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A GUIDE TO DOING BUSINESS IN SOUTH AFRICA

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AUDIT | TAX | CONSULTING

RSM

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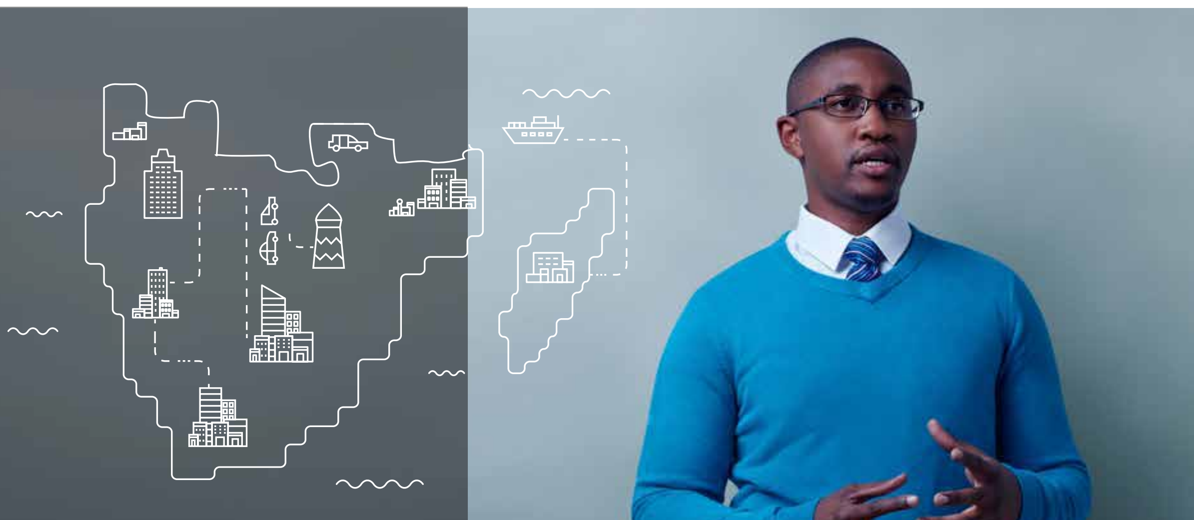

1. GENERAL INTRODUCTION

Country Profile

South Africa is situated at the southernmost part of the African continent and covers an area of approximately 1 220 000km^2. South Africa's coastline stretches more than 2 500km's and surrounds the western, southern and eastern parts of the country. South Africa borders the countries of Namibia, Botswana, Zimbabwe, Mozambique, Swaziland and enclaves Lesotho.

The administrative capital is Pretoria with other major cities being Johannesburg, Durban and Cape Town.

South Africa is known for its year round sunshine. The climate does however vary from region to region. The climate of the Western coastline and surrounding areas is affected by the cold Atlantic Ocean which creates a Mediterranean type climate. While the climate of the eastern coastline and surrounding areas is affected by the warm Indian Ocean which creates a subtropical type climate. The inland areas are mostly classified as a mild climate. Temperatures in South Africa are moderate to temperate. Rain falls in the summer months with the exception of the Western Cape where rain falls in the winter months.

The estimated population in 2017 was 56 521 900 with a density of 45 inhabitants per square kilometer. The ethnic groups can be divided into four categories namely Black, White, Coloured and Asian with the population divided into these groups being 80.8%; 8.0%; 8.8% and 2.5% respectively.

South Africa has 11 official languages however it should be noted that the most common language used in business is English. The official languages are as follows:

- Afrikaans
- English
- Southern Ndebele
- Northern Sotho
- Southern Sotho
- Tsonga
- Tswana
- Venda
- Xhosa
- ZuluSwazi

Economy

According to a list produced by the World Bank, South Africa's GDP is ranked 30 in the world. Some of the most prominent sectors contributing to our GDP include mining and quarrying; manufacturing; wholesale and retail trade; Finance, real estate, business services and transport, storage and communication.

South Africa has a healthy import and export trade. Amongst the top countries to which we export are Japan, Germany, United States of America, China, United Kingdom, Netherlands, Spain, Belgium, and India.
Government is continually focused on growth and with stakeholders there are a number of initiatives that are currently being run to stimulate the growth in our economy.

The following are some of South Africa's key indicators:

Indicator	*Percentage*	*Period*
CPI	3.8% y/y	March 2018
PPI	+3.7% y/y	March 2018
GDP	-2.2% q/q	1st Quarter 2018
Unemployment	26.7%	Quarter 4 2017

The South African economy grew 0.8 percent year-on-year in the first quarter of 2018, easing from a 1.5 percent expansion in the previous period and below market expectations of 1.9 percent. It was the weakest growth rate since the second quarter of 2016, mainly due to a contraction in agriculture, forestry and fishing activities and mining.

MENU

Administration

South Africa is classified as a constitutional democracy. Elections are held every 5 years where the people of South Africa are able to cast their vote for a registered party. This election process is overseen by the Independent Electoral Commission. Our President, who was put forward as the presidential candidate prior to the elections, is then elected by the winning party at a national assembly. The President is elected for a term of 5 years and can only serve 2 terms. South Africa is divided into 9 provinces namely:

- Eastern Cape
- Free State
- Gauteng
- KwaZulu Natal
- Limpopo
- Mpumalanga
- North West
- Northern Cape
- Western Cape

Each of these provinces has its own local government. These provinces are further divided into 52 Districts, 8 Metropolitan Municipalities, 44 District Municipalities and 226 Local Municipalities which also have their own local government, thus resulting in a more simplified administration of the country. The people of South Africa vote for the government of both provincial and local in addition to the national government elections.

The Judicial Authority of South Africa is vested in the courts. The courts are independent and subject only to the Constitution and the Law which they must apply impartially and without fear, favour or prejudice.

The various courts of South Africa are as follows:

The Constitutional Court	The highest court on constitutional matters
The Supreme Court of Appeal	Is the highest court in respect of all matters except for constitutional matters and decisions in this court are binding on all lesser courts.
The High Courts	This is the second highest court in respect of all matters and any decisions in this court are binding on all lesser courts within their area.
The Magistrates Courts	These consist of Regional and District courts. District courts have criminal and civil jurisdiction while Regional courts have criminal jurisdiction only.
Any other court established or recognised by an act of parliament	These are the lowest courts

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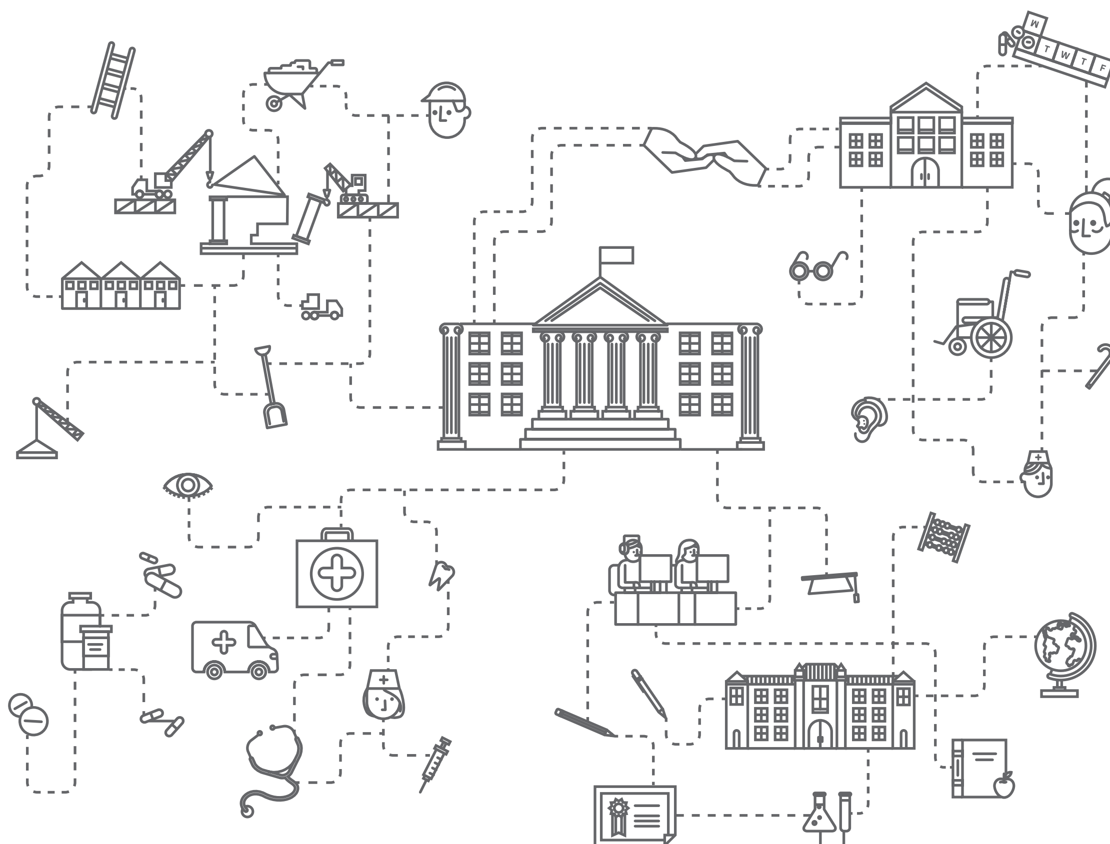

2. TYPES OF BUSINESS ENTITIES

In South Africa there are numerous types of entities available to do business through. The most suitable type of entity should be chosen taking into account the objects to be pursued, the capital to be committed, the level of liability of each type of entity, the tax implications and the complexity of accounting and organisational structures. The tax implications applicable to each of these entities are covered by the Taxation section of this guide.

SOLE PROPRIETOR

A Sole Proprietor is a business that is conducted by one person in their personal capacity and is the simplest form of business type.

Legal liability

This business has no separate legal entity from the owner and the owner is held personally liable for all the risks and liabilities of the business.

If the business is unsuccessful and is terminated, you will be personally liable for payment of all business debts, such as bank loans and unpaid bills to vendors and service providers (accountants, consultants, and attorneys). If your assets are not enough to satisfy the outstanding business debts, you may be forced to declare personal bankruptcy.

Accounting and Auditing

There is no legal requirement to prepare financial statements, but it is usually prepared for purposes of taxation and to meet the requirements of financial institutions.
Sole proprietors do not have to apply an approved accounting framework and no audit or review is required by law.

Formation and winding up

There are no legal requirements for forming or winding up of a Sole Proprietor business.

PARTNERSHIP

A Partnership is an unincorporated business type between two or more persons who join together to carry on a trade, business of profession and to share the profits thereof. The maximum partners allowed is 20 partners, after which it must register as a company. The only exception to this is for the formation of partnerships that perform professional services for gain and which currently includes the following professions:

- Registered public accountant and auditor;
- Attorney, notary and conveyancer;
- Professional engineer;
- Quantity surveyor;
- Stockbroker;
- Architect;
- Pharmacist; and
- Medical/dental practitioner, psychologist and supplementary health service provider.

Legal liability

This business type does not have a separate legal entity from the partners and the partners are held separately and jointly liable in their personal capacity for all the risks and liabilities of the business.

Accounting and Auditing

There is no legal requirement to prepare financial statements, but it is usually prepared for purposes of taxation and to meet the requirements of financial institutions.

Partnerships do not have to apply an approved accounting framework and no audit or review is required by law.

Formation and winding up

There are no legal requirements for forming or winding up of a Partnership's business.
It is advised that the detail of the business arrangement between the partners be documented in a written partnership agreement.

Advantages

- With more people comes more knowledge and expertise
- You will have more capital and cash to work with.
- You can share the financial burden and expenses of running a business with your fellow partners.
- Having partners means there is an even distribution of labour.
- You will have a better work-life balance as there are others to assist you with the workload and ensuring your business is becoming a success.

Disadvantages

- Everyone is liable for the debts of the business.
- You must share control of the business with your partner(s).
- Dealing with others is not always seamless, there could be a falling out or an argument, which can strain the relationship between you and your partner(s).
- If you ever want to sell your business, this could prove difficult if others do not want to sell.

CLOSE CORPORATION

A Close Corporation is a legal entity which has its own legal persona and a perpetual lifespan. The owners of a Close Corporation are called the members and each hold an interest in the Close Corporation expressed as a

percentage. Each member is allowed by law to contract on behalf of the Close Corporation. The members can be one up to a maximum of 10 who may only be:

- a natural person
- a trustee of a testamentary trust
- a trustee of an inter vivos trust who has natural beneficiaries which does not exceed the number of 10

A Close Corporation cannot be a member in another Close Corporation, but may be a member of a company.

Under current law, no new Close Corporations can be registered. Existing Close Corporations stay in place and can be transferred by change of membership. In terms of the Companies Act, 2008, Close Corporations that were in existence on the date that the 2008 Act became effective (1 May 2011) are allowed to continue to exist indefinitely, and there is no phasing out the concept of the Close Corporation. However no new Close Corporations may be formed after the effective date.

Legal liability

A Close Corporation is a legal entity which has its own legal persona and a perpetual lifespan. The members of a Close Corporation have limited liability. However, the members of a Close Corporation can become personally liable for the debts of the Close Corporation under certain circumstances as mentioned in the Close Corporation Act.

Accounting and Auditing

A statutory audit or review is not a requirement for a Close Corporation, although a limited review is required to be performed by specific professions who are allowed to act in the capacity of an Accounting Officer. A Close Corporation must prepare annual financial statements but does not have to prepare them in accordance with an approved accounting framework.

Winding up of a Close Corporation

The same provisions that apply to the winding-up of a company, apply to a Close Corporation.
A Close Corporation can also be deregistered in the same manner as a company.

COMPANIES

A company is a legal entity which has its own legal persona and a perpetual lifespan. The owners of the company (shareholders) and the directors may or may not be the same people. The directors are responsible for managing the company. Companies are characterised by the limited liability of the shareholders and the division of capital into shares. All companies must prepare annual financial statements within 6 months after the financial year end and in most instances in terms of a recognised accounting framework.

Each company must have a Memorandum of Incorporation (MOI) stating the rights and responsibilities of shareholders and directors.

Two types of companies can be formed and incorporated under the Companies Act, namely:
- A Profit company
- A Non-Profit company

Public Interest Score

The Companies Act, 2008 requires a company to be independently audited or reviewed depending on the Public Interest (PI) score of the company, which is calculated based on number of employees, turnover, number of shareholders and the amount of third party debt.

Profit Company

Profit companies can be registered as any of the following:

- **State-Owned Company – SOC**
  A state-owned company is described as a company listed in Schedule 2 or 3 of the Public Finance Management Act, 1999; or any company owned by a municipality, and is similar to an enterprise referred to in the mentioned Schedules. A SOC is a national government business enterprise. It is a juristic person under the ownership and control of the national executive that has been assigned financial and operational authority to carry on a business activity.

- **Private Company – (Pty) Ltd**
  A private company is described as a company that is not a SOC, and its MOI limits its securities from being offered to the public, and restricts the transferability of its securities.

- **Personal Liability Company – Inc.**
  A private profit company used mainly by professional associates such as attorneys, entrepreneurs and stockbrokers who wish to exploit some of the advantages of corporate personality such as perpetual succession. The MOI states that the directors are jointly and severally liable together with the company for all contractual debts and liabilities incurred during their terms of office. This type of company would typically be an alternative business type to be used to partnerships that perform professional services.

- **Public Company – Ltd**
  Any other profit company that is not a state-owned enterprise is known as a public company. The securities are open to public offerings and often trade on a stock exchange.

  The recognition of public company status is essentially sourced in the MOI of the company.

  Public companies that are listed on the Johannesburg Stock Exchange (JSE) must comply with the JSE rules.

Non-Profit Company – NPC

A non-profit company is incorporated for a public benefit or for cultural or social activities, or communal or group interests. The income and property may not be distributed to the incorporators, members, directors, officers or any related persons. A non-profit company does not have any

shareholders, but, in the event that non-profit company has members, a register of membership should be kept by the company.

A non-profit company can register as a Non-Profit Organisation with the Department of Social Services, and apply for tax exemption in terms of the Income Tax Act, 1962.

A non-profit company may acquire and hold securities issued by a profit company or directly or indirectly, alone or with any other person, carry any business, trade or undertaking consistent with or ancillary to its stated objects.

Upon winding up of the non-profit company, all assets of the company should be transferred to another non-profit company, with similar objects as the winding up company.

External Company

An external company is described as a company that is not registered in South Africa, which carries on business, or non-profit activities, within the Republic of South Africa. An external company must register with the Companies and Intellectual Property Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within South Africa.

