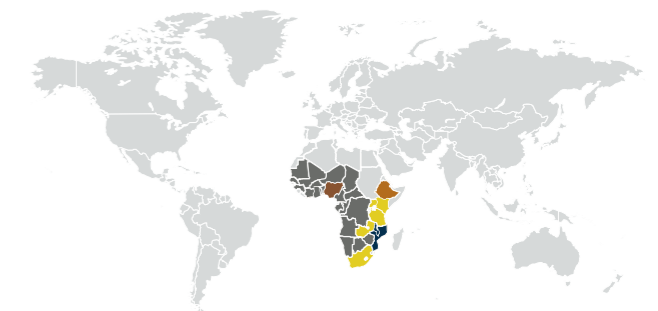
We are present in six countries in Africa: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Udoma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

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We have a comprehensive database of all the law firms we work with in the rest of Africa covering such countries as Algeria, Egypt, Morocco and French-speaking West 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. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.



- Bowmans offices
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Key Contacts



ALAN KEEP

Managing Partner
Johannesburg, South Africa

T: +27 11 669 9348

E: alan.keep@bowmanslaw.com



Cape Town, South Africa

T: +27 21 480 7800

E: info-cpt@bowmanslaw.com

Dar es Salaam, Tanzania

T: +255 76 898 8640

E: info-tz@bowmanslaw.com

Durban, South Africa

T: +27 31 109 1150

E: info-dbn@bowmanslaw.com

Johannesburg, South Africa

T: +27 11 669 9000

E: info-jhb@bowmanslaw.com

Kampala, Uganda

T: +256 41 425 4540

E: info-ug@bowmanslaw.com

Lusaka, Zambia

T: +260 211 356 638

E: info-zb@bowmanslaw.com

Moka, Mauritius

T: +230 52 98 01 00

E: info-ma@bowmanslaw.com

Nairobi, Kenya

T: +254 20 289 9000

E: info-ke@bowmanslaw.com



Follow us on Twitter:

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www.bowmanslaw.com

Alliance Firms:

Aman Assefa & Associates Law Office, Addis Ababa, Ethiopia

T: +251 11 470 2868

E: info@aaclo.com

Udo Udoma & Belo-Osagie, Lagos, Nigeria

T: +234 1 2774920-2, +234 1 2719811-3

E: uubo@uubo.org