Doing Business in South Africa

Legal and regulatory considerations

Fluxmans

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Fluxmans

Introduction

This guide provides a summary of some of the legal issues that may confront foreign business people and investors considering investing and doing business in South Africa.

While this guide touches on all of the most important considerations potential investors need to take into account, it is a general summary and provided for information purposes only. We have attempted to cover as accurately as possible the law at the date of publication (May 2024); however, it may not reflect subsequent new legislation, administrative policy or court decisions.

While we hope and trust that readers will find this guide useful and informative, Fluxmans cannot give an assurance that it will cover any and all issues that you may encounter when doing business in South Africa, or that it provides a full and comprehensive exposition of the law on any of the topics covered. Further, it is not intended to be a substitute for bespoke legal advice in respect of any specific matter. Fluxmans cannot accept any liability for any loss or damage sustained as a result of any action or decision you or any other person may take in reliance upon any of the content of this guide. Before taking any such action or decision you are advised to seek specific legal advice in relation to the particular circumstances of each case.

The directors, professionals, consultants and other employees of Fluxmans will have no liability of any nature, whether in contract, delict or otherwise, for any losses, damages, costs or expenses whatever and however caused arising from or in any way connected with the information contained herein.

About us

Fluxmans Attorneys is one of South Africa's top law firms. We offer an extensive range of legal services to a diverse client base, including individuals and large corporates across all sectors.

Our passion, knowledge and understanding within our service offering, as well as our ability to simplify complexities, ensures our clients receive the best personal service, support and solutions to their varied legal matters.

Fluxmans traces its origins to the 1890's and while we are cognisant of our entrenched history and successes, our way of doing business and our client satisfaction is what we are most proud of.

Our Approach to Law Firm Services

Taking advantage of our smaller size means that even though we offer a broad range of practice areas, we are more agile and dynamic, ensuring our clients receive the best law firm services for their specific needs. It is not without reason that many of our clients are of long standing and have developed strong and close relationships with us over the years. We try to ensure that clients understand everything we do and that they are happy with the way we do it.

Fluxmans believes in an inclusive workplace where equal opportunity is of the utmost importance. We are committed to transferring knowledge and expertise through mentoring and skills development thereby retaining and rewarding talent, whilst ensuring that our principles and fundamental values are retained.

Our History

Fluxmans traces its origins to the partnership of Adam & B Alexander which was formed in the 1890's and which, in the second quarter of the 20th century, pursuant to a merger with Siegfried Raphaely, traded under the name of Raphaely & Alexander Brothers.

During the 1960's, the practice changed its name to Raphaely Weiner Rosen & Treisman which, during the 1980's, was shortened to Raphaely Weiner.

In 1990, Raphaely Weiner merged with Fluxman Rabinowitz & Rubenstein and practised under the name Fluxman Rabinowitz – Raphaely Weiner.

In 2002 the name was shortened to Fluxmans.

Today, we are one of the leading law firms in Johannesburg.

Fluxmans

01

Anti-Corruption and Money Laundering

Author:
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Corruption and Money Laundering in South Africa is regulated by various pieces of legislation.

The Prevention of Combating of Corrupt Activities Act, 12 of 2004 ("PCCA")

The PCCA is the primary law governing anti-bribery and corruption and enforcement in South Africa. It applies to organisations based in the country and those based outside South Africa but which are doing business with organisations and individuals within the Republic. The aims of the PCCA are to –

- provide for the strengthening of measures to prevent and combat corruption and corrupt activities;
- provide for the offence of corruption and offences relating to corrupt activities;
- provide for investigative measures in respect of corruption and related corrupt activities;
- provide for the establishment and endorsement of a register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts;
- place a duty on certain persons holding a position of authority to report certain corrupt transactions;
- provide for extra-territorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities.

The PCCA defines corruption as being –

- directly or indirectly, accepting or giving or agreeing or offering to accept or give, any form of gratification from any other person, whether for the benefit of themselves or for the benefit of another person, in order to act personally or by influencing another person to act, in a manner that amounts to the illegal misuse or selling of information or material acquired in the course of the exercise;
- carrying out or performing of any powers, duties or functions that amounts to the abuse of a position of authority, breach of trust, or the violation of a legal duty or a set of rules, that is designed to achieve an unjustified result, or any other unauthorised or improper inducement to do or not to do anything.

The PCCA has jurisdiction over the following entities, individuals and activities –

- public officers;
- foreign public officials;
- agents;
- members of legislative authority;
- judicial officers;
- employers and employees;
- witnesses and evidential material in certain proceedings;
- contracts;
- procuring and withdrawal of tenders;
- auctions;
- sporting events;
- gambling or games of chance;
- offences related to the possible conflict of interest.

Section 23 of the PCCA authorises the National Director of Prosecutions ("**NDP**") to make application to Court to authorise an investigation into any person who possesses property which the NDP suspects as being disproportionate to the person's income or assets.

Section 28 of the PCCA prescribes that if a Court convicts a person of an offence in terms of the PCCA, the Court, in addition to handing down any sentence contemplated in the Act, can also issue an order directing that the particulars of the convicted person be endorsed in a register.

Section 34 of the PCCA provides that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence in terms of the PCCA which involves an amount of ZAR100 000 or more, must report such knowledge or suspicion to any police official. Any person who fails to comply with this provision will be guilty of an offence.