Formation of a Company

A company is formed by lodging a MOI with the Companies and Intellectual Property Commission, after which a registration number will be allotted.

The MOI usually addresses matters such as:

- Certificate of Incorporation
- Name of the company
- Purpose of the company describing the main business
- Share capital of the company
- Details of the subscribers
- Directors
- Dividends and accounts
- Notices

Winding up of a company

Winding up of a company can be voluntary or compulsory by a Court of Law.

A company can also be deregistered voluntarily or by action of the Companies and Intellectual Property Commission.

TRUSTS

A trust is a legal entity that has usually been created by means of a contract, where a donor has handed over to the trustee's control of property for the trustees to hold or administers separate from their own property. The trustee must hold or administer the trust property for the benefit of the beneficiaries of the trust or for the furtherance of a charitable or other purpose. A trust in this sense creates a fiduciary obligation. Mainly two types of trusts can be formed based on the nature of and right to benefits.

- **Discretionary trust**
  In this type of trust the property has been donated over to the trustees to be administered or disposed of in terms of the trust instrument for the benefit of the beneficiaries to the trust. The beneficiaries in this case do not have a right to receive benefits until the trustees decide so. This can be a tax-efficient solution when passing on wealth to beneficiaries.

- **Vesting trust**
  In this type of trust the property has been donated over to the trustees of the trust, but the beneficiaries and their benefit is pre-determined and thus not discretionary. The trustees are still responsible for administration or disposal of the property in terms of the trust instrument. The beneficiaries in this case have a vested interest in the trust.

A business trust is a trust which has the main objective to carry on a business enterprise with the intention of making a profit and distributing the profit to its beneficiaries.

Legal Liability

The legal liability rests with the trustees of the trust but in their capacity as such. Under normal circumstances trustees will not be personally liable for the risks and liabilities of the trust.

Accounting and Auditing

The nature and extent of the accounting records to be kept and the decision of whether the trust will be audited or not will be in terms of the trust instrument. However the Trust Property Control Act requires trustees to indicate clearly in their bookkeeping which is held in their capacity as trustee.

Formation of a trust

In order for a trust to be formed it first needs to have a trust instrument (a trust deed). This trust instrument will provide the details of the trustees and the beneficiaries of the trust and is submitted to the Master of the High Court who approves and authorises the appointment of the trustees by issuing a letter of authority. The trust is then registered and provided with a registration number. All trustees of a trust are required to comply with the provisions of the Trust Property Control Act. The trust is also required to have a separate bank account at a banking institution or building society.

Winding up of a trust

A trust can be wound up by resolution of the trustees and notice to the Master of the High Court.

Date of issue: 8 April 2021

3. COMPANY LAW AND CORPORATE GOVERNANCE

COMPANY LAW

The new Companies Act No. 71 of 2008, was promulgated in April 2009 and has been effective from 1 May 2011. The Act makes provision for certain transitional arrangements to existing companies in order to ensure that the governing framework for enterprises encourages entrepreneurship, economic and employment growth as well as good governance. The Companies Amendment Act, 2011 rectifies certain provisions of the Act, in order to safeguard the improvement of administration and the establishment of a proper foundation for certain necessary Regulations in the Act.

CORPORATE GOVERNANCE

Corporate governance relates to the manner in which corporations are regulated and managed. It is a set of rules and practices by which a board of directors ensures transparency, fairness and accountability, in a company's relationship with its various stakeholders. Corporate governance increases a corporation's ability to sustain itself in the social and environmental context in which it operates.

In South Africa the Institute of Directors has issued a code and report on Governance known as King IV. The King Code and Report expands on governance issues already detailed in law as well as other issues which will result in good governance.

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4. FOREIGN EXCHANGE CONTROLS

The Exchange Control Regulations of 1961 regulate the flow of funds into South Africa from external or foreign sources such as non-resident individuals or companies. The exchange control regime is managed by the South African Reserve Bank (SARB) and by various authorised dealers appointed by the SARB. The authorised dealers assist the SARB in administering the exchange control system.

All payments made by residents to non-residents involve exchange control procedures and/or approvals. Non-resident shareholders in a resident company should have their share certificates endorsed "non-resident". The non-resident endorsement facilitates dividend payments by the resident company, as well as the remittance of sale proceeds, to the non-resident shareholder.

Exchange control approval is required for:

- A loan by a non-resident to a South African resident. The SARB will generally not permit interest exceeding the local prime rate for loans by non-resident shareholders to their local subsidiaries.
- Payment of management services and other fees by a resident to a non-resident.
- Payment of royalties, licence and similar fees to non-residents for the right to trademarks, patents, copyright or other intellectual property.
- The sale of South African intellectual property to a non-resident.

Exchange control, therefore, constitutes an effective system of control to these ends by monitoring the movement of financial and real assets (money and goods) into and out of South Africa.

In terms of start-up capital, corporations are generally able to provide funding by way of either a loan or to subscribe for share capital to the value of the money being invested. Both such mechanisms of funding will require SARB approval.

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5. TAXATION

- Various taxes are levied by the National Government.
- Provincial Government do not levy taxes.
- Municipalities levy rates on the value of fixed property to finance the cost of municipal services.

INCOME TAX

Residence basis of taxation

- South Africa applies a residence-based income tax system. Residents are (subject to certain exclusions) taxed on their worldwide taxable income, irrespective of where the income is earned.
- Foreign taxes proved to be payable are credited against South African tax payable on foreign income. Foreign income and taxes are translated into the South African currency, the Rand.

Residence — Individuals

Two tests (namely the ordinarily resident test and the physical presence test) apply in order to determine whether or not an individual is a tax resident of South Africa.

- **Ordinarily resident test**
  - This test is to determine whether the individual is ordinarily resident in South Africa.
  - The courts have interpreted the term 'ordinarily resident' to mean the country to which an individual would naturally return from his/her wanderings. It might, therefore, be called an individual's usual or principal residence and it would be described more aptly, in comparison to other countries, as the individual's real home.

- **Physical presence test**
  - This test applies to an individual who is not considered ordinarily resident in South Africa.
  - In terms of this test, an individual, who is physically present in South Africa for a period(s) exceeding:
    - 91 days in aggregate during the year of assessment under consideration; and
    - 91 days in aggregate during each of the five years preceding the year of assessment under consideration; and
    - 915 days in aggregate during the above preceding five years of assessment, will be regarded as resident in South Africa from the beginning of the sixth year of assessment.
  - Where an individual who is resident as a result of the physical presence test is absent from South Africa for a continuous period of at least 330 full days immediately after the day on which he/she ceased to be physically present in South Africa,b he/she will be regarded as being non-resident from the date on which he/she ceased to be physically present in South Africa.
- Any person who is deemed to be exclusively a resident of another country with which South Africa has entered into an agreement for the avoidance of double taxation is excluded from the definition of resident.

Residence – Companies and other entities

- Any company or other entity which is incorporated, established, formed in South Africa, or which has its place of effective management in South Africa is regarded as being resident in South Africa.

Foreign companies

- Where one or more South African residents (excluding headquarter companies) together, directly or indirectly, own or control more than 50% of the voting or participation rights in a foreign company, then it is a 'controlled foreign company' (CFC) in relation to those residents.
- The taxable income of a CFC is imputed to those residents in proportion to their shareholdings, subject to applicable exclusions and tax credits.

Headquarter companies

- A headquarter company is a South African resident company which elects headquarter company status during a year of assessment.
- In order to elect headquarter company status the following must apply:
  - for the whole year of election each shareholder must hold 10% or more of the equity shares and voting rights in the headquarter company;
  - at least 80% of the cost of the total assets of the headquarter company must be attributable to one or more of, equity shares in, loans or advances to, or intellectual property licences to a foreign company in which the headquarter company holds at least 10% or more of the equity shares and voting rights ("qualifying foreign investment");
  - in calculating the 80% rule, cash or bank deposits payable on demand are not taken into account and the rule is not applied where the total market value of the assets is R50 000 or less;
  - where the gross income of a headquarter company exceeds R5 million in a year of assessment at least 50% of the gross income must consist of rental, dividends, interest, royalties or service fees from a qualifying foreign investment or the proceeds from the disposal of equity shares in or intellectual property licensed to a qualifying foreign investment.
- Where a company has elected to be a headquarter company:
  - dividends paid by it are exempt from normal tax and are not subject to dividends tax;
  - any capital gain or loss made by it on the disposal of a qualifying investments must be disregarded;
  - it is subject to normal tax on its taxable income; and
  - dividends received from qualifying foreign investments will be exempt.

Calculation of taxable income

- The Income Tax Act (IT Act) provides for a series of steps to be followed in arriving at the taxpayer's 'taxable income' for a specific year or period of assessment.
- *The first step* – Determine the taxpayer's 'gross income' for a specific year or period of assessment, namely, in the case of:
  - any person who is a resident, the total amount of income (worldwide), in cash or otherwise, received by or accrued to or in favour of that person; or
  - any person who is not a resident, the total amount of income, in cash or otherwise, received by or accrued to or in favour of that person from a source within or deemed to be within SA, during such year or period of assessment.
- Receipts or accruals of a capital nature, subject to certain exceptions, are generally excluded from gross income. The Eighth Schedule to the IT Act deals with capital gains and capital losses.
- *The second step* – Calculate the 'income', of the taxpayer by deducting from the gross income all amounts that are exempt from income tax in terms of the IT Act from the taxpayer's 'gross income'.
- *The third step* – In arriving at 'taxable income' –
  - deduct all the amounts allowed to be deducted or set-off in terms of the IT Act from 'income'; and
  - add all amounts (which includes taxable capital gains) to be included or deemed to be included in the taxable income in terms of the IT Act.

Tax rates

- Tax rates are proposed by the Minister of Finance in the annual Budget Speech and fixed or passed by Parliament each year.
- The tax rates below are applicable to the 2019 year of assessment.

Taxable income (excluding any retirement lump sum benefit) of any natural person, deceased estate, insolvent estate and special trust

Taxable income	*Rates of tax*
Not exceeding R195 850	18% of taxable income
Exceeding R195 850 but not exceeding R305 850	R35 253 plus 26% of the amount by which the taxable income exceeds R195 850
Exceeding R305 850 but not exceeding R423 300	R63 853 plus 31% of the amount by which the taxable income exceeds R305 850
Exceeding R423 300 but not exceeding R555 600	R100 263 plus 36% of the amount by which the taxable income exceeds R423 300
Exceeding R555 600 but not exceeding R708 310	R147 891 plus 39% of the amount by which the taxable income exceeds R555 600
Exceeding R708 310 but not exceeding R1 500 000	R207 448 plus 41% of the amount by which the taxable income exceeds R708 310
Exceeds R1 500 000	R532 041 plus 45% of the amount by which the taxable income exceeds R1 500 000

Rebates (natural persons only)	Amount
Below the age of 65 years	R 14 067
65 years to 75 years	R 7 713
Age 75 and over	R 2 574

Income tax thresholds (natural persons only)	Amount
Below the age of 65 years	R 78 150
65 years to 75 years	R 121 000
Age 75 and over	R 135 300

Taxable income comprising of any retirement lump sum or severance benefit accrued to natural persons

Not exceeding R500 000	0%
Exceeding R500 000 but not exceeding R700 000	18% of the taxable income exceeding R500 000
Exceeding R700 000 but not exceeding R1 050 000	R36 000 plus 27% of the taxable income exceeding R700 000
R1 050 000 and above	R130 500 plus 36% of the taxable income exceeding R1 050 000

Retirement fund lump sum withdrawal benefits

Retirement fund lump sum withdrawal benefits consist of lump sums from a pension, pension preservation, provident, provident preservation or retirement annuity fund on withdrawal.

Tax on retirement fund lump sum withdrawal benefit is equal to:

- Tax determined by applying the tax table to the aggregate of that lump sum plus all other retirement fund lump sum withdrawal benefits accruing from 1 March 2009, and all retirement fund lump sum benefits accruing from 1 October 2007, and all severance benefits received or accruing from 1 March 2011; less
- Tax determined by applying the tax table to the aggregate of all retirement lump sum benefits accruing from 1 March 2009, and all retirement fund lump sum benefits accruing from 1 October 2007, and all severance benefits received or accruing from 1 March 2011.

The withdrawal benefit is taxed as follows:

Taxable income	Tax payable
R0 – R25 000	0%
R25 001 – R660 000	18% of the taxable income exceeding R25 000
R660 001 – R990 000	R114 300 plus 27% of the taxable income exceeding R660 000
R990 001 and above	R203 400 plus 36% of the taxable income exceeding R990 000

Taxable income of trusts (other than special trusts)

Taxable income	Rate of tax
On each rand of taxable income	45%
Age 75 and over	R2 466

Taxable income of Corporates

Companies (Standard)/Close Corporations /Branches of foreign companies

Taxable income	Rate of tax
On each rand of taxable income	28%

- Gold mining companies are taxed according to the "gold mining tax formula".

Small Business Corporations (SBCs)

Any year of assessment ending during the twelve-month period ending on 31 March 2019

Taxable income	Rate of tax
Not exceeding R 78 150	0% of taxable income
Exceeding R 78 150 but not exceeding R 365 000	7% of the amount by which the tax-able income exceeds R 78 150
Exceeding R 365 001 but not exceeding R 550 000	R 20 080 plus 21% of the amountby which the taxable income exceeds R 365 000
Exceeding R 550 001	R 58 930 plus 28% of the amountby which the taxable income exceeds R 550 000

DEDUCTIBILITY OF EXPENSES – TYPES OF EXPENSES

- The general deduction formula provides the general rules to which an expense must comply with in order to be deductible for income tax purposes.
- Other provisions of the IT Act allow for special deductions. If no special deduction applies, the expense in question will have to comply with the general deduction formula.
- The general deduction formula provides that for expenditure and losses to be deductible they must be –
  - actually incurred;
  - during the year of assessment;
  - in the production of income;
  - not of a capital nature; and
  - laid out or expended for the purposes of trade.
- It should be noted that deductions of expenditure claimed against income from employment (remuneration) derived by employees and office holders, are limited. This limitation, however, does not apply in respect of agents and representatives whose remuneration is normally derived mainly in the form of commission based on sales or turnover attributable to that agent or representative.

CAPITAL GAINS TAX (CGT)

Introduction

- A capital gain arises when the proceeds from the disposal of an asset exceed the base cost of that asset. A capital loss occurs when an asset is disposed of and the base cost of that asset exceeds the proceeds from that disposal.
- CGT only comes into effect when the taxpayer disposes of an asset. The taxable capital gain forms part of a taxpayer's taxable income and must be declared in the income tax return for the year of assessment in which the asset is disposed of.

Rates

- **Individuals and special trusts**
  For individuals and special trusts 40% of the net capital gain, is included in taxable income and is subject to income tax at the marginal rate of tax of the individual and special trust.
- **Companies and trusts (other than special trusts)**
  For companies and trusts that are not special trusts 80% of the net capital gain is included in taxable income and subject to income tax at the company rate of 28%, or in the case of a trust (other than a special trust), at 45%.
- **Effective rate of tax**
  The effective rate of tax on a capital gain ignoring the annual exclusion (which is only applicable to individuals and special trusts) and any assessed capital loss brought forward from the previous year is as follows:
  - Individuals and special trusts: 45% x 40% = 18% (assuming that the top marginal rate of tax applies)
  - Companies 28% x 80% = 22.4%
  - Trusts that are not special trusts: 45% x 80% = 36%

Capital losses

- Capital losses may only be set off against capital gains. Any capital loss that is not utilised in the current year of assessment is carried forward to the next year of assessment as an assessed capital loss and may be set off against any capital gains in that year of assessment.

Exclusions

- Some capital gains or losses (or a portion thereof) are excluded for CGT purposes.
- The following are some of the specific exclusions:
  - R2 million gain/loss on the disposal of a primary residence. Alternatively, if the disposal proceeds for the primary residence are R2 million or less, any capital gain will be excluded.
  - Most personal belongings which are not used for the carrying on of a trade. Examples include motor vehicles, caravans, furniture and jewellery.
  - Any gain or loss on disposal of a motor vehicle in respect of which you receive a travel allowance.
  - Retirement benefits.
  - An amount received in respect of a long-term insurance policy where you were the original owner.
  - Only in the case of individuals and special trusts, the first R40 000 of the sum of gains and losses in a year of assessment (known as the annual exclusion).
  - The annual exclusion increases to R300 000 in the year of death.
  - Small business assets or an interest in a small business, limited to R1.8 million if certain requirements are met, including:
    - the gross asset value of the business is less than R10 million
    - the natural person was a sole proprietor, partner or at least 10% shareholder for at least five years, is at least 55 years old, or suffers from ill-health, is infirm or deceased
  - Compensation for personal injury, illness or defamation.
  - Proceeds from gambling, games and competitions (only for natural persons).
  - Proceeds from regulated unit trust schemes
  - Donations and bequests to approved public benefit organisations.
  - Assets disposed of by persons or institutions exempted from income tax.
  - Assets used to generate income that is exempt from income tax except for the annual interest exemption, dividends and the copyright of a first owner thereof.