The Financial Intelligence Centre Act, 38 of 2001 ("FICA")

FICA requires financial institutions and other defined entities ("**accountable institutions**") to implement anti-money laundering ("**AML**") policies and procedures to identify and verify the identity of their clients.

FICA was enacted to establish procedures to identify proceeds of crime, combat money laundering, tax evasion and the financing of terrorism in order to protect the integrity of South Africa's financial system.

FICA came into effect in July 2003, along with the establishment of the Financial Intelligence Centre ("**FIC**") which is responsible for overseeing compliance with the Act.

In terms of Section 21 of FICA, an accountable institution must, in the course of establishing a business relationship or entering into a single transaction, establish and verify the identity of the client and, if applicable, the person representing the client as well as any other person on whose behalf the client is acting.

FICA requires that an accountable institution, after applying its processes to establish and verify a client's identity, should have confidence that it knows who the client is with sufficient certainty given the accountable institutions risk assessment pertaining to that client's engagement.

FICA requires that in verifying the identity details of the client, the accountable institution must obtain a range of information about the client. Verification of the client's identity entails that the accountable institution corroborates the person's identity information by comparing it with information contained in documents or electronic data issued or created by reliable or independent third party sources.

The Financial Intelligence Centre Amendment Act, 1 of 2017 ("FICA Amendment Act")

FICA has been amended by the FICA Amendment Act of 2017 ("**FICA Amendment Act**"). The FICA Amendment Act brings South Africa closer to international anti-money laundering standards and the best practices recommended by the Financial Action Task Force ("**FATF**").

The General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act, 22 of 2022 ("AML Amendment Act")

The AML Amendment Act came into effect in December 2022 and introduced various amendments to various statutes including –

- The Trust Property Control Act, 57 of 1988;
- The Nonprofit Organisations Act, 71 of 1997;
- The Financial Intelligence Centre, Act 38 of 2001;
- The Companies Act, 71 of 2008.

The AML Amendment Act was introduced to strengthen the fight against corruption, fraud and terrorism and to assist South Africa in meeting the international standards so as to reduce the prospect of grey listing by the FATF.

The Prevention of Organised Crime Act, 121 of 1998 ("POCA")

The effect of POCA is to criminalise the activities of persons who benefit from crime. In terms of POCA, any person who knows or ought reasonably to have known that property concerned in a transaction was derived from unlawful activities and still chooses to enter into the transaction will be guilty of a criminal offence if the transaction is likely to have the effect of concealing or disguising the nature, source, location or movement of the property, or the ownership thereof or any interest which anyone may have in respect thereof.

A company or person may also be found guilty of contravening POCA if the transaction is likely to enable or assist any person to avoid prosecution or to remove or diminish any property acquired as the result of the criminal offence.

In terms of POCA, any person who retains any form of property which was produced as a result of a pattern of racketeering and knew or ought to have reasonably known the origin of such property, and still chooses to invest any part of such property to acquire any interest in, or the establishment, operation or activities of any enterprise, will be guilty of an offence and liable to a fine or imprisonment, or both.

02

Black Economic Empowerment

Author:
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Overview

Broad-Based Black Economic Empowerment (BEE) is a policy of the South African Government. Effect is given to this policy by the Broad-Based Black Economic Empowerment Act, 53 of 2003. The Act seeks to redress historic economic inequalities by advancing economic transformation and the economic participation of black people (which the Act defines as African, Coloured and Indian people who are South African citizens) in the South African economy.

Which entities must comply with BEE?

It is mandatory for all Government agencies at a national, provincial and municipal level and for all other public sector entities including state-owned entities (SOEs) to comply with the BEE laws and regulations.

Accordingly, a public sector agency or entity will not award a contract to a private sector entity including a foreign-owned entity, unless such entity meets the minimum level of BEE compliance as measured under the BEE regulations applicable to such private sector entity.

Although compliance with BEE is not mandatory for private sector entities, one of the elements by which BEE compliance is determined is the level of procurement from other "BEE-compliant entities". This causes BEE compliance requirements to impact downstream and upstream suppliers, in the private sector.

In certain sectors such as mining, power generation, broadcasting and telecommunications, compliance (to the applicable level) is mandatory to obtain a permit or licence to carry on business.

Elements of compliance

BEE compliance is measured under 5 elements, namely –

- ownership – the extent to which black people hold an economic interest and are able to exercise voting rights in the entity. However, multinationals and other foreign-owned entities may be exempt from compliance under this element if they agree to invest an equivalent amount in an approved programme aimed at socio-economic development for example, education, skills development or, import replacement. These programs are known as equity equivalents;
- management control – the extent to which black persons have been appointed to junior, middle, senior and executive management roles in the business;
- skills development – the extent to which the employees of the entity have participated in training and education programmes;
- enterprise and supplier development – the extent to which the entity has procured products from and/or made contributions to "BEE-compliant" suppliers or entities; and
- socio-economic development – measures the amounts paid by the entity (as a percentage of its business profits) to socio-economic initiatives.

Levels of BEE Compliance

100% ("**all or nothing**") compliance with BEE requirements is not necessary. Points are awarded for the degree or extent of compliance under each element of BEE compliance, which are differently weighted based on their relative priority in achieving the policy goals of BEE. For example, a relatively larger number of points are available for achieving the compliance targets under the elements of ownership, skills development (training and education) and enterprise and supplier development (of black-owned SMMEs and SMEs and procurement from such entities).

BEE compliance levels for foreign-owned entities

A foreign-owned entity looking to do business in South Africa is also subject to BEE requirements. Any such entity needs to assess whether compliance with BEE requirements is relevant to its business and if so, the required level of compliance.

03

Business Entities

Author:
Ian Jacobsberg

Most business in South Africa is carried on through limited liability companies. Companies are regulated in terms of the Companies Act, 71 of 2008. The Companies Act provides for 4 types of companies –

- private companies;
- public companies;
- personal liability companies;
- non-profit companies.

In general, companies enjoy the benefit of limited liability, in other words, the shareholders cannot be held personally liable for the debts of the company. Personal liability companies are the exception to the general rule, the shareholders and directors are jointly and severally liable for the company's debts. Personal liability companies are therefore generally only used by professional practices, where the rules of the profession require it.

Registering a new company

A new company is formed by registering the Memorandum of Incorporation ("**MOI**") of the company with the Companies and Intellectual Property Commission ("**CIPC**"). The proposed name of the company must be reserved through the CIPC. The CIPC will only approve a name that is not so similar to the name of an already registered company as to suggest a connection or cause confusion.

The MOI is the main constitutional document of the company. The Companies Act contains a simple standard form MOI. It is however recommended that caution be exercised in using the form, as it may not be suitable in many cases. Where the shareholders have differing rights and duties, such as where there are vast disparities in their shareholdings or where one is purely a funder, it is advisable to prepare a bespoke MOI specifically catering for the unique structure of the company. The company has a wide discretion as to the content of the MOI, as long as it does not conflict with any of the "unalterable provisions" in the Companies Act.

A private company requires only one shareholder and one director. There is no general requirement that any of the directors or shareholders be a South African citizen or resident, although it is necessary in some circumstances in terms of the Broad-Based Black Economic Act and other legislation (see the section on Black Economic Empowerment above).

Every company is required to appoint a public officer, who is responsible for ensuring that the company complies with local tax legislation and serves as the contact point for interactions with the revenue authorities. The public officer must be a South African resident.

Where any shares in a company are owned by a foreign person or entity, the share certificate issued to that shareholder must be endorsed "non-resident" in terms of the Exchange Control Regulations. This is necessary so the non-resident shareholder can receive dividends from the company and can repatriate capital.

External company

As an alternative to registering a new company as a subsidiary, a foreign company may establish a branch in South Africa. A foreign company that has engaged employees in South Africa or has carried on business in South Africa for at least 6 months must register with the CIPC as an external company. Unlike a subsidiary registered in South Africa, an external company is not a separate legal entity, but is a branch of the foreign company. Therefore, if a local shareholder is to be introduced, it is best to form a local company, in which the offshore parent company and the local shareholder will both hold shares.

An external company must appoint a representative in South Africa to accept service of documents on its behalf.

There are also different tax consequences between incorporating a new local company, and registering a branch of a foreign company as an external company. In this regard, please see the section on taxation below.

Partnerships and Joint Ventures

As an alternative to registering a company, businesses can also be structured as partnerships or joint ventures. Registration is not necessary, and the relationship between the parties is entirely governed by the agreement between them. The difference between a partnership or joint venture, on the one hand, and a company on the other, is that, in a partnership or joint venture, the partners do not enjoy the benefits of limited liability, they are jointly severally liable for the debts of the business and are taxed individually on the profits they receive.