CGT on disposal of property in South Africa by a person who is not a resident of South Africa

- A person who is not a resident of South Africa must account for capital gains and losses made from the disposal of the following assets:
  - Immovable property situated in South Africa or any interest or right in immovable property situated in South Africa. The term "interest in immovable property situated in South Africa" includes a direct or indirect holding of 20% or more of the shares in a company, where 80% or more of the current market value of the shares of that company are directly or indirectly attributable to immovable property situated in South Africa. Also included as immovable property is a vested interest in a trust where 80% or more of the value of that interest is attributable directly or indirectly to immovable property in South Africa.
  - Assets attributable to a permanent establishment in South Africa (for example a branch of a foreign company in South Africa)

WITHHOLDING TAXES

Dividends Tax

- Dividends Tax is, in line with international norms, levied at shareholder level. The tax applies only in respect of dividends declared by South African resident companies, and is levied at a rate of 20%.
- The party entitled to the benefit of the dividend is the party ultimately liable for the tax (subject to withholding solely for collection purposes).
- The Dividends Tax is imposed on the date when the dividend is paid by the company (which is regarded as the date when the dividend accrues to the shareholder). Thus, accrual does not coincide with mere dividend declaration. Consequently, for instance, in a listed share context, the accrual of a dividend to a shareholder will generally take place sometime after the dividend is declared.
- The Dividends Tax is subject to exemptions. More specifically, the beneficial owner of a dividend will be exempt from the Dividends Tax if the beneficial owner is:
  - a South African resident company;
  - a pension, provident or other similar benefit fund;
  - a sphere of the South African government (i.e. national, provincial or local);
  - an exempt South African public entity;
  - an approved public benefit organisation; or
  - an environmental rehabilitation trust (as contemplated in section 37A).
  - a shareholder in a registered "micro business" as defined in the Sixth Schedule.

Tax on royalties

- Amounts received for the imparting of any scientific, technical, industrial or commercial knowledge or information, commonly known as 'know-how' payments are specifically included in the gross income definition, and are therefore taxable in the recipient's hands.
- A final withholding tax of 15% (or a lower rate determined in a relevant agreement for the avoidance of double taxation) is payable in respect of royalties or similar payments made to person who is not a resident of South Africa for the right of, or the grant of permission to use in South Africa –
  - patents, designs, trademarks, copyright, models, patterns, plans, formulas or processes or any property or right of a similar nature; or
  - any motion picture film, or any film or video tape or disc for use in connection with television, or any sound recording or advertising matter used or intended to be used in connection with such motion picture film, film or video tape or disc.
- The withholding tax must be paid over to SARS by the last day of the month following the month during which the royalty is paid.

Withholding tax on foreign entertainers and sportspersons

- South African residents who are liable to pay amounts to foreign entertainers and sportspersons for their performances in South Africa must withhold tax at a rate of 15% from the gross payments and pay it over to SARS on behalf the foreign entertainers and sportspersons before the end of the month following the month in which the tax was withheld.
- Failure to withhold and/or to pay it over to SARS will render the resident payer personally liable for the tax.
- Where it is not possible for the withholding tax to take place (for example, the payer is not a resident of South Africa), the entertainer or sportsperson who is not a resident of South Africa will be held personally liable for the 15% tax and must pay it over to SARS within 30 days after the amount is received by or accrued to the foreign entertainer or sportsperson.
- The 15% is a final tax, which means there will be no need to submit an income tax return.
- Where an entertainer or sportsperson is not a resident of South Africa, he/she is employed by a South African employer and he/she is physically present in South Africa for more than 183 days in aggregate in a 12-month period that commences or ends during a year of assessment, these persons will have to pay income tax on the same basis as South African residents, that is, at the usual income tax rates, which may require the submission of an income tax return.

Withholding tax on payments to non-residents on the sale of their immovable property in South Africa

- Withholding tax is payable by a person (the purchaser) that acquires immovable property in South Africa from a seller, who is not a resident of South Africa.
- The purchaser of the property is required to withhold from the amount which has to be paid for the property an amount equal to:
  - 7,5% of the amount payable, if the seller is an individual;
  - 10% of the amount payable, if the seller is a company; or
  - 15% of the amount payable, if the seller is a trust
- The seller may apply for a directive that no amount or a reduced amount be withheld if certain conditions are met as set out in section 35A(2) of the IT Act.
- The amount withheld is an advance (credit) against the seller's income tax liability for the year of assessment, during which the property was disposed of.
- The withholding tax is not payable if the total amount payable for the immovable property does not exceed R2 million.

Withholding tax on interest

- Withholding tax on interest at a rate of 15% applies to all interest paid by any person to or for the benefit of any non-resident to the extent that the amount received or accrued is from a South African source.
- There will be exempt from withholding tax on interest any amount of interest:
  - paid to any non-resident:
    - in respect of any government debt;
    - in respect of any listed debt;
    - in respect of any debt owed by any domestic bank or the South African Reserve Bank;
    - in respect of any bill of exchange, letter of credit or similar instrument relating to the import or export of goods
    - by a headquarter company in respect of financial assistance that is not subject to the transfer pricing and thin capitalisation provisions
  - payable in terms of domestic dealer and brokerage accounts
  - deemed to have accrued to any non-resident in terms of domestic investment schemes
- Interest paid to a non-resident by a bank will not be exempt from the withholding tax on interest if the interest arose as a result of back-to-back loan agreements designed to avoid the 15% withholding tax.
- A non-resident will be exempt from the withholding tax on interest if that non-resident is a natural person who was physically present in the republic for more than 183 days during the year of assessment or at any time during the year carried on business within the Republic through a permanent establishment or is a controlled foreign company as defined in the IT Act.

Withholding tax on service fees

- There is no withholding tax on service fees, however the payment of certain service fees by South African residents to non-residents are dealt with under the provisions of Reportable Arrangements in the Tax Administration Act.
- The following is listed as a reportable arrangement:
  - an arrangement where a non-resident (or an employee, agent or representative of that person)
  - who was, is, or is anticipated to be physically present in South Africa
  - in connection with, or for the purpose of rendering certain technical and professional services to a resident or South African permanent establishment of a non-resident
    - consultancy, construction, engineering, installation, logistical, managerial, supervisory, technical or training services
  - the amount of the expenditure in respect of those services under that arrangement exceeds or is anticipated to exceed R10 million in aggregate, and
  - does not qualify as remuneration.

VALUE-ADDED TAX

Introduction

- Value-added tax (VAT) is levied on the supply of goods and services by vendors (persons who are or are required to be registered under the VAT Act) throughout the business cycle.
- Effectively, VAT is levied on the value-added by an enterprise.
- VAT is also levied on the importation of goods as well as on the supply of imported services into South Africa.
- VAT is levied at the standard rate of 15% effective from 1 April 2018, but certain supplies are subject to the zero-rate or are exempt from VAT.
- VAT is levied on an inclusive basis, which means that VAT has to be included in all prices on products, price lists, advertisements and quotations.

Who is liable for the payment of VAT?

- VAT is levied on all supplies made by vendors in the course or furtherance of their enterprises.
- Only a vendor may levy VAT.
- Any person who carries on an enterprise and whose total value of taxable supplies (taxable turnover) exceeds, or is likely to exceed, the compulsory VAT registration threshold of R1 million in any 12-month consecutive period (VAT threshold), must register for VAT purposes.
- Any non-resident supplier of electronic services which makes taxable supplies that exceed R50 000 must register for VAT purposes.

- A vendor making taxable supplies of less than the VAT threshold per annum, but more than R50 000 per annum is not obliged to register as a vendor, but may nevertheless apply for voluntary registration.
- Enterprises making taxable supplies of less than R50 000 per annum cannot register for VAT. But excludes the following –
  - any person who intends to carry on an enterprise from a specified date, where the enterprise will be supplied to that person as a going concern and the total value of taxable supplies made by the supplier of the going concern has exceeded R50 000 in the previous 12 months;
  - any person who carries on an enterprise of a welfare organisation, share block company or a municipality supplying specific goods or services as listed in the VAT Act; or
  - any person who carries on an enterprise where as a result of the nature of the activity, the person can reasonably be expected to make taxable supplies exceeding R50 000. The taxable supplies will therefore only be made after a period of time.

Tourists, diplomats and exports to foreign countries

- **Tourists**
  - VAT borne by foreign tourists in respect of goods taken out of South Africa may be refunded by the VAT Refund Administrator (VRA) upon departure from SA.
  - The tourist must be in possession of a valid tax invoice and have the goods available for inspection upon departure from SA.
  - An administration fee of 1,5% of the VAT inclusive amount of the claim, subject to a minimum of R10 and a maximum of R250, is levied by the VRA for processing the refund.

- **Diplomats**
  - VAT relief is granted to certain diplomatic and consular missions in the form of a refund of VAT borne on official purchases.

- **Exports to foreign countries**
  - A vendor may apply the zero-rate when supplying movable goods and consigning or delivering them to a recipient at an address in an export county.
  - Vendors may, in certain circumstances, apply the zero-rate where goods are exported by the foreign purchaser or his/her/its cartage contractor.
  - If a person who is not a resident of South Africa or foreign enterprise purchases goods in South Africa and subsequently exports the goods, the VAT may be refunded by the VAT Refund Administrator.

OTHER TAXES

Environmental taxes

Plastic bag levy

- An environmental levy is charged on certain plastic carrier bags and flat bags (bags generally regarded as "grocery bags"). The levy is at a rate of 12 cents per bag effective 1 April 2018.
- Plastic bags used for immediate wrapping/packaging, refuse bags and refuse bin liners are excluded from paying this levy. Apart from the payment of this specific Environmental Levy per quarterly excise account, VAT is also levied on these bags, calculated on a value which includes the amount of the levy. Manufacturers of such bags must licence their premises as manufacturing warehouses with the local Controller of Customs and Excise and submit quarterly excise accounts to such Controller.

Tyre levy

- The tyre levy is intended to reduce waste, while encouraging reuse, recycling and recovery, and discouraging disposal into landfills. This levy was implemented at a rate of R2.30/kg of tyre, effective 1 October 2016.

Incandescent globe tax

- An environmental levy on incandescent light bulbs was introduced to encourage the use of more efficient compact fluorescent bulbs and reduce electricity demand. The levy is R8 per globe effective from 1 April 2018.

Motor vehicle emissions tax

- The motor vehicle emissions tax aims to encourage consumers to use more fuel-efficient, low-carbon emitting vehicles, and manufacturers to improve fuel efficiency. For passenger vehicles, the tax rate is R110 for every gram of emissions/km above 120 gCO_2/km and, for double cabs, R150 for every gram of emissions/km in excess of 175 gCO_2/km effective from 1 April 2018.

Transfer Duty

- Transfer duty is levied on the consideration payable for the acquisition of fixed property. If, for some reason, no consideration is payable or consideration is not market related, the duty is levied on the fair market value of the property.

- Transfer duty rates are as follows:

Fair market value or Consideration	*Rate*
On the first R900 000 of the consideration	0%
On the amount that exceeds R750 000 but not R1 250 000	3% on the value above R900 000
On the amount that exceeds R1 250 000 but not R1 750 000	R10 500 plus 6% on the value above R1 250 000
On the amount that exceeds R1 750 000 but not R2 250 000	R40 500 plus 8% on the value above R1 750 000
On the amount that exceeds R2 250 000 but not R10 000 000	R80 500 plus 11% on the value above R2 250 000
R10 000 001 and above	R933 000 plus 13% on the value above R10 million

- The above rates are applicable from 1 March 2017.
- No transfer duty will be chargeable if the transaction is subject to VAT (either standard or zero rated).
- Where the ownership of a trust or the shares or members interest of a company or close corporation which owns residential property is transferred, transfer duty will be chargeable on the market value of the property excluding any liabilities.
- The transfer duty is payable at the appropriate rate applicable to the purchaser. If the purchaser fails to pay the transfer duty it will be recovered from the seller.

Estate Duty

- Where the deceased was ordinarily resident in South Africa, his/her estate will, for estate duty purposes, consist of all property wherever situated, including deemed property (for example, life insurance policies and payments from pension funds).
- Property situated outside South Africa will be excluded from his/her estate if such property was acquired by him/her before he/she became ordinarily resident in South Africa for the first time, or after he/she became ordinarily resident in South Africa and acquired such property by way of donation/inheritance from a person which was not ordinarily resident in South Africa at the date of such donation/inheritance.
- The exclusion also applies to property situated outside South Africa, acquired out of profits/proceeds of any such property acquired in the above circumstances.
- The estate of a person who is not a resident of South Africa is only subject to estate duty to the extent that it consists of certain property of the deceased in South Africa.
- The term "property" is defined in section 3(2) of the Estate Duty Act, No. 45 of 1955 and includes deemed property referred to in the paragraph above.
- Estate duty is levied on the dutiable value of the estate at a rate of 20% for estates valued up to R30 million and 25% for estates exceeding R30 million effective from 1 March 2018.

Donations tax

- Donations tax (not a tax on income) is payable by a person who is a resident, who made a donation, (the donor) to another person (donee).
- Donations tax is calculated at a rate of 20% on the value of the property disposed of provided the donation does not exceed R30 million. Any donations in excess of R30 million in one tax year will be taxed at a rate of 25% effective from the 01 March 2018.
- Each individual is allowed to make exempt donations totalling R100 000 per year of assessment. Non-natural persons are allowed to make exempt donations totaling R10 000 per year of assessment.
- Donations to certain persons such as public benefit organisations and recreational clubs are also exempt from the payment of donations tax.
- If the donor fails to pay the tax within the prescribed period (by the end of the month following the month during which the donation takes effect or such longer period as the Commissioner may allow), the donor and the donee (whether a resident or not) are jointly and severally liable for the tax.
- Donations tax does not apply to non-residents even if they donate South African assets.

Customs

General

- Customs duty is levied on imported goods and is usually calculated as a percentage on the value of the goods (refer to the relevant Schedules to the Customs and Excise Act, 1964). However, goods such as certain meat and primary plastic products, certain textile products and certain firearms attract rates of duty that are calculated either as a percentage of the value of the goods, or as cents per unit, kilogram or metre, etc. Additional ad valorem customs duties are levied on a wide range of luxury or non-essential items such as perfumes, firearms, arcade games, etc.

- **Cargo entering South Africa**
  - When cargo is landed in South Africa, a cargo manifest in respect of those goods must be produced to Customs. These manifests reflect all the goods imported. All the goods must be accounted for to the satisfaction of Customs by means of bills of entry. If importers or owners of imported goods fail to enter their cargo for customs purposes the goods may be detained and removed to the State warehouse.

- **State warehouses**
  - The State provides State warehouses for the safekeeping of goods. The main purpose of such warehouses is to protect duty and VAT which may be due thereon. The reason for such safekeeping may include goods not entered for customs purposes, abandoned goods, seized goods or goods detained provisionally for specific reasons subject to compliance with requirements for import

or export. When the importer or owner of goods has complied with all customs or other requirements, release thereof may be granted upon payment of the applicable state warehouse rent. Unclaimed goods may be sold on public auction after a prescribed period from the date on which the goods were taken up in the State warehouse and the proceeds are applied in discharge of any duties, VAT or other expenses in respect of those goods.

- **Importation of household effects by immigrants/ returning residents**
  - *Bona fide* household effects may be imported, free of duty and exempt from the VAT normally levied on importation, provided that the importer changes his/her residence to South Africa on a permanent/temporary basis. Importers such as contract workers and students may also import their bona fide household effects under rebate of duty and exempt from VAT (a deposit may be called for to cover the VAT on importation either in part or in full, which is refundable when such goods are exported). The requirement would, however, be that they re-export their household effects at conclusion of the work contract or studies, or they may dispose of it locally, provided they have not sold, lent, hired or disposed of it in any manner whatsoever within a period of six months since importation. Importers taking up temporary residence in the Republic on a continual basis, for example, people with holiday homes, do not qualify for this rebate.
- **Motor vehicles**
  - Natural persons on change of their residence on a permanent basis to South Africa may import one motor vehicle into South Africa, free of duty and exempt from VAT. Here they would be required to qualify as a permanent resident sanctioned by the Department of Home Affairs. South Africans working or studying abroad do not qualify for this rebate item.
- **Motor vehicles imported on a temporary basis**
  - Motor vehicles utilised in South Africa by tourists may be imported under rebate of duty and exempt from VAT for a period of three months and this may be extended to six months (a deposit may be called for to cover the VAT on importation either in part or in full, which is refundable when such goods are exported). After a period of six months the motor vehicles must be re-exported.
- **Anti-dumping and countervailing duties on imported goods**
  - Anti-dumping and countervailing duties are levied on goods considered to be dumped in South Africa or on subsidised imported goods respectively. These goods are the subject of trade and industry investigations into pricing and export incentives in the country of origin and the rate imposed will depend on the result of the investigations.
  - The above duties are either levied on an ad valorem basis (percentage of the value of the goods) or as a specific duty (percentage per unit, kilogram, litre, etc). The level and type of duty imposed on a product is subject to the following main criteria –
    - the value of the goods (customs value);
    - the volume or quantity of the goods; and
    - the tariff classification of the goods (tariff heading)
- **Sugary Beverages Levy (SBL)**
  - The SBL is a new Health Promotion Levy in support of the Department of Health's deliverables to decrease diabetes, obesity and other related diseases in South Africa.
  - The levy, governed by the Customs and Excise Act, 1964, is on sugary beverages which have been manufactured in or imported into South Africa. Imported products will be taxed when they are cleared for home consumption and locally manufactured products will be taxed at source.
  - SBL will be paid in addition to any other customs and excise duty payable and imports will not be declared on separate bills of entry.
  - Only commercial manufacturers that produce sugary beverages with a total annual sugar content in excess of 500 kg per year need to be licensed and pay the SBL. Non-commercial producers below this threshold will be expected to register but will not be subject to the SBL.
  - The SBL was implemented with effect from 1 April 2018 and is be calculated as follows:
    - The rate is fixed at 2.1 cent per gram of the sugar content that exceeds 4 grams per 100ml. The first 4 grams per 100ml are levy free.
    - Sugar content means both the intrinsic and added sugar and other sweetening matter.
    - Sugar content will be calculated on:
      - the sugar content as certified on a recognised test report from a testing facility accredited with the South African National Accreditation System (SANAS) or the International Laboratory Accreditation Cooperation (ILAC).
      - In the absence of such a valid test report, a deemed sugar content of 20 grams per 100 ml is assumed.
    - For powder and liquid concentrates, sugar content will be calculated on the total volume of the prepared beverage.

Securities Transfer Tax (STT)

- STT is payable at a rate of 0,25% on the transfer of all shares in companies incorporated in SA as well as foreign companies listed on the SA stock exchange. It is also payable on the transfer of a member's interest in a

close corporation. The cession of dividend rights is also subject to STT. No STT is payable on the original issue of shares.

- STT is payable on the higher of the consideration paid or the market value of the security. Where the shares or securities are transferred, the STT is payable by the purchaser thereof. Where the shares or securities are cancelled or redeemed, the STT is payable by the company or close corporation cancelling or redeeming the shares.
- No STT is payable if the share is cancelled or redeemed due to the company being wound up, liquidated or deregistered.

Skills Development Levy (SDL)

- This is a compulsory levy scheme for the funding of education and training. SARS administers the collection of the levy. The levy, at the rate of 1%, is payable by employers who have an annual payroll in excess of R500 000.

Unemployment Insurance Contributions

- The Unemployment Insurance Fund insures employees against the loss of earnings due to termination of employment, illness and maternity leave. A monthly contribution is collected from the employer, which consists of–
  - a contribution made by the employee equal to 1% of the remuneration paid or payable by the employer to the employee during any month, limited to R148.72; and
  - a contribution made by the employer equal to 1% of the remuneration paid or payable by the employer to that employee during any month, limited to R148.72.

TAX INCENTIVES AND CASH GRANTS

Special allowances

Industrial buildings

- Wear and tear is normally not allowed on buildings or other structures of a permanent nature. However, an allowance equal to 5% (20-year straight-line basis) of the cost to the taxpayer of industrial buildings or of improvements to existing industrial buildings used in a process of manufacture (other than mining or farming) is granted.

Commercial buildings

- An allowance equal to 5% (20-year straight-line basis) of the cost to the taxpayer of new and unused buildings/improvements to buildings (other than the provision of residential accommodation) which were contracted for on or after 1 April 2007 and the construction, erection or installation of which commenced on or after the above-mentioned date.
- With effect from 21 October 2008:
- For the purposes of the above 5% allowance, where a taxpayer acquires a part of a building without erecting or constructing that part, the percentages below will be deemed to be the cost incurred:
  a) 55% of the acquisition price, in the case of a part being acquired; and
  b) 30% of the acquisition price, in the case of an improvement being acquired.

Hotel keepers

- *Buildings and improvements*
  - An allowance equal to 5% (20-year straight-line basis) of the cost to the taxpayer of such building and improvements
  - Any improvements which have or are commenced on or after 17 March 1993 which does not extend the existing exterior framework of the building – an allowance equal to 20% (5-year straight-line basis) of the cost to the taxpayer of such improvements.
- *Machinery/improvements/utensils/articles*
  - An allowance equal to 20% (5-year straight-line basis) of the cost to the taxpayer of such assets.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act.

Aircraft/ships

- An allowance equal to 20% (5-year straight-line basis) of the cost to the taxpayer of such aircraft/ships.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act.

Rolling stock (that is, trains and carriages)

- An allowance equal to 20% (5-year straight-line basis) of the cost incurred by the taxpayer in respect of rolling stock brought into use on or after 1 January 2008.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act and must be used directly by the taxpayer wholly/mainly for the transportation of persons, goods or things.

Certain pipelines, transmission lines and railway lines

- **Pipelines for transporting of natural oil**
  - An allowance equal to 10% (10-year straight-line basis) of the cost incurred by the taxpayer in respect of the acquisition of the new or unused asset.
  - The assets must be owned by the taxpayer and brought into use for the first time by the taxpayer and used directly by the taxpayer for the transportation of natural oil.

- **Pipelines for transportation of water used by power stations**
  - An allowance equal to 5% (20-year straight–line basis) of the cost by the taxpayer in respect of the acquisition of the new or unused asset
  - The asset must be owned and be brought into use for the first time by the taxpayer and used directly by the taxpayer for the transportation of water used by power stations in generating electricity.

Electricity transmission lines

- An allowance equal to 5% (20-year straight-line basis) of the cost incurred by the taxpayer in respect of the acquisition of the new or unused asset.
- The assets must be owned by the taxpayer and brought into use for the first time by the taxpayer and used directly by the taxpayer for the transmission of electricity.

Telephone transmission lines

- An allowance equal to 6.67% (15-year straight-line basis) of the cost incurred by the taxpayer in respect of the acquisition of the new or unused asset.
- The assets must be owned by the taxpayer and brought into use for the first time by the taxpayer and used directly by the taxpayer for the transmission of telecommunication signals.

Railway lines

- An allowance equal to 5% (20-year straight-line basis) of the cost incurred by the taxpayer in respect of the acquisition of the new or unused asset.
- The assets must be owned by the taxpayer and brought into use for the first time by the taxpayer and used directly by the taxpayer for transportation of persons/goods/things.

Airport assets

- That is any new or unused aircraft hangar, apron, runway or taxiway on any designated airport (including any earthworks or supporting structures forming part of such hangar, apron runway or taxiway).
- An allowance equal to 5% (20-year straight-line basis) of the cost actually incurred by the taxpayer in respect of the acquisition of such asset brought into use on or after 1 January 2008.

Port Assets

- That is any new or unused port terminal, breakwater, sand trap, berth, quay wall, bollard, graving dock, slipway, single point mooring, dolos, fairway, surfacing, wharf, seawall, channel, basin, sand bypass, road, bridge, jetty or off-dock container depot, and (including any earthworks or supporting structures forming part of the aforementioned).
- An allowance equal to 5% (20-year straight-line basis) a year of the cost of new and unused assets, brought into use on or after 1 January 2008.

Machinery, plant implements, utensils and articles (other than farming/manufacturing/small business corporations)

- An allowance equal to the amount which the Commissioner may think just and reasonable which the value of the asset has been diminished by reason of wear and tear or depreciation
- If the cost price of an item is less than R7 000 it can be written off immediately. For assets acquired prior to 1 March 2009, the limit for small items was R5 000 per asset.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act.

Machinery or plant (manufacture or similar process)

- An allowance equal to 20% (5-year straight-line basis) of the cost to the taxpayer to acquire such machinery or plant.
- This allowance is increased in respect of new or unused machinery or plant acquired on or after 1 March 2002 and brought into use by the taxpayer in its manufacture or similar process carried on in the course of its business on or after that date to:
  - 40% of the costs to the taxpayer of the machinery or plant in year of assessment during which the machinery or plant was brought into use; and
  - 20% of the costs to the taxpayer of the machinery or plant in each of the three subsequent years of assessment.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act.

Patents, inventions, copyrights, designs, other property, etc

- An allowance is allowed in respect of expenditure incurred to acquire (otherwise than by way of devising, developing or creating) the following property:
  - invention or patent as defined in the Patents Act, 1978 (Act No.57 of 1978);
  - design as defined in the Designs Act, 1993 (Act No. 195 of 1993);
  - copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978);
  - other property which is of a similar nature (other than Trade Marks as defined in the Trade Marks Act, 1993 (Act No. 194 of1993); or knowledge connected with the use of such patent, design, copyright or other property or the right to have such knowledge imparted.
- The allowance is allowed in the year of assessment in which the abovementioned property is brought into use for the first time by the taxpayer for the purposes of the taxpayer's trade.
- Where the expenditure exceeds R5 000, the allowance will not exceed in any year of assessment –
  - 5% of the expenditure in respect of any invention, patent, copyright or the property of a similar nature

or any knowledge connected with the use of such invention, patent, copyright or other property or the right to have such knowledge imparted; or
- 10% of the expenditure of any design or other property of a similar nature or any knowledge connected with the use of such design or other property or the right to have such knowledge imparted.

Research & development

- The main aim of the research & development (R&D) incentive is to encourage R&D in South Africa.
- The R&D incentive allows:
  - a deduction equal to 150% of expenditure incurred directly for R&D and
  - an accelerated depreciation deduction (that is, 50:30:20) for capital expenditure incurred on plant or machinery used for R&D
- The deduction will only be allowed if:
  - the expenditure is incurred in the production of income;
  - the expenditure is incurred in the carrying on of any trade;
  - the taxpayer has an approval letter issued by the Department of Science and Technology; and
  - the R&D is incurred on or after the date of receipt of the application by the Department of Science and Technology for approval of the R&D.
- Special relief is available where R&D expenditure did not qualify for deduction solely because approval from the Department of Science and Technology was granted after the end of the relevant year of assessment. In such situations, the Commissioner may issue a reduced assessment where the expenditure would have been an allowable deduction if approval had been granted during the relevant year of assessment.

Plant or machinery used for storing/packing farming products by any agricultural co-operative

- An allowance equal to 20% (5-year straight-line basis) of the cost to the taxpayer to acquire the asset.
- The assets must be owned by the taxpayer or acquired as purchaser in terms of an instalment credit agreement as defined in the VAT Act.

Learnership Agreements

- *An allowance where:*
  a) the employer during the year of assessment entered into a registered learnership agreement with a learner before 31 March 2022 in the course of any trade carried on by that employer; or
  b) the learner completed during the year of assessment a registered learnership agreement entered into by the employer with that learner during the year or any previous year of assessment in the course of any trade carried on by that employer.
- *Annual allowance*
  - NQF level 1 – 6: R40 000 or R60 000 for a learner with a disability
  - NQF level 7 – 10: R20 000 or R50 000 for a learner with a disability
  - The allowance is based on full monthly periods completed in the employer's year of assessment.
  - The allowance will be apportioned if falling in more than one year of assessment.
  - The commencement allowance is allowed in respect of each successive year of learnership.
- *Completion allowance*
  - NQF level 1 – 6: R40 000 or R60 000 for a learner with a disability, in respect of each completed 12 month period of the learnership.
  - NQF level 7 – 10: R20 000 or R50 000 for a learner with a disability, in respect of each completed 12 month period of the learnership.
  - The allowance is only claimable on the successful completion of the learnership.
- If the learner leaves during the year there is no recoupment.
- The deduction will not be allowed in respect of any registered learnership agreement where the learner previously failed to complete any other registered learnership agreement that contains the same education and training components.

Machinery, plant, implements, utensils and articles used in farming or production of renewable energy – Farming

- An allowance equal to –
  - 50% of the cost to the taxpayer of the asset in the year of assessment (first year of assessment) in which the asset is so brought into use;
  - 30% of such cost in the 2nd year of assessment; and
  - 20% of such cost in the 3rd year of assessment.

Production of bio-fuels

- An allowance, in respect of these assets to be used for the production of bio-fuels (bio-diesel and/or bio-ethanol), equal to:
  - 50% of the cost to the taxpayer of the asset in the year of assessment (first year of assessment) in which the asset is so brought into use;
  - 30% of such cost in the 2nd year of assessment; and
  - 20% of such cost in the 3rd year of assessment.

Generation of electricity

- An allowance in respect of these assets to be used in the generation of electricity from –
  - wind;
  - sunlight;
  - gravitational water forces to produce electricity of not more than 30 megawatts; and
  - biomass comprising organic wastes, landfill gas or plants,

- equal to –
  - 50% of the cost to the taxpayer of the asset in the year of assessment (first year of assessment) in which the asset is so brought into use;
  - 30% of such cost in the 2nd year of assessment; and
  - 20% of such cost in the 3rd year of assessment.
- The assets referred to above must be owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (a) of an "instalment credit agreement" as defined in section 1 of the VAT Act.

Environmental expenditure

- Environmental treatment and recycling asset (that is, any new and unused air, water and solid waste treatment and recycling plant or pollution control and monitoring equipment)
- An allowance equal to:
  - 40% of the cost to the taxpayer to acquire the asset in the year of assessment (first year of assessment) in which the asset is so brought into use; and
  - 20% of such cost in the subsequent 3 years of assessment
- Environmental waste disposal asset (that is, any new and unused air, water and solid waste disposal site, dam, dump, reservoir, or other structure of a similar nature, or any improvement thereto)
- An allowance equal to 5% (20-year straight-line basis) of the cost to the taxpayer to acquire the asset
- Post-trade environmental expenses
- A deduction equal to 100% the expenditure or loss incurred in respect of certain decommissioning, remediation or restoration.

Residential units

- An allowance equal to 5% of the cost to the taxpayer of new and unused residential unit (or of new and unused improvement to a residential unit) owned by the taxpayer if:
  a. the unit or improvement is used by the taxpayer solely for the purposes of a trade carried on by the taxpayer;
  b. the unit is situated within the South Africa; and
  c. the taxpayer owns at least five residential units within the South Africa, used by the taxpayer for the purposes of a trade carried on by the taxpayer.
- An additional allowance of 5% of the cost of a low-cost residential unit of a taxpayer will be allowed if the allowance of 5% (referred to in (i) above) is allowable.
- The percentages below will be deemed to be the costs incurred by the taxpayer in respect of a residential unit where the taxpayer acquires a residential unit (or improvement to a residential unit) representing only a part of a building without erecting or constructing the unit or improvement on:
  a. 55% of the acquisition price, in the case of the unit being acquired; and
  b. 30% of the acquisition price, in the case of the improvement being acquired.

Sale of low-cost residential units on loan account

- A deduction equal to 10% of the amount owing to the taxpayer by the employee in respect of the disposal of a low-cost residential unit by the taxpayer to an employee.

Environmental conservation and maintenance expenditure

- Expenditure incurred by a taxpayer to conserve or maintain land, if:
  a) the conservation or maintenance is carried out in terms of a biodiversity management agreement that has a duration of at least five years entered into by the taxpayer in terms of the National Environmental Management: Biodiversity Act, No. 10 of 2004; and
  b) the land is utilised by the taxpayer for the production of income and for purposes of a trade consists of, includes or is in the immediate proximity of the land that is the subject of the agreement contemplated in (a).
- The above expenditure must not exceed the income derived by the taxpayer, from a trade carried on by the taxpayer on the land utilised as contemplated in (b). The excess amount will be carried forward and deemed to be a deduction in the next year of assessment. Expenditure incurred by a taxpayer to conserve or maintain land owned by the taxpayer is for purposes of section18A of the IT Act deemed to be a donation, if the conservation or maintenance is carried out in terms of a declaration that has a duration of at least 30 years in terms of the National Environmental Management Protected Areas Act, No. 57 of 2003.
- If land is declared a national park or nature reserve and the declaration is endorsed on the title deed of the land with a duration of at least 99 years, 10% of the lesser of the cost or market value of the land is for purposes of section 18A and paragraph 62 of the Eighth Schedule to the IT Act deemed to be a donation in the year of assessment in which the land is so declared and each of the succeeding nine years of assessment.