Distributorships and Franchises

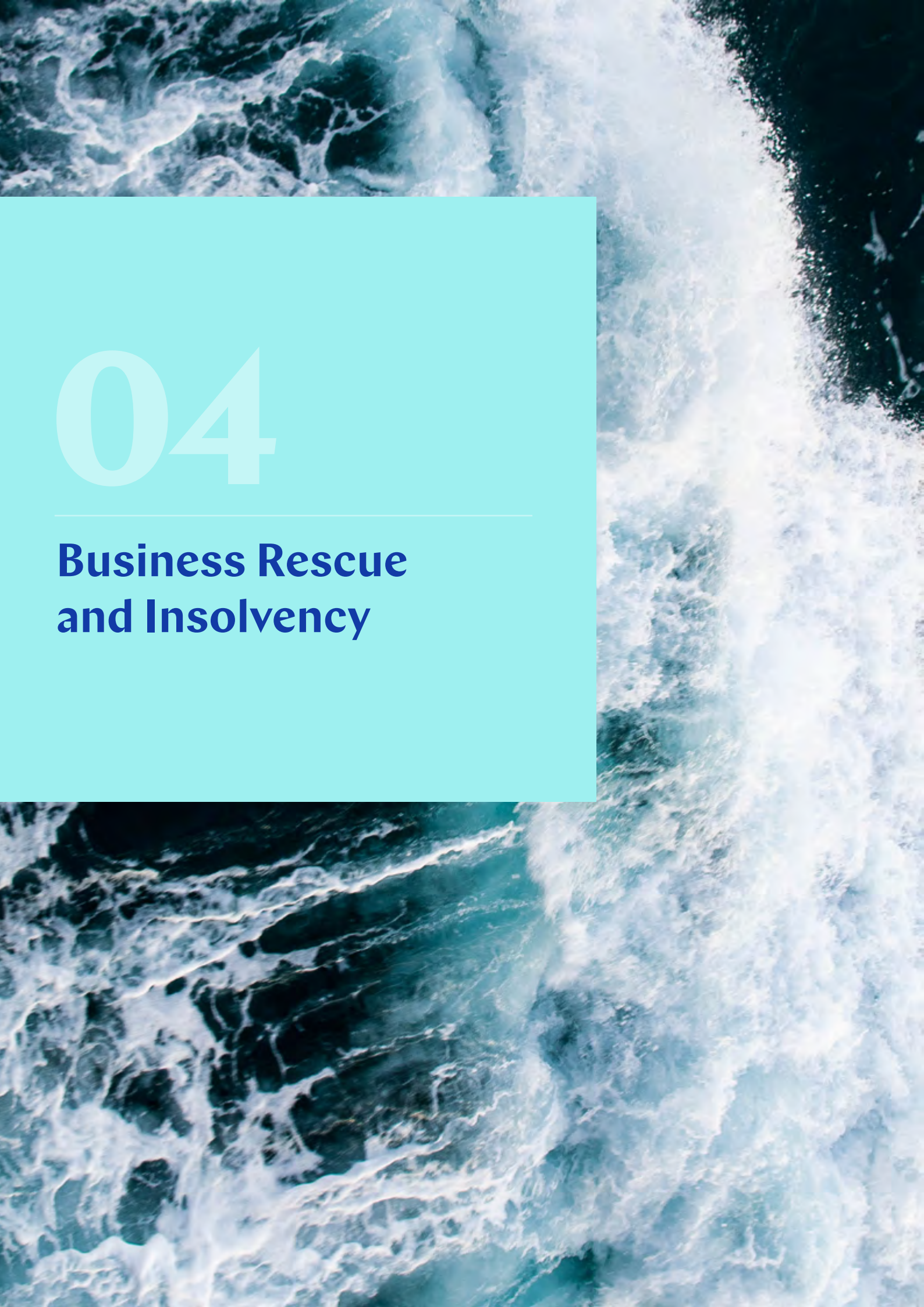
Foreign businesses who wish to offer their products and services without establishing their own operations in South Africa may appoint local distributors or franchisees.

A distributorship is a contractual relationship, by which a local company is appointed to buy the products of the offshore supplier and resell them in South Africa. The distributor is usually required to offer after-sales service and support to local customers. The relationship is governed by the contract between them. No compulsory notice period or termination payments are prescribed by law.

A franchise agreement is an agreement –

- in which, in return for consideration paid, the franchisor grants the franchisee the right to carry on business in South Africa under a system or marketing plan determined or controlled by the franchisor;
- under which the operation of the business will be associated with advertising schemes or programmes or one or more trademarks, symbols or logos or any similar marketing, branding, labelling or devices owned, used or licensed by the franchisor; *and*
- that governs the business relationship between the parties, including the relationship between them with respect to the goods or services to be supplied to the franchisee by the franchisor.

Although franchises do not have to be registered, the Consumer Protection Act, 68 of 2008, requires that the franchisee be given a disclosure document at least 14 days before the agreement is signed, and the franchise agreement must contain certain prescribed terms and information.



04

Business Rescue and Insolvency

Author:
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A sound insolvency regime and sound system to deal with distressed businesses is one of the factors which lends confidence to investors. South Africa has such systems that are well established. Insolvency deals with the bankruptcy of individuals and trusts (known as "sequestrations") and the bankruptcy of companies and close corporations (known as "liquidations").

Sequestrations

These are dealt with in terms of the Insolvency Act 24 of 1936. Being a very old Act there is much established precedent dealing with both the substantive and procedural aspects of this field. All sequestrations and liquidations are handled or supervised by a government department known as the **Master of the High Court.**

Trustees are appointed to administer sequestrated estates. In line with accepted policy in South Africa, previously disadvantaged individuals ("**PDIs**") are appointed as co-trustees. Those experienced ones to assist, those who are not so experienced, to participate in a quasi mentorship role.

Trustees (save for PDIs who are nominated by the Master of the High Court) are appointed on nominations of creditors by the Master or Deputy Master (those employed in the office of the Master) of the High Court. The nominations are based on those trustees who are nominated by creditors, with claims of the majority of value of claims and a second trustee is usually appointed based on simple majority of number of creditors that support the trustee.

This first appointment is a provisional role.

Thereafter the Master convenes a first meeting of creditors at which creditors are given another opportunity to appoint trustees, this time by submitting their claims to be proven and once proven by giving such proven creditors the right to vote for the appointment of a trustee (final or permanent). A further trustee, i.e one trustee based on majority of value of creditors' claims is also voted in. The original PDIs appointment cannot be removed or replaced.

Trustees are obliged to finalise the winding-up of a sequestrated estate in 6 months. This does not take place in practice and provision is made for the trustees to explain themselves as to why delays are incurred in finalising the estate and to seek extensions for the winding-up of the estate which is normally and ordinarily granted. Decisions by trustees are to be unanimous and any dispute between trustees is ordinarily resolved by the Master of the High Court.

Liquidations

Liquidation of commercially solvent companies (i.e for reconstruction, tax or to distribute cash purposes, i.e where a business is sold out of a company and the company ceases to trade) is accomplished pursuant to the Companies Act 71 of 2008 ("**Companies Act**"). Although the Companies Act's predecessor, the Companies Act 61 of 1973 was repealed by this Act, Chapter 14 of the old Act is still of application to companies which are commercially insolvent, i.e companies which are wound-up on the basis that they are unable to pay their debts. The distinction is drawn in South Africa between companies which are "factually insolvent", i.e whose liabilities (fairly valued) exceed their assets (fairly valued), also on occasion referred to as "balance sheet insolvency" and "commercial insolvency" which by definition refers to companies which do not have sufficient cash to pay their debts as and when they fall due for payment.

As stated "commercially solvent companies" are wound-up under the Companies Act and "commercially insolvent" companies are wound-up in terms of Chapter 14 of the Companies Act 61 of 1973.

Those appointed to administer the winding-up of the estate are known as liquidators. They are appointed in the same manner as trustees are appointed in sequestrated estates.

Liquidated companies should also be wound-up within 6 months. This seldom occurs and liquidators are also allowed to apply to the Master for extensions of time which are normally granted to finally wind-up companies.

Commencement of Sequestration and Liquidation

Sequestration
From date of grant of provisional sequestration order.

Voluntary Liquidation
Liquidations of solvent companies – from date of registration of shareholders' resolutions to wind-up the company at the companies office known as the CIPC (Companies and Intellectual Property Commission).

Liquidation of commercially insolvent companies
This can take place by way of shareholders' resolution. Effective date is date of registration of the shareholders' resolution with the CIPC.

Most commercially insolvent companies are liquidated by Order of Court. The effective date of liquidation of these companies is the date that the application is issued (stamped by the Registrar of the High Court). On the granting of the provisional liquidation order it is retrospective to this date.

A company placed into liquidation still exists. It only undergoes a status change (from solvent to insolvent). Only at the end of the liquidation process and once the liquidator is discharged by the Master for having complied with his obligations is a certificate issued. This certificate then allows for the company to be de-registered. It is then removed from the roll of companies. This effectively then is the end of the life of the company.

Business Rescue
This is a relatively new concept in South Africa. It finds its genesis in Chapter 6 of the Companies Act.

It allows **financially distressed companies** to be placed under supervision of a person known as a business rescue practitioner ("**BRP**"). By definition, a company is financially distressed if in the next 6 months it appears to its board to be reasonably unlikely to be able to pay its debts as they become due and payable (similar to commercially insolvent) or if in 6 months it appears likely that the company will become insolvent[1] (i.e factually insolvent).

It is recognised by our High Courts that there are two rescues. There is the classic rescue where a company is reorganised in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or if it is not possible, for its assets and/or business to be sold provided in this process creditors receive a larger dividend than they would have on liquidation.

Duration
It is legislated for a distressed company to be rehabilitated in 3 months.

This is not achievable in practice.

Provision is made in this instance for all time limits pertaining to the rescue proceedings to be extended by the votes of a simple majority of creditors calculated according to value of their claims.

Moratorium
The most profound of advantages to business rescue is the moratorium which is imposed on creditors whose claims arose prior to

[1] Section 128

the commencement of a business rescue ("**commencement date**") and for the duration of the rescue proceedings.

A BRP if he can classically rescue a company has the obligation to formulate a business rescue plan (the contents of which is legislated for in Chapter 6)[2]. This plan is ultimately voted upon and the threshold to be approved is the votes of creditors whose claims in value exceed 75% of which 50% must be independent creditors (i.e of the company and business rescue practitioners).

The BRP's duty is thereafter to implement an adopted plan.

Once the plan has been substantially implemented, the BRP then files a certificate with the CIPC taking the company out of rescue and returning it to the commercial market place.

Our commercial courts have described when a company should be placed in rescue as opposed to liquidation. A judge has aptly stated that business rescue is not for the terminally ill, it is not for the critically ill, it is for the ailing.

Offers of Compromise

This is also contained in Chapter 6 of the Companies Act. It is only available to boards of directors and liquidators of liquidated companies. It could be brought at any time, i.e before the company is liquidated, during liquidation or after liquidation.

It cannot be brought whilst the company is under business rescue.

The procedure is a very simple one, i.e the liquidator or board of directors provides to those creditors which claims it wishes to compromise an offer in writing for their approval or rejection and calls them to a meeting to vote.

At the meeting a vote is taken on the proposal by the creditors (who have the same rights) on the offer.

The hurdle to overcome is higher than that for a business rescue plan, i.e 75% of value of creditors' claims and 50% in number of creditors' claims.

Once the plan is adopted the company must apply to court to sanction it.

Once sanctioned the offer is binding on the company and all creditors including those who did not participate in the vote and those who voted against the plan.

The sanction order is then to be attached to the company's memorandum. This is a statutory obligation.

Tax

In sequestration and liquidations there is a well-established legal framework for trustees and liquidators to deal with the South African Revenue Services.