Small Business Corporations (SBC)

- 100% of the cost of plant and machinery used in a process of manufacture or similar process.
- Other depreciable assets acquired after 1 April 2005 can be written off on the following basis: 50%, 30%, 20%.

Urban Development Allowances

- Accelerated depreciation for refurbished and new buildings in designated urban zones in order to counter decay and encourage urban regeneration.

Date of issue: 6 June 2018

6. SPECIAL ZONES AND AREAS – PREFERENTIAL TAX TREATMENT IN SOME CITIES/REGIONS

URBAN DEVELOPMENT ZONES

- This incentive has been introduced in the form of an accelerated depreciation allowance and has been effected by the insertion of section 13quat into the Act. When claimed, the tax incentive reduces the taxable income of a taxpayer. The incentive is not limited to the taxable income of the taxpayer and can create an assessed loss.
- This allowance (the UDZ allowance) is applicable in respect of the –
  - erection, extension or improvement of or addition to an entire building;
  - erection, extension, improvement or addition of part of a building representing a floor area of at least 1000 m^2; or
  - purchase of such a building or part of a building directly from a developer on or after 8 November 2005, provided that certain requirements are met.
- A taxpayer will only qualify for the UDZ allowance in respect of a building or part of the building constructed, improved or purchased directly from a developer within an urban development zone (UDZ), if the building or that part of the building is used solely for the purposes of that person's trade and was brought into use for these purposes on or before 31 March 2014.
- A deduction in respect of the UDZ allowance will be allowed in the determination of the taxable income of a person that constructed, improved or purchased a building from a developer, provided all the requirements are complied with.
- The following municipalities were included:
  Buffalo City, City of Cape Town, Ekurhuleni, Emalahleni, Emfuleni, eThekwini Metro, Mahikeng, Johannesburg Metro, Mangaung, Matjhabeng, Mbombela, Msunduzi, Nelson Mandela Bay, Polokwane, Sol Plaatje, Tshwane Metro
- Other municipalities may apply to the Minister for a UDZ area to be demarcated if the area complies with prescribed criteria.

INDUSTRIAL DEVELOPMENT ZONE

- An Industrial Development Zone ("IDZ") is an area designated by the Minister of Trade and Industry in terms of the Manufacturing Development Act 187 of 1993. It is defined by the Department of Trade and Industry (DTI) as "a purpose-built industrial estate linked to an international seaport or airport that leverages fixed direct investments in value-added and export-oriented manufacturing industries".
- Within an IDZ are found Customs Controlled Areas (CCAs). CCAs are designated by SARS in concurrence with the Minister of Trade and Industry and are controlled by SARS.
- According to the DTI, the benefits of operating within an IDZ are that the CCAs have dedicated SARS officials to provide support for any customs and VAT requirements. Furthermore, there are direct links to international ports of entry. There is a suspension of import duty on imports for production-related raw materials, including machinery and assets used in production with the aim of exporting the finished products. There are VAT exemptions under specific conditions for supplies procured in South Africa. The IDZs also offer a world-class industrial support infrastructure.
- The section 12I allowance of the Act (ITA) provides 'super allowances' for capital expenditure to be incurred on qualifying greenfield (i.e. new) projects located within an industrial development zone (IDZ).
- For a greenfield project located within an IDZ and approved on or after 1 January 2012, the following enhanced deductions will be applicable:
  - A 100% deduction of the cost of any new and unused manufacturing asset used in an industrial policy project with preferred status. An Industrial Policy Project that met additional qualifying criteria in terms of section 12I(8) of the Act by scoring at least 8 out of 10, and at least 2 out of 4 in terms of direct employment creation and skills development criteria.
  - A 75% deduction of the cost of any new and unused manufacturing asset used in any industrial policy project with qualifying status. An Industrial Policy Project that met the basic qualifying criteria in terms of section 12I(8) of the Act by scoring at least 5 out of 10, and at least 2 out of 4 in terms of direct employment creation and skills development criteria.
- The section 12I allowances are in addition to the capital allowances (i.e. s11(e), s12C and s13 allowances) that may be claimed on qualifying expenditure. Therefore, the taxpayer could obtain up to 200% tax deductions in respect of qualifying capital expenditure.

DOUBLE TAXATION AGREEMENTS

- The underlying concept is that the double taxation agreements will override all other local taxation rules.
- These agreements commonly provide that income of a particular nature will be taxed in only one of the countries, or may be taxed in both countries with the country of residence allowing a credit for the tax imposed by the other country, or exempting that income from income tax. SA uses the credit method.
- The following countries have double taxation agreements with South Africa:
  Algeria, Australia, Austria, Belarus, Belgium, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Egypt, Ethiopia, Finland, France, Germany, Ghana, Greece, Grenada, Hong Kong, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Malawi, Malaysia, Malta, Mauritius, Mexico, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Peoples' Republic of China, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saudi Arabia, Seychelles, Sierra Leone, Singapore, Slovak Republic, Spain, Swaziland, Sweden, Switzerland, Taiwan, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Zambia, Zimbabwe

TRANSFER PRICING AND THIN CAPITALISATION

Transfer Pricing

- The ITA contains provisions aimed at combatting transfer pricing between connected persons across international borders.

The Arm's Length Principle

- The first and overriding principle is that transactions between connected persons are to be conducted at arm's length. This simply means that the transaction should have the substantive financial characteristics of a transaction between independent parties, where each party will strive to get the utmost possible benefit from the transaction.
- In terms of section 31(3)(b) of the IT Act, where there is a difference between the arm's length amount and the amount actually paid or received for goods or services to a non resident investor, the difference shall be deemed to be a loan from the South African taxpayer to the non-resident in question. The taxpayer will be required to calculate an arm's length rate of interest on the deemed loan and such interest will be deemed to be payable until the deemed loan is repaid to the South African taxpayer.

Acceptable Methods for Determining an Arm's Length Price

- Neither Section 31 of the IT Act nor the tax treaties entered into by South Africa prescribe any particular methodology for the purpose of ascertaining an arm's length consideration. Given that there is no prescribed legislative preference, the Commissioner would generally seek to use one of the transfer pricing methods recognised by the OECD Guidelines set out below.
  a) the comparable uncontrolled price method (CUP method);
  b) the resale price method (RP method);
  c) the cost plus method (CP method);
  d) the transactional net margin method (TNMM); and
  e) the profit split method.
- The most appropriate method in a given case will depend on the facts and circumstances of the case and the extent and reliability of data on which to base a comparability analysis. It should always be the intention to select the method that produces the highest degree of comparability.
- The choice of the most appropriate method should therefore be based on a practical weighting of the evidence, having regard to:
  - the nature of the activities being examined,
  - the availability, quality and reliability of the data,
  - the nature and extent of any assumptions, and
  - the degree of comparability that exists between the controlled and uncontrolled transactions where the difference would affect conditions in the arm's length dealings being examined.

Documentation

- Section 75(1)(f) requires all records (namely ledgers, cash-books, journals, cheque-books, bank statements, deposit slips, paid cheques, invoices, stock lists, all other books of account and data created by means of a computer relating to any trade carried on by the taxpayer), as well as recorded details from which the taxpayer's returns were prepared, for assessment of taxes, to be retained for a period of seven years from the date on which the return relevant to the last entry in any of the above-mentioned records was received by the Commissioner.

Burden of Proof

- In terms of section 31, the discretion to adjust the consideration in respect of a transaction rests with the Commissioner. In the discharging of its burden of proof it is clearly in a taxpayer's best interests to:
  - develop an appropriate transfer pricing policy
  - determine the arm's length amount, as required by section 31 of the IT Act; and
  - voluntarily produce documentation to evidence their analysis.

Thin capitalisation

- Thin capitalisation is treated as a form of transfer pricing.
- Thin capitalisation provisions are applied to limit the deductibility of interest where there is a disproportionate ratio between the loan capital and equity employed.
- These rules apply to a non-resident investor who has granted financial assistance to a resident investee, where the investor and investee are connected persons. Financial assistance includes a loan, advance, or debt and provision of a security or guarantee.
- The thin capitalisation rules incorporate the arm's length principle. This makes it necessary to test the level of debt the company received compared to the debt it could have borrowed from an independent third party lender.
- The legislation is cast in wide terms and significant discretion is given to the SARS. In determining whether the loan arrangement is at arm's length one has to look at various factors and these would typically include:
  - Debt : Equity ratio
  - The ratio of Debt to Earnings Before Interest Tax Depreciation and Amortisation – Debt : EBITDA
  - Interest cover – debt servicing – EBITDA : Interest
  - Lending risks
  - The term of the loan
  - Security
  - Currency denomination of the loan
- In terms of section 31(3)(b) of the IT Act the amount of the difference between the interest paid on an arm's length loan and the interest actually paid to the non-resident investor is deemed to be a loan from the South African taxpayer to the non-resident investor. The South African taxpayer will be required to calculated an arm's length rate of interest on that deemed loan, and such interest will be deemed to be payable until the deemed loan is repaid to the South African taxpayer.

TAX FILING AND PAYMENT DEADLINES

Registration as a taxpayer

- Every person who becomes liable for any income tax or who becomes liable to submit any return of income must register as a taxpayer at SARS within 21 days after so becoming a taxpayer by completing an IT 77 form.

Year of assessment

- **Individuals and trusts**
  The year of assessment for natural persons, deceased estates, insolvent estates and trusts covers a period of 12 months and commences on 1 March of a specific year and ends on the last day of February the following year. Natural persons and trusts may be allowed to draw up their financial statements for their businesses to dates other than the last day of February.
- **Companies**
  Companies are permitted to have a year of assessment ending on a date that coincides with their financial year. If the financial year-end is 30 June, its year of assessment will run from 1 July of a specific year to 30 June the following year.

Filing of tax returns

- The income tax returns must be submitted manually or electronically by a specific date each year. This date is published for information of the general public and is promoted by way of a filing campaign to encourage compliance in this regard.

Provisional tax

- Provisional tax is not a separate tax but simply a provision for the taxpayer's final income tax liability for a year of assessment, which will be determined upon assessment.
- Compulsory provisional tax payments are made six months after the beginning of a year of assessment and at the end of the year of assessment and represent income tax, calculated on the estimated taxable income anticipated for the year of assessment.
- A provisional taxpayer is:
  - any person who derives income by way of:
    i. any remuneration from an employer that is not registered in terms of paragraph 15 of the 4th Schedule;
    ii. any amount that does not constitute remuneration as defined in the 4th Schedule to the IT Act; or
    iii. an allowance or advance in terms of section 8(1) of the IT Act;
  - any person who derives income from the carrying on of any business;
  - a company/close corporation; and
  - any person who is notified by the Commissioner that he/she is a provisional taxpayer
- Excluded as a provisional taxpayer is –
  - an approved public benefit organisation;
  - an approved recreational club;
  - any body corporate, share block company or association of persons;
  - any non-resident owner or charterer of ships or aircraft who is liable to make payments in respect of normal tax in terms of section 33 of the IT Act;

- any natural person who does not derive income from carrying on any business if:
  - the taxable income of that person does not exceed the tax threshold; or
  - the taxable income of that person is derived from interest, dividends, foreign dividends, rental from the letting of fixed property and remuneration from an employer that is not registered in terms of paragraph 15 and does not exceed R30 000;
  - a small business funding entity; and
  - a deceased estate.

eFiling

- The primary objective of eFiling is to facilitate the electronic submission of tax returns and payments by taxpayers and tax practitioners. Taxpayers registered for e-Filing can engage with SARS online for submission of returns and payments in respect of most taxes.

Date of issue: 9 May 2018

7. EMPLOYMENT

Due to the historical background of South Africa, and the fact that an employee generally has less power, influence and resources than that of an employer, the rights of an employee outweigh the rights of an employer in most instances.

The definition of an 'employee' under South African legislation is any person, excluding an independent contractor, who works for another person or for the State, and who receives or is entitled to receive any remuneration; and, any person who in any manner assists in carrying on or conducting the business of an employer. Various tests have evolved from case law to distinguish between an employment relationship and other forms of contract dealing with the provision of work. These tests are the control test, the dominant impression test, the organisation test, and the composite test.

The South African legislative environment in respect of employment is complex, the topics covered in this guide are by no means exhaustive.

LABOUR LEGISLATION

South African labour legislation applies to all employees working in South Africa including foreign nationals working in South Africa.

The Constitution of the Republic of South Africa enshrines the right to fair labour practices, the right to strike, the right to form and join trade unions, the right to participate in trade union activity and the right for trade unions and employers to engage in collective bargaining.

Various pieces of legislation relating to employment give effect to employees' constitutional rights, and regulate various aspects in regard to employment. Some of the most important pieces are briefly described below.

Basic Conditions of Employment Act 75 of 1997

Known colloquially as "the BCEA", this Act sets out minimum conditions of employment which apply to any employment relationship, unless the terms and conditions the employer is offering are more favourable to employees than those prescribed by the BCEA. Among other things, the BCEA regulates the following:

- Working time, ordinary hours of work, overtime, and work on Sundays and public holidays
- Annual, sick, maternity and family responsibility leave
- Requirements in regard to the written particulars of employment record keeping and payment of remuneration, as well as deductions
- Notice of termination, payments on termination and severance pay
- Sectoral determinations

Labour Relations Act 66 of 1995

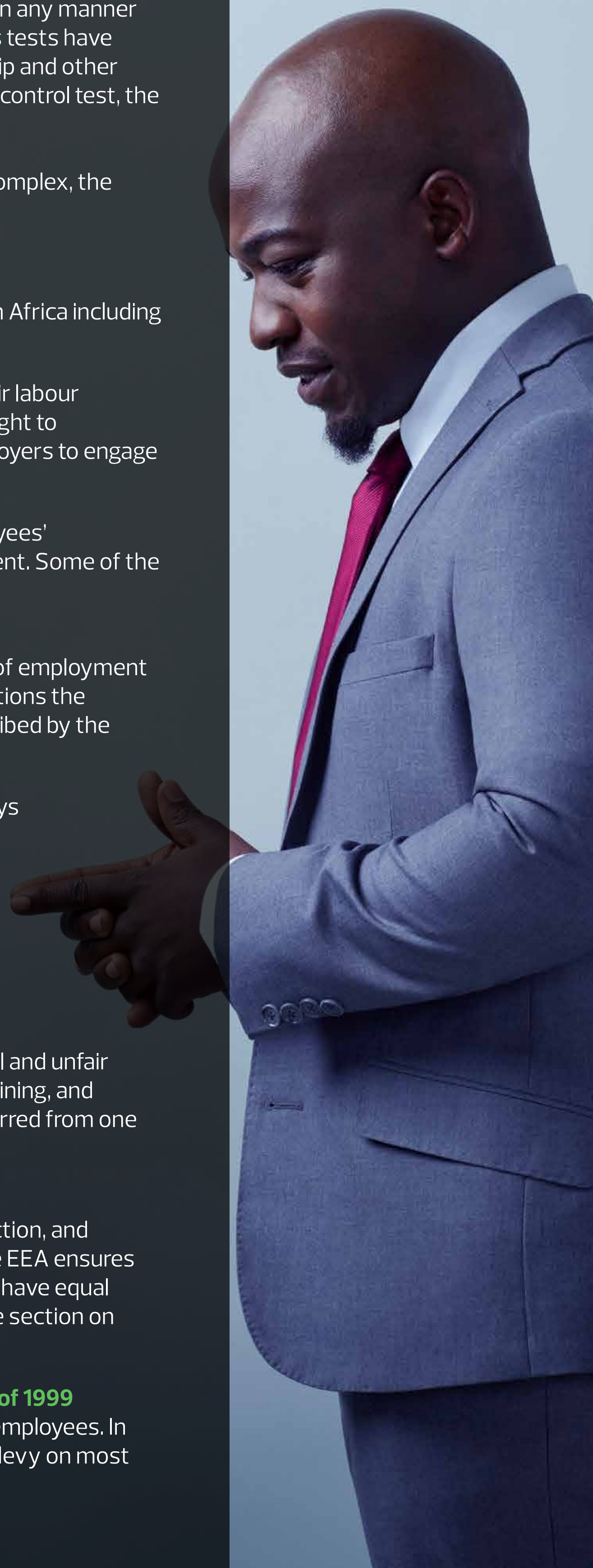
Known as "the LRA", this Act protects employees against unfair dismissal and unfair labour practices. The LRA also encourages and regulates collective bargaining, and governs the transfer of employees as a result of a business being transferred from one employer to another as a going concern.

Employment Equity Act 55 of 1998

Known as "the EEA", the objective of this Act is to promote affirmative action, and eliminate unfair discrimination. In the promotion of affirmative action, the EEA ensures that designated groups, being black people, disabled people and women, have equal opportunities and are equitably represented in workplaces. (Also see the section on Broad-Based Black Economic Empowerment elsewhere in this Guide)

Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999

The Skills Development Act seeks to develop the skills of South African employees. In order to do so, the Skills development Levies Act imposes a compulsory levy on most employers of 1% of the employers total payroll amount.



Unemployment Insurance Act 63 Of 2001

This Act establishes the Unemployment Insurance Fund that provides benefits under certain conditions to employees who take unpaid maternity leave, and to employees who have lost their jobs through circumstances beyond their control. Both employers and employees are required to make contributions to the Unemployment Insurance Fund.

Occupational Health and Safety Act 85 of 1993

This Act applies to all employers, with the exception of mines, shipping vessels, and those exempted by the Minister of Labour. The Occupational Health and Safety Act imposes a general duty on employers to provide and maintain a safe and healthy working environment.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

This Act provides for compensation to employees (or their dependants) where an employee has suffered illness, injury or death due to an occupational injury. The illness, injury or death must have occurred as a result of the scope of the employees employment, and must not have been predictable, or as a result of wilful misconduct.

National Minimum Wage Act 9 of 2018

This Act introduced a national minimum wage to South Africa, creating the entitlement for almost every employee to be paid in accordance with the remuneration prescribed by the Act.

RECRUITMENT

Recruitment is most commonly done through placing adverts on online recruitment platforms, through social media and through recruitment agencies. Most universities will in some form or another, facilitate the recruitment of graduates from the university.

The employer makes the decision as to who to hire, however job applicants have a right not to be unfairly discriminated against, except to the extent that is permitted by the Employment Equity Act specifically in regard to affirmative action and to advance the employers employee profile to be aligned to the economically active population. Aside from appropriate affirmative action programmes, discrimination on the grounds of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or any other arbitrary ground, is prohibited.

Employers are required under the Protection of Personal Information Act, No.4 of 2013, to comply with the provisions of this act in the treatment of personal information for job applicants and employees.

Employment contracts should be carefully tailored to suit the South African legislative environment and the employer as there are areas of an employment relationship that are difficult to vary once the employee has been offered employment. Employers may not unilaterally change the terms and conditions relating to an employment relationship. Employers are well advised to consult with professionals specialising in labour legislation in order to avoid risk and best protect themselves.

EXPATRIATE EMPLOYEES

South Africa is unique in its challenges and its opportunities. Expatriate employees can benefit greatly from working in South Africa but need to be aware that there are aspects to the South African work environment that require attention in order to mitigate risk.

Expatriate employees are advised to ensure that they have private medical cover so that they can be treated by private medical hospitals, clinics and doctors.

The quality of State schooling varies greatly depending on where you are in South Africa. Private schooling is available but is in great demand and there may be waiting lists. In addition, private schools are entitled to determine the school fees that they charge.

A person can drive in South Africa with his/her foreign drivers licence as long as it is issued in one of the official languages of South Africa, or if they hold a certificate of authenticity issued in an official language of South Africa, or a translation of the licence is attached to the licence. Licences must contain a photograph, and the signature of the licence holder.

South African labour legislation and tax legislation is applicable to all employees working in South Africa.

Generally the cost of living in South Africa is significantly less than in the United States, United Kingdom and Europe, and living in South Africa offers a wonderful lifestyle due to the outdoor activities, wildlife and climate.

Visas

All foreign nationals are required to enter South Africa with a valid visa. Only certain types of visas allow for individuals to conduct work while in South Africa and obtaining a visa can take weeks, if not months. The most common types of visas that would be applicable to people entering South Africa in order to conduct work would be:

- General Work Visa
- Business Visa
- Corporate Visa
- Intra Company Transfer
- Critical Skills Visa

BENEFITS, ENTITLEMENTS AND DEDUCTONS

South Africa has recently introduced the National Minimum Wage Act, No. 9 of 2018, which set a national minimum wage which is applicable to almost all employers, and it entitles the employee to be paid at least the prescribed national minimum wage.

Employees earning under the earnings threshold as determined by the Minister of the Department of Labour and amended from time to time, are entitled to overtime pay. Employees earning over the earnings threshold are not entitled to overtime pay, unless there is a contractual arrangement in place creating that right.

A bonus in the form of double pay or a thirteenth cheque is common in South Africa at the end of the year, is common in South Africa, but these are usually at the employers discretion in terms of when it is paid and how much. Employees do not have a right to a bonus unless there is a contractual arrangement, or there is a long standing practice that has created an expectation that employees will receive a bonus.

All employers are required to report earnings of employees to the South African Revenue Service and to deduct Pay as You Earn from employees. This is covered in more detail in the Taxation section of this guide.

Employers are required to contribute to the statutory fund in place to protect employees in the event of occupational illness or injury.

Employees and Employers are required, in equal portions, to contribute towards the Unemployment Insurance Fund.

The use of temporary employment services to provide labour can be complex in terms of the rights and entitlements of the employees. It is advised that professional advice is taken before engaging with a temporary employment service or labour broking arrangement.

TERMINATION

Due to the protection that employees are accorded under the various pieces of legislation, action taken by employers in regard to dismissal, discrimination and unfair labour practices can result in reputational risk and great cost.

Employment can only be terminated by an employee in the following ways:

- Resignation;
- Retirement or death;
- Constructive dismissal.

Employment can only be terminated by an employer, after following specific procedures to ensure procedural and substantive fairness, in the following ways:

- Misconduct;
- Incapacity;
- Operational requirements.

Employers are not permitted to unilaterally change the terms and conditions of an employment relationship. The only way such changes can be made is if the employee agrees to the changes without force, or if the changes are a result of following the procedures required by operational requirement dismissals.
Employers are required to provide employees who have terminated their services, with a Certificate of Service as prescribed by the Basic Conditions of Employment Act.
Employers are advised to consult with experts in the field of human resources and labour legislation before taking any action against employees.

Date of issue: 20 March 2019

8. INTELLECTUAL PROPERTY RIGHTS

Intellectual Property Rights refer to the intangible property rights which are a result of intellectual effort. Patents, trademarks and copyright are the main intellectual property rights.

PATENTS

Patents are regulated by the Patents Act, 1978. For an invention to be patentable, it must be new, involve an inventive step and must be capable of industrial application.

A patent must be registered with the South African Registrar of Patents to be protected. Patent disputes are dealt with by the Commissioner of Patents or the High Court.

TRADEMARKS

Trademarks are regulated by the Trademarks Act 194 of 1993. A trademark is a brand name, a slogan or a logo. Trademarks must be capable of distinguishing the goods or services of one undertaking from those of other undertakings. The right holder is entitled to prevent unauthorised use of an identical or substantially similar mark used in the same type of industry as that in which the trade mark has been registered.

Trademarks can be registered with the South African Registrar of Trademarks. Trademarks are registered for ten years but can, on application, be renewed for an unlimited number of additional ten-year periods. Unregistered marks can be protected under the common law action of passing off. The application fee for a trademark is R590 for each class in which you apply, and for each spare trademark.

Where there has been an infringement, the High Court can grant interdicts, order the removal of the infringing mark and the delivery up of the products bearing the mark or award damages.

COPYRIGHT

Copyrights are regulated by the Copyright Act, 1978. Copyright protection is different from other forms of Intellectual Property protection in that it exists automatically and no steps need to be taken in South Africa to register it. Copyright is created by putting the words "copyright" or "copyright reserved" or "copyright name and year" or the symbol "© name and year".

The following are eligible for copyright protection, provided they are original:

- Literary works
- Musical works
- Artistic works
- Cinematography
- Sound recordings
- Broadcasts
- Programme-carrying signals
- Computer programs
- Published editions

The right holder is entitled to the exclusive right to reproduce, publish, perform, broadcast or adapt the work in question, depending on the nature of the work protected by copyright.

The life span of Copyrights is 50 years, and in the case of written works is for the life of the author plus 50 years after the writer has died. There are civil sanctions and criminal sanctions available within our legislature for copyright infringement.

Date of issue: 8 April 2021

9. ASSET VALUATION

Valuations are a fundamental business requirement used in decision making, negotiating a transaction price, preparing financial statements, and satisfying tax and regulatory requirements. Whether valuing a business or an underlying individual asset, a valuation calls for the application of technical skills experience and business insight. This invariably involves conducting a detailed analysis, undertaking market research and applying valuation techniques, in order to arrive at a reliable, credible and supportable valuation.

CIRCUMSTANCES THAT REQUIRE ASSET VALUATION

In the light of today's rigorous compliance and regulatory environment, it is recommended that in the following transactions, the valuation of the assets should be appraised by a suitably qualified professional.

- Mergers and acquisitions (M&As) whether buying or selling
- Privatisations
- Initial public offerings (IPOs)
- Fair and reasonableness opinions
- Liquidations
- Tax transactions (Income tax, Capital gains tax and Estate duty)
- Restructuring of operations
- Purchase price allocations (including the valuation of intangible assets)
- Valuations in terms of International Financial Reporting Standards
- Deceased Estates Valuations
- Property valuations
- Calculations with respect to damages in insurance claims
- Divorce settlements/dissolution of joint estates
- Succession planning for family owned businesses and/or other corporate entities
- Valuations for purposes of litigation proceedings and/or dispute resolution processes
- Broad Based Black Economic Empowerment Transactions

PROVIDER OF ASSET VALUATION SERVICES

South African law does not specifically stipulate the service providers that may perform valuation services, relating to business and asset valuations, although in certain areas the service provider must be accredited by the respective authoritative body (e.g. the Johannesburg Stock Exchange (JSE) when performing fair and reasonableness opinions for JSE listed entities).

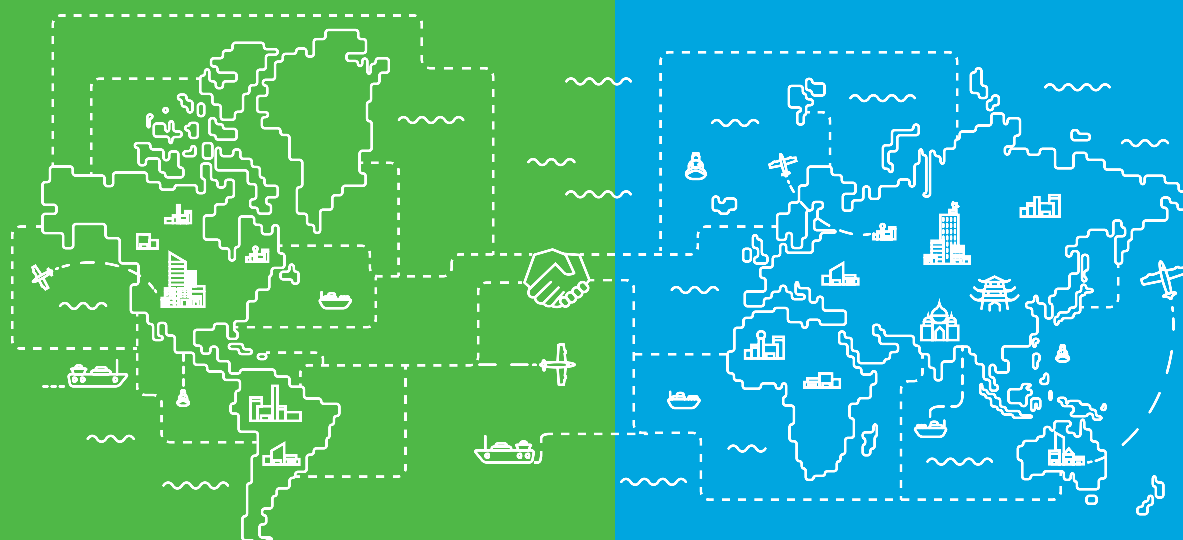
When fixed property is being valued, in terms of the Property Valuers Profession Act, the Valuer should be registered with the South African Council for The Property Valuers Profession. The Valuers profession is also governed by The South African Institute of Valuers. Most Valuers specialise and it is therefore important to select not only a registered Valuer but also a Valuer with the relevant experience for the specific valuation required.

ASSET VALUATION COSTS

Valuation engagements are usually charged on one of the following basis:

- Professional service providers and consultants – hourly rate
- Investment banks – percentage of transaction

Date of issue: 8 February 2021



10. INVESTING IN SOUTH AFRICA

OVERVIEW

South Africa is one of the most sophisticated, diverse and promising emerging markets globally with enormous potential as an investment destination, offering a unique combination of highly developed first world economic infrastructure with a vibrant emerging market economy.

Strategically located at the tip of the African continent, South Africa is a key investment location, both for the market opportunities that lie within its borders and as a gateway to the rest of the continent, a market of about 1 billion people.

It is also one of the most advanced, broad-based industrial and productive economies in Africa.

Here are some of the reasons for doing business in South Africa:

Sound economic policies

Since the start of democracy in 1994, South Africa's economy has been undergoing structural transformation, with a disciplined fiscal framework aimed at promoting domestic competitiveness, growth and employment and increasing the economy's outward orientation.

Key economic reforms have given rise to a high level of macro-economic stability. Taxes have been reduced, tariffs lowered, the fiscal deficit brought under control, and exchange controls relaxed.

Despite its bright prospects, South Africa still faces key challenges of poverty, unemployment and inequality. The government is addressing these through two key economic frameworks:

- The New Growth Path, which aims to create a more developed and equitable economy, largely through creating 5-million jobs. The plan aims, by the year 2030, to achieve a real annual economic growth rate of 5%, reduce inequality, and rein in unemployment from its current 25% to a mere 6%.
- The Industrial Policy Action Plan, which aims to promote broader participation by historically disadvantaged groups in the mainstream of the industrial economy. The strategy here involves large-scale state investment in infrastructure, small business and skills development, and interventions targeting specific areas of the economy.

South Africa's central bank, the SA Reserve Bank, maintains its independence from the government. The Bank's programme of inflation targeting has shown good results: the real interest rate has stabilised and the currency remains at competitive levels for investment. Consumer inflation came in at 5.74% from 2013 to the beginning of 2016.

Favourable legal and business environment

South Africa has a world-class, progressive legal framework. Legislation pertaining to commerce, labour and maritime issues are particularly well developed, while laws relating to competition policy, copyright, patents, trademarks and disputes conform to international norms and conventions.

The Johannesburg Stock Exchange Ltd (JSE) rates among the top 20 stock exchanges in the world by market capitalisation. The JSE is regarded as a mature, efficient, secure market with world-class regulation, trading, clearing, settlement assurance and risk management. It has harmonised its listing requirements, disclosure and continuing obligations with those of the London Stock Exchange (LSE) and offers superb investor protection.

South Africa's improvements in "technological readiness" has helped reverse a four-year decline and improve seven positions to land back into the top 50, in the World Economic Forum's Global Competitiveness Index. This index measures "the agility with which an economy adopts existing technologies to enhance the productivity of its industries for increased efficiency and enabling innovation for competitiveness".

World-class infrastructure

South Africa has world-class infrastructure - including a modern transport network, reasonably available energy, and sophisticated telecommunications facilities.

The government has identified massive infrastructure projects as key to boosting the country's economic growth rate and creating employment and are spending billions of Rands on getting the investment ball rolling. South Africa's success in hosting the world's largest sporting event, the 2010 FIFA World Cup, has shown that the country is capable of undertaking – and successfully completing – major projects on time.

Access to markets

Located at the southern most tip of the African continent, South Africa is ideally positioned for access to the 15 countries comprising the Southern African Development Community (SADC) – with a combined market of over 250-million people – as well as the islands off Africa's east coast, and even the Gulf States and India .

South Africa also serves as a trans-shipment point between the emerging markets of Central and South America and the newly industrialised nations of South and Far East Asia.

Major shipping lanes pass along the South African coastline in the South Atlantic and Indian oceans, and its seven commercial ports form by far the largest, best equipped and most efficient network on the continent.

These ports are the Conduits for trade between South Africa and its partners in the SADC and the South African Customs Union, as well as hubs for traffic to and from Europe, Asia, America and Africa.

Gateway to Africa

Africa, with 200 to 300-million of its people approaching relative middle-class status, is seen as the next great growth story after China and India.

South Africa facilitates easy access to other sub-Saharan markets. The country is the economic powerhouse of Africa and it is rightly considered a dynamic force within the 15-member Southern African Development Community. Bordering Namibia, Botswana, Zimbabwe, Mozambique, Swaziland and Lesotho, and its well-developed road and rail links provide the platform and infrastructure for ground transportation deep into sub-Saharan Africa.
Moreover, South Africa has the resident marketing skills and distribution channels to open up commercial ventures into Africa.