In business rescues this is not so. There is much current litigation ongoing between business rescue practitioners and the South African Revenue Services all with a view to securing clarity on the tax laws dealing with business rescue proceedings, especially in regard to the timing of when the liability for payment of various taxes arrives, i.e is it to be treated pre commencement or post commencement? Timing certainly makes a difference as in practice most claims which arise post commencement are settled in full and those pre commencement are subject to compromises (known as haircuts) as provided for in the adopted business rescue plan.

[2] Section 150

Business Rescue and Insolvency

05

Competition and Antitrust Law

Author:
Ian Jacobsberg

Competition Law Enforcement in South Africa

South African competition law is governed by the Competition Act, 89 of 1998. The Act is enforced by the Competition Commission ("Commission"), the Competition Tribunal ("Tribunal") and the Competition Appeal Court ("collectively referred to as the Competition Authorities")

The Competition Authorities are responsible for monitoring certain business activities. These activities consist of monitoring certain mergers and the relationships between competitors, suppliers and customers. The Act prohibits restrictive horizontal practices and vertical practices which have anti-competitive effects. It also prohibits the abuse of power by dominant firms.

Mergers and acquisitions

Mergers and acquisitions that meet the criteria set out in the Act may not be implemented without the prior approval of the Competition Authorities. Approval from the Competition Authorities is required if the transaction –

- is an economic activity within, or having an effect within South Africa;
- constitutes a "merger" as defined in the Act (in terms of section 12, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm); and
- meets the financial thresholds of assets and turnover values contemplated in section 11 of the Act.

The thresholds are based on the turnover and/or asset value of the target firm and the acquiring firm in relation to their business activities in, into, or from South Africa. In determining whether or not a transaction is notifiable or requires the approval of the Competition Authorities, the first consideration is whether the annual turnover in, into, or from South Africa, or the asset value of the target firm/s is ZAR100 million or more. If the turnover or asset value is less than ZAR100 million, the transaction will not be notifiable. However, if the turnover or asset value is ZAR100 million or more, one needs to consider whether one of the other 4 thresholds is met before the transaction becomes notifiable i.e. (1) combined turnover of the acquiring firm and the target firm; or (2) combined assets of the acquiring firm and the target firm; or (3) turnover of the acquiring firm plus assets of the target firm; or (4) turnover of the target firm plus assets of the acquiring firm.

Turnover and/or Asset Value	Intermediate Merger Thresholds	Large Merger Thresholds
Annual turnover in, into, or from South Africa, or asset value of the target firm/s; **and**	ZAR100 million or more	ZAR190 million or more
Combined annual turnover in, into, or from South Africa, of the acquiring firm/s and the target firm/s; **or**	ZAR600 million or more	ZAR6.6 billion or more
Combined assets in South Africa of the acquiring firm/s and the target firm/s; **or**	ZAR600 million or more	ZAR6.6 billion or more
Annual turnover in, into or from South Africa of the acquiring firm/s plus the assets in South Africa of the target firm/s; **or**	ZAR600 million or more	ZAR6.6 billion or more
Annual turnover in, into or from South Africa of the target firm/s plus the asset/s in South Africa of the acquiring firm/s.	ZAR600 million or more	ZAR6.6 billion or more

There is no obligation to notify a merger that falls below the intermediate merger thresholds (i.e. a small merger) unless the Competition Authorities call upon the parties to notify the

merger, which they may do if they are of the opinion that a small merger may substantially prevent or lessen competition in a market, or is not justifiable on public interest grounds. The Commission may call for a notification within 6 months of implementation of the merger.

Notifiable small and intermediate mergers are approved by the Commission while large mergers are approved by the Tribunal. The filing fee for a merger, which is payable to the Commission, is ZAR165 000 the case of an intermediate merger and ZAR550 000 in the case of a large merger.

Restrictive Practices

Restrictive Horizontal Practices

The Act prohibits agreements between parties in a horizontal relationship (i.e. competitors) that are deemed to prevent or lessen competition, such as agreements between competitors to fix prices, divide markets or amount to bid rigging, and those agreements proven to have the effect of substantially lessening or preventing competition in a relevant market. Section 4 of the Act deals with cartels. Cartel activity encompasses various agreements that are prohibited outright. The relevant section of the Act in this regard is section 4(1)(b), which states "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if... it involves any of the following restrictive horizontal practices –

- directly or indirectly fixing a purchase or selling price or any other trading condition;
- dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- collusive tendering.

Restrictive Vertical Practices

Vertical relationships are regulated by section 5 of the Act which states –

"(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

(2) The practice of minimum resale price maintenance is prohibited.

(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided that the supplier or producer makes it clear to the reseller that the recommendation is not binding and if the product has its price stated on it, the words "recommended price appear next to the stated price".

As can be seen, section 5(1) is a rule of reason provision (where the parties are able to justify the practice in certain circumstances) while section 5(2) is a per se provision (outright prohibition) subject to section 5(3).

Dominant Firms

The Act penalises abuse of a dominant market position. A firm is dominant in a market if –

- it has at least 45% of that market;
- it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
- it has less than 35% of that market, but has market power.

The Act defines "market power" as the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

It is prohibited for a dominant firm to –

- charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act, if the anticompetitive effect of that act outweighs its technological, efficiency or other procompetitive gain; *or*
- engage in any of the following exclusionary acts, unless the firm

concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

- require or induce a supplier or customer to not deal with a competitor;
- refuse to supply scarce goods to a competitor when supplying those goods is economically feasible;
- sell goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
- sell goods or services below their marginal or average variable cost ("**predatory pricing**"); or
- buy up a scarce supply of intermediate goods or resources required by a competitor.

Administrative Penalties

If a company contravenes a provision of the Act or implements a transaction without the prior approval of the Competition Authorities, the Tribunal may impose an administrative penalty of not more than 10 per cent of the company's annual turn-over in the Republic and its exports from the Republic during the company's preceding financial year. In the case of a repeat offender, the Tribunal may impose an administrative penalty of not more than 25 percent.

Competition and Antitrust Law

Ian Jacobsberg

Fluxmans

06

Data Protection and Privacy

Author:
Ryszard Lisinski

There are currently two main pieces of legislation that govern data protection and privacy in South Africa, namely –

Cybercrimes Act, 19 of 2020 ("Cybercrimes Act") and Protection of Personal Information Act, 4 of 2013 ("POPIA")

Cybercrimes Act

South Africa has the third highest number of reported cybercrime victims worldwide (annual impact of estimated ZAR2.2 billion). As recently as 5 June 2023, the login details of 27 000 subscribers to the South African streaming service Showmax were published by hackers on an illicit website.

The Cybercrimes Act defines and penalises cybercrime and harmful communications and imposes an obligation on others to report any such incidents.

It applies to both natural and juristic entities. This ranges from electronic communication service providers and financial institutions to essentially anyone who has access to and utilises a computer, smartphone, tablet or other device with internet access.

Offences

The Cybercrimes Act makes provision for several offences –

- unlawful access and interception of data;
- unlawful acts in respect of a software or hardware tool;
- unlawful interference with data, computer program or computer system;
- unlawful acquisition, possession, provision, receipt or use of password or access code;
- cyber fraud;
- cyber forgery and uttering;
- cyber extortion; and
- theft of incorporeal property.

Malicious communications

The Cybercrimes Act criminalises the following types of malicious communications –

- data messages which incite damage to property or violence;
- data messages which threaten persons with damage to property or violence; and
- disclosure of data messages of intimate images.

Penalties

Anyone who commits an offence under the Cybercrimes Act may be liable to a fine or imprisonment or both. The sentence for imprisonment may range from 3 years for malicious communications to as much as 15 years for aggravated offences. The potential fines to be imposed are not specified as yet.

Jurisdiction

The Cybercrimes Act empowers courts in South Africa to hear legal proceedings relating to any offence listed in the Cybercrimes Act and to deliver binding judgements in respect of contraventions.

The Cybercrimes Act also gives South African courts (with the written consent of the National Department of Public Prosecutions) jurisdiction to try cybercrime offences committed outside of South Africa if that offence affects any individual ordinarily resident in South Africa, South African government institution, private entity incorporated in South Africa, South African restricted computer program or any body of persons (whether incorporated or unincorporated) in South Africa.

Powers of police services

The Cybercrimes Act grants the South African Police Services ("**SAPS**") extensive

powers to investigate, search, access and seize any computer, computer program, database or network or part thereof. Electronic communications service providers, financial institutions or any person in control of any data, computer program, computer data storage medium or computer system which is subject to a search ordered by a court are obligated to assist police officials, failing which they will be liable to imprisonment of up to 2 years or a fine or both.

Duty to report

Electronic communications service providers and financial institutions have a duty to report a cybercrime to the SAPS. They must do so without an undue delay (and, where feasible, not later than 72 hours after having become aware of the offence) and preserve any information which may be of assistance to the SAPS.

POPIA

POPIA regulates the processing of personal information by public and private bodies in a manner that gives effect to the South African Constitutional right to privacy.

Personal information, as defined in POPIA, includes all conceivable types of information concerning a person or entity, such as medical, financial, criminal and employment history, identity numbers, telephone numbers, email addresses and online identifiers (such as Twitter handles). The definition of personal information is even wide enough to extend to personal opinions and preferences and biometric information.

Any person or company that processes personal information ("**responsible party**") of another person or company ("**data subject**") must obtain the consent of the person concerned unless –

- the processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- the processing complies with an obligation imposed by law on the responsible party;
- the processing protects a legitimate interest of the data subject;
- processing is necessary for the proper performance of a public law duty by a public body; or
- processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

For the purposes of POPIA, "processing" means any operation or activity concerning personal information, including –

- collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- dissemination by means of transmission, distribution or making available in any other form; or
- merging, linking, as well as restriction, degradation, erasure or destruction of information.

Notably, POPIA differs materially from similar legislation in other countries in that it extends the privacy protection to juristic persons.

Information officer

POPIA requires every private and public body to appoint an information officer. The information officer has a number of prescribed duties under section 55 of POPIA and Regulation 4 of the POPIA Regulations and may appoint deputy information officers to assist. These duties include –

- encouraging compliance with POPIA;
- facilitating preliminary assessments;
- ensuring a compliance framework is developed, implemented and monitored;
- confirming that adequate safeguards exist for lawful processing;
- developing a POPIA Manual;
- ensuring that this manual is published and

is available on a company's website and at its offices during normal business hours;

- developing and maintaining internal measures to process requests as well as complaints by data subjects;
- conducting an 'impact risk assessment' to ensure that the correct POPIA standards are met and how they will impact the business;
- conducting internal awareness sessions to inform and educate staff on POPIA compliance;
- understanding the role of external processors and what kinds of information they are allowed to access; and
- determining who, other than the information officer and deputy information officer/s, will be able to authorise access to personal data if need be.