Trade reform, strategic alliances

South Africa has trading relationships with more than 200 countries and territories. It was admitted to the BRIC group of countries of Brazil, Russia, India and China (now called BRICS) in 2011. Market access has been enhanced through free trade agreements with the European Union and the SADC and the implementation of the Africa Growth and Opportunity Act by the United States.

The country has special relationships with the Southern African Customs Union (Botswana, Namibia, Lesotho and Swaziland), the Southern African Development Community, as well as the European Union. There are also bilateral agreements in place with Mozambique and Zimbabwe.
It also has strong relations with markets in the rest of Africa, Asia and Latin America – especially via its economic alliance with other BRICS members.

South Africa has become a key trade and investment partner to China, which over the past decade has become a major player on the African continent.

Cost of doing business in SA

South Africa's exchange rate makes it one of the least expensive countries for foreigners to live and do business in – with a first-world infrastructure and high living standards ensuring good value for money.

South Africa's energy costs have increased in recent years, but the government is determined to meet its growing energy needs through renewable and efficient sources.

The country compares favourably for petroleum prices, with private sector and multinational oil companies refining and marketing nearly all imported petroleum products in southern Africa.

South Africa's telecommunications costs are coming down. The government is taking steps to ensure cheaper and more widely available bandwidth capacity, while the landing of several submarine fibre-optic cables along both the east and west coasts of Africa has boosted the continent's connection with the rest of the world.

South Africa's unit labour costs are one of the lowest when comparing to other key emerging markets and the country's labour productivity has improved in recent years.

Industrial capability, cutting-edge technology

The country's manufacturing output is increasingly technology-intensive, with high-tech manufacturing sectors – such as machinery, scientific equipment and motor vehicles – enjoying a growing share of total manufacturing production.

South Africa's technological research and quality standards are world-renowned. The country has developed a number of leading technologies, particularly in the fields of energy and fuels, steel production, deep-level mining, telecommunications and information technology.

BUSINESS FINANCE

Business in South Africa is financed either by way of equity finance (Owner capital) or loan funding. Loan funding comprises three main loan products; overdrafts, term loans and mortgages although for marketing purposes these products may be given different names.

Some of the banks located in South Africa who can assist with loan funding include:

- Standard Bank Group Limited
- ABSA Bank Limited
- Nedbank Group Limited
- RMB Holdings Limited
- Investec Limited
- FirstRand Limited
- Capitec Bank Limited

Micro Finance Regulatory Council

The MFRC regulates the money-lending industry to foster good practice in the industry and to protect consumers who use the services of micro finance businesses.

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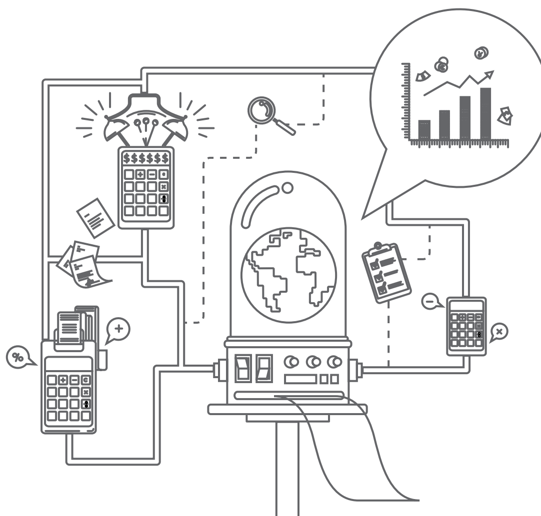


11. LISTING RULES IN SOUTH AFRICA

South Africa's securities are traded by an entity known as the Johannesburg Stock Exchange Limited ("JSE"). This stock market was established in 1887. Companies wishing to list on the JSE have two options namely the Main Board and the Alternative Exchange (AltX). The companies wishing to list have to comply with the on-going requirements of the JSE Listings Requirements.

A high level overview of the listing requirements for the two markets is discussed below:

THE MAIN BOARD

An applicant seeking a listing on the Main Board must satisfy the following criteria:

- A subscribed capital of at least R50 000 000 including reserves (but excludes minority interests, as well as revaluations of assets and intangible assets that have not been subject to a valuation by an independent expert within the last six months)
- Not less than 25 000 000 equity shares in issue
- Audited annual financial statements for the last 3 financial years with no modified audit reports and:
  - at the time of the last audit, reported at least R15 000 000 before tax and after a headline earnings adjustment; or
  - have a subscribed capital of at least R500 million including reserves (but excludes minority interests, as well as revaluations of assets and intangible assets that have not also been subject to a valuation by an independent expert within the last six months)
  - the JSE may list a company in a development stage and does not meet the profit history requirements listed above, at its own discretion. Provided that the applicant has an existing subscribed capital of at least R500 million and must have been in existence for at least twelve months.
- The business must be performing its regular activity either directly or through one or more of its subsidiaries. It's also required to be an independent entity that is supported by a historic revenue earning history and control over a majority of its assets for 3 financial years; or
- It must have a reasonable spread of direct interests in the majority of its assets and the right to actively participate in the management of such assets, whether by voting or through other rights which give it influence in the decisions relating to the assets and must have done so for the period 3 years;
  - The JSE may list a company which has only controlled or had a direct interest in the majority of its assets for twelve months, at its own discretion. Provided that,:
    1. It has during the period for which it has exercised control, produced audited financial statements with the required profits.
    2. It is able to illustrate that the assets or subsidiaries are in a similar business line and are dependent on one another in order to generate the company's products.
    3. At least one of the underlying assets or subsidiaries would, on its own, qualify to list on the main board.
- 20% of each equity securities class must be held by the public
- Certain other criteria apply to investment entities, mineral companies and property companies that wish to be listed on the JSE

THE ALTERNATIVE EXCHANGE (ALTX)

Companies who do not wish to list on the main board of the JSE may also consider a listing on the Alternative Exchange ("AltX"). This is a market aimed at small to medium companies that are in a growth phase. The listing requirements are similar to that of the Main Board but are less onerous to allow smaller entities access to the Exchange. The unique requirements applicable to companies registered on the AltX can be summarised as follows:

- Appoint a Designated Advisor ("DA")
- Share capital of at least R2 000 000 including reserves (but excludes minority interests, as well as revaluations of assets and intangible assets that have not been subject to a valuation by an independent expert within the last six months)
- 10% of each equity securities class must be held by the public
- Directors must have completed the AltX Directors Induction Programme
- Appoint executive financial director and the audit committee must submit written confirmation to the JSE that the financial director has the appropriate expertise and experience to fulfil the role; The JSE may at its discretion allow for a part-time director to be appointed or no financial director at all, provided that there is sufficient motivation.
- Produce profit forecast for the remainder of the financial year of listing and for the following year or provides a 3 year acceptable profit history
- At least 50% of shareholding of each director and DA should be held in trust from the date of listing by the applicant issuer's auditors or attorneys
- The applicant must have control over the majority of its assets.
- Certain other criteria apply to property companies that wish to be listed on the JSE.

The above entails a summary of the requirements for listing and the issues to take note of prior to listing. Users of this document are urged to at all times consult the appropriate advisers when dealing with the Listings Requirements to ensure proper and full compliance.

Date of issue: 19 February 2021

12. BROAD-BASED BLACK ECONOMIC EMPOWERMENT

INTRODUCTION

South Africa's first democratic government was elected in 1994, with a clear mandate to redress the political, social and economic inequalities of the past. Since 1994, government has embarked on a comprehensive programme to transform South Africa's economy.

In 2003, the Broad-Based Black Economic Empowerment ("B-BBEE") Act was published. The fundamental objective of the Act was to provide a legislative framework to advance economic transformation and enhance the economic participation of Black people in the South African economy.

The definition of "Black" people includes Africans, Coloureds, Indians and Chinese who comply with the following:

- Are citizens of the Republic of South Africa by birth or descent; or
- became citizens of the Republic of South Africa by naturalisation:
  - before 27 April 1994; or
  - became citizens of the Republic of South Africa by naturalisation on or after 27 April 1994, and who would have been entitled to acquire citizenship by naturalisation prior to that date.

In 2007, and in accordance with the 2003 B-BBEE Act, the Minister of Trade and Industry issued the Codes of Good Practice and Transformation Charters, which set out the "rules of the game" for entities wishing to be involved in the B-BBEE process. The B-BBEE Advisory Council was also established.

The 2007 B-BBEE Codes of Good Practice met with partial success, necessitating a revision and the publishing of "new" Codes in October 2013. These new codes came into effect on 30 April 2015. Effective 01 December 2019, there have been additional changes to the Generic Codes of Good Practice, particularly with respect to Schedule 1 (definitions); Statement 300 (Skills Development) and Statement 400 (Enterprise and Supplier Development).

B-BBEE IS NOT COMPULSORY, BUT...

B-BBEE is not a legislative requirement for privately-owned entities. This means that it is not compulsory to obtain a B-BBEE Certificate.

Whilst private entities have the freedom to elect whether to obtain a B-BBEE rating or not, government and other public entities (including parastatals), do take into consideration B-BBEE ratings when granting tenders and licences (e.g. mining, telecommunications, and gambling licences). Entities with unfavourable B-BBEE ratings are therefore unlikely to be granted such tenders and licences. All companies listed on the Johannesburg Stock Exchange (JSE) must provide the Commission with a report on an annual basis detailing their compliance with B-BBEE.

Besides assisting with transformation in South Africa, entities also choose to obtain B-BBEE ratings due to pressure from their industry and/or customers. Customers may require a B-BBEE rating from an entity so that the customer can include it in their procurement calculation. Obtaining a favourable rating can also provide a competitive advantage over a competitor.

FRONTING

Fronting means a deliberate circumvention or attempted circumvention of the B-BBEE Act and/or the Generic or Sector Codes. Fronting commonly involves reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance, or by any other person.

Verification agencies, and/or procurement officers and relevant decision-makers may come across fronting indicators through their interactions with measured entities.

Common fronting practices may comprise of:

- Window-dressing: This includes cases in which Black people are appointed or introduced to an entity on the basis of tokenism, and discouraged or inhibited from substantially participating in the core activities of an entity.
- Benefit Diversion: This includes initiatives implemented where the economic benefits received as a result of the B-BBEE status of an entity do not flow to Black people in the ratio as specified in the relevant legal documentation.
- Opportunistic Intermediaries: This includes entities that have concluded agreements with other entities with a view to leveraging the opportunistic intermediary's favourable B-BBEE status in circumstances where the agreement involves:
  - Significant limitations or restrictions upon the identity of the opportunistic intermediary's suppliers, service providers, clients or customers;
  - The maintenance of their business operations in a context reasonably considered improbable having regard to resources; and
  - Terms and conditions that are not negotiated at arms-length on a fair and reasonable basis.

Fronting is a criminal offence. Any person convicted of fronting may be liable to a fine, or a maximum prison sentence of 10 years, or in the case of a juristic person, a fine of up to 10% of its annual turnover.

Further, any person/entity convicted of fronting may not for a period of ten years from the date of conviction, contract or transact any business with any organ of state or public entity and will be registered in a register of tender defaulters with the National Treasury.

It is also an offence for individuals who do not take proactive steps to ensure that fronting is not taking place in any ventures in which he or she may be involved.

VERIFICATION CERTIFICATES AND SECTOR CODES

Entities that are verified receive a verification certificate from a South African National Accreditation System (SANAS) accredited verification agent. All certificates are valid for one year from date of issue.

The Generic Codes apply to all entities unless a specific Sector Code is applicable to that entity. Certain specified industries/sectors (e.g. the tourism sector, mining sector, financial services sector, and others) have their own Sector Codes. These Sector Codes will override the Generic Codes in respect of the B-BBEE requirements that need to be met by that entity.

Sector Charters are documents that are being developed by the sector/industry concerned, to regulate B-BBEE within that sector. Once such Sector Charter has been accepted by the industry and the government, and has undergone a formal publication process, only then will the Sector Charter become a Sector Code, and become binding on each entity falling within that sector for B-BBEE verification purposes.

CLASSIFICATION OF ENTITIES

Based on their annual revenue, entities are classified into one of three categories. The thresholds detailed below are applicable to the Codes of Good Practice and may differ if a specific Sector Code is applicable.

These categories are as follows:

- Exempt Micro Enterprises ("EME's") – annual revenue up to R10 million
- Qualifying Small Enterprises ("QSE's") – annual revenue between R10 million and R50 million
- Generic Enterprises – annual revenue of above R50 million

5 ELEMENTS OF MEASUREMENT

The 5 elements under which an entity will be measured are:

Ownership	25 points
Management Control	19 points
Skills Development	20 points (+5 bonus)
Enterprise and Supplier Development	44 points (+2 bonus)
Socio Economic Development	5 points
Total	120 points

Ownership

- An entity receives points for participation by Black people in its right to ownership. Black people may own rights in the entity as direct participants, or through different structures such as companies, trusts, Broad-Based Ownership Schemes, Employee Share Ownership Programmes, or through any other form of juristic person recognised under South African Law.
- When determining the ownership structure to be adopted, management should first determine their long-term strategy, as implementing new ownerships structures can be a lengthy and costly exercise. If done correctly, it can add value to the company and to Black people (e.g. employees or bursary holders).
- Ownership is a priority element, and an entity has to meet the subminimum of 40% of 8 points (net value) to avoid discounting.

Management control

- Entities will receive points by meeting the targets for participation of Black people (and particularly Black women) at Board, Executive Management, Senior Management, Middle Management, and Junior Management levels.
- Black employees with disabilities will also score points.
- The latest payroll figures are used to determine the points scored. An EEA2 and EEA4 is required to have been lodged to Department of Labour.

Skills development

- Skills Development contributes to the achievement of the country's economic growth and social development goals that should drive the creation of decent work and sustainable livelihoods. This element aims to strengthen the skills base by encouraging support of skills development initiatives. It measures the extent to which employers carry out initiatives designed to develop the competencies of Black employees, as well as Black people within the entity and also outside of the entity.
- An entity must have the following in place in order to score points:
  - Workplace Skills Plan, Annual Training Report and Pivotal Report which are SETA approved; and
  - Implementation of a Priority Skills programme generally, and more specifically for Black people.
- Actual spend for the financial period under review is used and points are awarded according to this spend.
- This is a priority element. An entity will drop a level should it fail to meet or exceed 40% of the total weighting points. The scorecard uses targets that are based on racial demographics provided in the Employment Equity Act and Commission on Employment Equity Report.

Enterprise and supplier development

- A subminimum of 40% is set for each of the three categories within the Enterprise and Supplier Development scorecard and entities that fail to meet these requirements will be discounted by one level.
- Enterprise and Supplier Development consists of three subsections:

  1. Procurement
  The objective of this element is to strengthen local procurement. Specific focus is made to procuring from QSE's, EME's, entities that are at least 51% Black owned, and entities that are at least 30% Black women owned. This element measures the extent to which entities buy goods and services from Empowering Suppliers with strong B-BBEE recognition levels. Points can only be scored for procuring from Empowering Suppliers.

  2. Supplier Development
  The objective of this element is to contribute to the development, sustainability and financial and operational independence of QSE's and EME's that are at least 51% Black owned. Contributions include monetary and non-monetary contributions. The beneficiary of these contributions must be a supplier to the measured entity. Targets are based on a percentage of Net Profit after Tax (NPAT). Should a company make a loss, contributions are still required. Guidance is given in the Codes on how to calculate the targets, should the company be in a loss-making position.

  3. Enterprise Development
  The objective of this element is to contribute to the development, sustainability and financial and operational independence of QSE's and EME's that are at least 51% Black owned. Contributions include monetary and non-monetary contributions. Targets are based on a percentage of Net Profit after Tax (NPAT). Should a company make a loss, contributions are still required. Guidance is given in the Codes on how to calculate the targets, should the company be in a loss-making position.

Actual spend on Procurement, Enterprise and Supplier Development for the financial period under review is used to calculate the points achieved.

Socio economic development

- The objective of socio economic contributions is the promotion of sustainable access for the beneficiaries to the economy. Beneficiaries of Socio Economic Development are communities, natural persons or groups of natural persons where at least 75% of beneficiaries are Black People.
- Contributions to Socio Economic Development can be monetary or non-monetary. Targets are based on a percentage of Net Profit after Tax (NPAT). Should a company make a loss, contributions are still required. Guidance is given in the Codes on how to calculate the targets, should the company be in a loss-making position.
- Actual spend on Socio Economic Development for the financial period under review is used to calculate the points achieved.

PRIORITY ELEMENTS

Three priority elements (namely Ownership, Skills Development, and Enterprise and Supplier Development) have been introduced. These priority elements are applicable to QSE's and Generic Entities.

If a measured entity fails to meet at least 40% of its compliance target in any of the above priority element

categories, the entity is "penalised", and the B-BBEE status level of the measured entity will be discounted by one level. Only the discounted level will appear on the face of the entity's B-BBEE certificate.

EMPOWERING SUPPLIER

It is imperative that all entities consider whether they need to be an Empowering Supplier to their customers. In order for a customer to gain the relevant B-BBEE points for this portion of the customer's scorecard, the customer may only take into account spend with an Empowering Supplier.

The definition of an Empowering Supplier is as follows:

- An Empowering Supplier, within the context of B-BBEE, is a B-BBEE compliant entity, which is also a good citizen, a South African entity, complies with all regulatory requirements of the country, and should meet at least three (if it is a Generic Enterprise), or one (if it is a QSE) of the following criteria:
  a. At least 25% of total cost of sales must be procured from local producers or local suppliers in South Africa. In the service industry, labour costs are included under total cost of sales, but capped at 15%. In industries supplying goods, labour costs and depreciation are excluded from total cost of sales.
  b. Job creation – 50% of jobs created must be for Black people, provided further that the total number of Black employees since the previous verified B-BBEE assessment must have remained the same, or increased.
  c. At least 25% of raw materials (which includes local manufacturing, production and/or assembly, and/or packaging) must have been beneficiated.
  d. Skills transfer – the supplier must spend at least 12 days productive time per annum in assisting Black EME (Exempted Micro Enterprise) and QSE beneficiaries to increase their operational or financial capacity.

All EME's are automatically recognised as Empowering Suppliers.

However, a press release statement (Notice 708 of 2016) by the DT has noted that: any entities rated on or after 1 May 2016 will automatically deemed an empowering supplier, until further notice.

YES INITIATIVE

The Youth Employment Service (YES) initiative was introduced by Government with the aim of reducing the unemployment rates, specifically the high rates of unemployment for youth between the ages of 18 and 35 years. The initiative allows Measured Entities that register with and meet YES targets the ability to move up a maximum of two levels on their current B-BBEE scorecard.

In order to participate in the YES initiative, Measured Entities need to register with YES Non-Profit Company. In order to qualify, the Measured Entity needs to comply with the 40% sub-minimum requirements, i.e. Generic Entities need to comply with all sub-minimum elements, whilst a QSE needs to comply with Ownership and one other element. There are targets that need to be met, depending on Annual Turnover, Average NPAT for the last 3 years and employee headcount in the preceding year.

B-BBEE Recognition	
Achieve YES target and 2.5% absorption	Move up 1 B-BBEE Recognition Level
Achieve YES target and 5% absorption	Move up 1 B-BBEE Recognition Level + 3 bonus points
Achieve YES target and 2.5% absorption	Move up 2 B-BBEE Recognition Levels

The YES initiative is a 12 month workplace experience initiative for youth to gain valuable workplace knowledge. This will improve their chances of finding full time employment and adds value to their CV. Youth are only allowed to take part in the programme once.

The 12-month workplace experience is not a Learnership, Internship or Apprenticeship programme.. The Salaries paid to YES Employees cannot be claimed under the Skills Development of the Generic Codes or relevant Sector Code scorecard as a Training initiative. The YES initiative is in addition to the skills spend.

YES Measured Entities need to maintain the previous B-BBEE Status Level obtained before participating under the YES initiative. Maintenance of B-BBEE Status Levels will be verified by a SANAS Accredited B- BBEE Verification Agency before the Y.E.S B-BBEE Recognition is awarded.

CONCLUSION

Achieving a favourable rating is generally not a quick and simple process. Entities need to strategically focus on complying, with a conscious effort required by top management to focus on long term solutions. Compliance can have a financial impact for entities, and the cost versus benefit must be carefully considered. Being rated as "non-compliant" can have a commercially detrimental long-term effect when tendering for contracts or when interacting with customers and other third parties.

Date of issue: 9 February 2020

13. GOVERNMENT INCENTIVE SCHEMES

Government departments offer an array of incentive schemes to stimulate and facilitate the development of sustainable, competitive enterprises by providing accessible incentives that effectively support national priorities. A variety of incentive schemes seek to support the development or growth of commercially viable and sustainable enterprises through the provision of either funding or tax relief, thereby ensuring the creation of new and sustainable jobs. The intention is to increase participation in various areas of development. Most of the incentives are housed within the Department of Trade and Industry, with a few others in other government departments.

Incentive categories generally mirror the stages involved in project development, visually:

- Conceptualisation of the project, including feasibility studies and research and development;
- Capital expenditure, involving the creation or expansion of the productive capacity of businesses; and
- Competitiveness enhancement, involving the introduction of efficiencies and whetting the competitive edge of established companies and commercial or industrial sectors

CAPITAL EXPENDITURE INCENTIVES

These are incentives for companies that want to acquire or upgrade assets in order either to establish or expand the business' productive capacity.

- Small Industry
- Large Industry
- Infrastructural Development Incentives
- Critical Infrastructure Programme (grant funding)
- Industrial Development Zones
- Capital Expenditure in the Automotive Industry
- Foreign Investment Grant
- Capital Expenditure in the Textiles Industry
- Manufacturing competitiveness enhancement programme (MCEP)

COMPETITIVENESS ENHANCEMENT INCENTIVES

These are incentives for companies that want to acquire or upgrade assets in order either to establish or expand the business' productive capacity.

- Small Industry
- Large Industry
- Infrastructural Development Incentives
- Critical Infrastructure Programme (grant funding)
- Industrial Development Zones
- Capital Expenditure in the Automotive Industry
- Foreign Investment Grant
- Capital Expenditure in the Textiles Industry
- Manufacturing competitiveness enhancement programme (MCEP)

CONCEPT AND R&D INCENTIVES

These are incentives available to private sector enterprises that invest in the creation, design and improvement of new products and processes. Such businesses conduct investigative activities with the intention of making a discovery that can either lead to the development of such new products and processes or to the improvement of existing products.

- Grants for small R&D projects
- Grants for large R&D projects
- R&D tax incentive
- Grants for feasibility studies
- Technology and Human Resources in Industry Programme (THRIP)
- SEDA Technology Programme
- Technology Venture Capital Fund
- R&D in the automotive industry

INCENTIVES FOR SPECIFIC INDUSTRIES

General Manufacturing

- Manufacturing Competitiveness Enhancement Programme (MCEP)
- Capital Goods Industry – The Capital Projects Feasibility Programme (CPFP)
- Additional investment and training allowances in respect of industrial policy projects – S12I of the Income Tax Act
- Foreign Investment Grant (FIG)

Automotive Industry

- Automotive Investment Scheme (AIS)
- People-Carrier Automotive Investment Scheme (P-AIS)

Aquaculture

- Aquaculture Development and Enhancement Programme (ADEP)

Business Process Service

- The Business Process Services scheme (BPS)

Textiles

- Clothing and Textiles Competitiveness Programme (CTCP)

Film and Television

- Film and Television Production Incentive

Tourism

- Tourism Enterprise Support Programme (TEP)

Other Incentives

- Black Business Supplier Development Programme (BBSDP)
- Critical Infrastructure Programme (CIP)
- Co-operative Incentive Scheme (CIS)
- Employment Creation Fund (ECF)
- Export Marketing and Investment Assistance (EMIA)
- Incubation Support Programme (ISP)
- Isivande Women's Fund
- Sector-Specific Assistance Scheme (SSAS)
- Support Programme for Industrial Innovation (SPII)
- SEDA Technology Programme
- Technology and Human Resource for Industry Programme (THRIP)

MUNICIPAL AND PROVINCIAL INCENTIVES

These are varied, and inquiries should be made in the specific municipality and province to see whether there are any incentives available at the time of requesting.

Date of issue: 8 April 2021

14. CONSUMER PROTECTION ACT 68 OF 2009

The Consumer Protection Act 68 of 2009 (the CPA) came into force on 31 March 2011. The Act aims to introduce a single, comprehensive framework for consumer protection affairs in South Africa. The CPA applies to relationships between the consumer and suppliers or service providers at every level of the supply chain and applies to agreements and transactions that were entered into in the ordinary course of business between suppliers and consumers unless the transaction has been exempted.

The rights of the consumer include the right to equality in the consumer market; the right to privacy; the right to freedom of choice; the right to the disclosure of information; the right to fair and responsible marketing; the right to honesty and fair dealing; the right to fair, just and reasonable terms and conditions; and the right to fair value, good quality and safety.

Failure to comply with the CPA could result in compliance notices being issued, fines and possible criminal liability. In the event that the provisions of an agreement were to contravene the CPA, such provisions could be declared to be void insofar as it does not comply with the CPA.

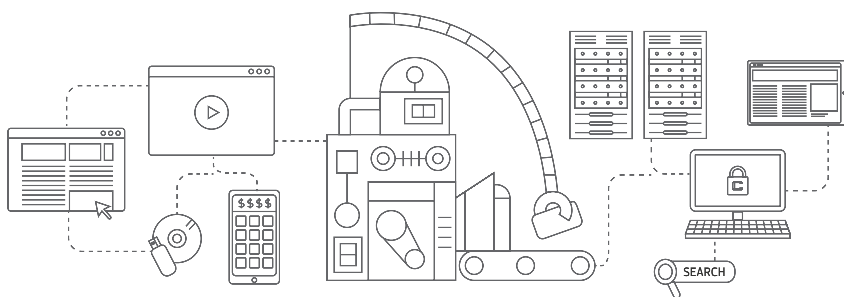
Date of issue: 8 April 2021

15. DATA PRIVACY

In South Africa, data privacy is regulated by the Protection of Personal Information Act 4 of 2013 ("POPIA"). POPIA will apply to the processing of personal information by both private and/or public bodies.

Broadly speaking, every person who collects, stores and otherwise modifies or uses the personal information of any living natural person and/or any existing juristic person (the "Data Subject") is responsible under POPIA and must comply with the conditions required for the lawful processing of personal information, as envisaged in POPIA.

POPIA will apply when the party responsible for processing the personal information (the "Responsible Party") is domiciled in South Africa, or where a Responsible Party is not domiciled within South Africa, but such Responsible Party uses automated or non-automated means of processing personal information in South Africa.



The conditions for lawful processing of personal information imposed by POPIA require compliance with the following 8 principles:

1. Accountability: Processors of personal information and Responsible Parties must comply with the 8 principles, and/or any other requirements imposed by POPIA, or they will be held liable in terms of the provisions of POPIA.
2. Processing Limitation: Personal information should only be obtained or collected by limited and lawful means, and processing of such personal information must be done in such a manner that such processing does not unnecessarily infringe on the privacy of the Data Subject.
3. Purpose Specification: The purpose for which personal information is collected must be specific, explicitly defined and lawful.
4. Further Processing Limitation: Any further processing must be compatible with the purpose for which data is collected.
5. Information Quality: Reasonably practicable steps must be taken by the Responsible Party to ensure that personal information is complete, accurate, not misleading, and updated.
6. Openness: The necessary steps must be taken to notify the information regulator when a Responsible Party processes personal information in instances where pre-approval is required, and must advise the Data Subject of certain mandatory information with regards to the collection, as well as mandatory notification to the information regulator and the Data Subject in the event of unauthorised access of personal information, or any other breaches in respect thereof.
7. Security Safeguards: The integrity and confidentiality of the personal information must be secured.
8. Data Subject Participation: The Data Subject has certain access rights, including a right to request the deletion of his/her personal information.

Date of issue: 20 March 2019

16. RELEVANT WEBSITES AND SOURCES OF REFERENCE

- Department of Trade & Industry
  www.dti.gov.za
- South African Revenue Services
  www.sars.gov.za
- South African Department of Labour
  www.labour.gov.za
- South African Department of National Treasury
  www.finance.gov.za
- Johannesburg Securities Exchange
  www.jse.co.za

SOURCES OF REFERENCE

The following sources of reference have been used in compiling the information contained in this guide:

Websites:

- Bowman Gilfillan Attorneys
  www.bowman.co.za
- Companies and Intellectual property registration office
  www.cipro.co.za
- Department of Trade and Industry
  www.dti.gov.za
- Global Migration SA
  www.globalimsa.com
- Government Information
  www.info.gov.za
- Johannesburg Stock Exchange
  www.jse.co.za
- South African Institute of Intellectual Property Law
  www.saiipl.org.za
- South African Reserve Bank
  www.reservebank.co.za
- South African Revenue Service
  www.sars.gov.za
- Stats South Africa
  www.statssa.gov.za
- Webber Wentzel Attorneys
  www.weberwentzel.com

Books:

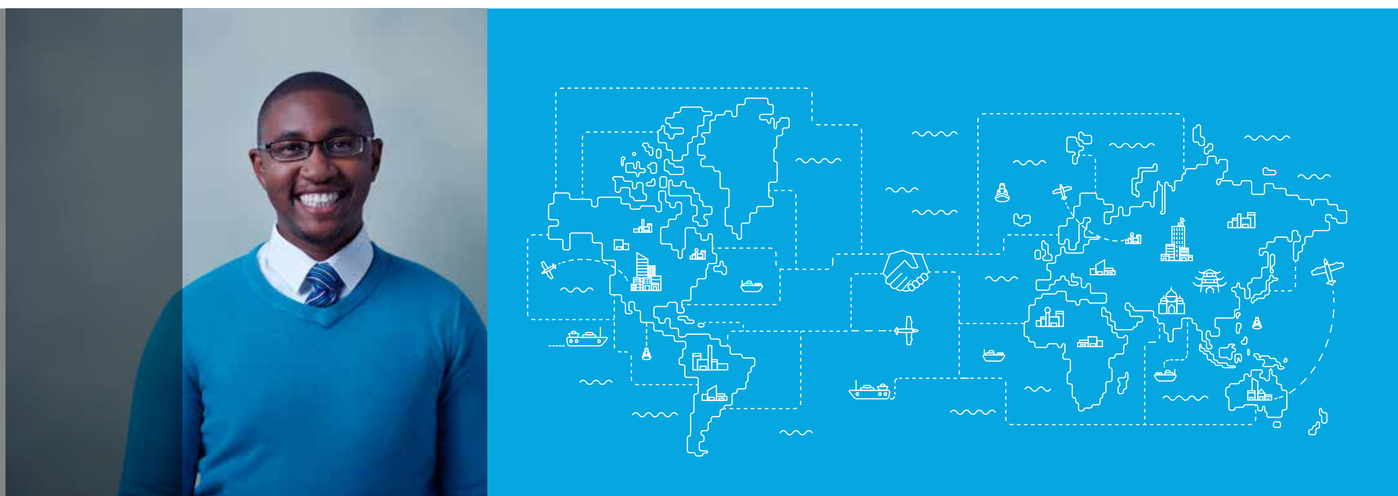
- Business Blue-Book of South Africa | 70th Edition
- Honore's South African Law of trusts | 5th Edition | Cameron, De Waal and Wunsh
- Workplace Law | John Grogan
- Human Resource Management in South Africa | Carrell, Grobler, Elbert, Marx,
- Hatfield, van der Schyf
- International Financial Reporting Standards |
- International Accounting Standards Board
- South African Corporate Business Administration | JG Van der Merwe, RB
- Appleton, PA Delport, RW Furney, DP Mahoney, M Koen

Guides:

- Department of Trade & Industry | Investors Handbook
- Institute of Directors | King Code and Report on Governance for South Africa
- South African Revenue Service | Guide on Income Tax and the Individual
- South African Revenue Service | Guide on the residence basis of taxation for Individuals
- South African Revenue Service | Tax guide for Small Businesses
- South African Revenue Service | Guide on taxation in South Africa
- South African Revenue Service | Guide to the Urban Development Zone Tax Incentive
- South African Revenue Service | Guide for Tax rates/ duties/levies
- South African Revenue Service | Practice Note: No 2 Date14 May 1996
- South African Revenue Service | Practice Note: No 7 Date 6 August 1999

Legislation:

- Companies Act 61 of 1973
- Close Corporations Act 69 of 1973
- Income Tax Act 58 of 1962
- Trust Property Control Act No.57 of 1988
- Basic Conditions of Employment Act No. 75 of 1997
- Labour Relations Act No. 66 of 1995
- Employment Equity Act 1998
- Skills Development Act 1998
- Unemployment Insurance Act No 63 of 2001
- Occupational Health & Safety Act 1993



17. ABOUT RSM SOUTH AFRICA

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