Exclusions

The following exclusions are carved out by POPIA –

- personal or household activity;
- de-identified data;
- public bodies, when performing judicial functions and for national security;
- journalistic, artistic or literary expression.

Offences

POPIA makes provision for several offences. These include interfering with the protection of the personal information of a data subject, obstructing the information regulator in the performance of its duties and a failure to comply with an enforcement notice.

Penalties

Less serious offences are punishable by a fine or imprisonment for a period of 12 months, or both, whilst more serious offences are punishable by a fine of up to ZAR10 million or a period of imprisonment not exceeding 10 years, or both.

Litigation


Buhle Duma
Jessica Strydom
Ryszard Lisinski
Lionel dos Passos
Trevor Simon
Deneska Potgieter
Nafeesa Noor Mahomed
Colin Strime
Charles Shapiro
Simphiwe Shoba


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07

Employment Law

Author:
Bronwyn Marques

South African employment laws apply to all employees in South Africa regardless of their citizenship or legal status. The primary laws governing employment relationships in South Africa are –

- the Labour Relations Act, 66 of 1995, ("**LRA**") – the LRA aims to give effect to the constitutional right to fair labour practices and deals with unfair dismissals;
- the Basic Conditions of Employment Act, 75 of 1997 ("**BCEA**") – the BCEA prescribes the minimum terms and conditions of employment applicable to employees;
- the Employment Equity Act, 55 of 1998 ("**EEA**") – the EEA provides for the promotion of the constitutional right to equality, the elimination of unfair discrimination and the implementation of employment equity to redress historical discrimination in an attempt to achieve diversity in the workplace;
- the National Minimum Wage Act, 9 of 2018 ("**NMWA**") – the NMWA sets the minimum wage/remuneration payable to every worker.

In addition to the above, certain industries are subject to sectoral determinations or collective agreements which further regulate the terms and conditions of employees employed in specific sectors.

Labour Relations Act, 66 of 1995

The LRA regulates the organizational rights of employees and trade unions. It promotes and facilitates collective bargaining in the workplace and at a sectoral level. It also deals with strikes and lockouts, workplace forums and alternative dispute resolution. The purpose of the LRA is to protect the rights of everyone in the workplace and to promote and advance economic development, fair labour practices, peace, democracy and social development.

The LRA also establishes various dispute resolution forums such as the Commission for Conciliation, Mediation and Arbitration ("**CCMA**"), Labour Court and Labour Appeal Court with exclusive jurisdiction to decide matters arising from the LRA.

In terms of South African labour law, the termination of an employee's employment with an employer must be substantively and procedurally fair. Where termination is found to be unfair (either substantively or procedurally), the aggrieved employee will have a right of recourse as provided in for in the LRA. The 3 main recognised grounds for termination in South Africa are –

- misconduct (e.g. theft, assault, gross negligence etc.);
- incapacity based on an employee's poor work performance, ill health or injury;

and

- operational requirements (more commonly known as retrenchment).

The applicable process to be followed in each case will depend on the underlying reasons for the termination.

The primary remedy in respect of dismissals that are found to be either substantively or procedurally unfair, or both, is retrospective reinstatement. Compensation is generally limited to 12 months remuneration. In certain circumstances, such as where the reason for the dismissal is unfair discrimination, compensation of up to 24 months remuneration may be ordered by the Labour Court. The amount of compensation which may be awarded to an employee in respect of an unfair dismissal is regulated by the LRA.

The Basic Conditions of Employment Act, 75 of 1997

The BCEA provides for the minimum terms and conditions of employment which regulate, inter alia, working time (including pay for overtime, Sunday and public holiday work), leave (including annual, sick, family responsibility, maternity and parental responsibility leave), particulars of employment, remuneration, termination notice periods and payments on termination.

A written contract of employment is not strictly required, however section 29 of the BCEA provides that an employer must provide an employee with certain written particulars of employment and this information is usually set out in a contract of employment. Even where there is no formal employment contract, an employer is required to give an employee written particulars of employment when the employee commences work. The particulars of employment include, inter alia, the following –

- the full names and address of the employer;
- the name and occupation of the employee or a brief description of the work for which the employee is employed;
- the place of work;
- the date upon which the employee commenced employment;
- the employee's ordinary hours of work;
- the employee's remuneration and how it will be paid, and any deductions to be made from the employee's remuneration;
- the leave to which the employee is entitled and the notice period upon termination; and
- a description of any council or sectoral determination which covers the employer's business.

On termination of employment, an employee is entitled to the following payments –

- accrued annual leave pay in respect of annual leave that has been accrued but not taken;
- payment in lieu of notice, unless the employee is summarily dismissed or is required to work the notice period;
- severance pay equivalent to a minimum of one week's salary for every completed year of service with the employer (this payment is only applicable if the employee is dismissed as a result of the employer's operational requirements); *and*
- any other amount to which the employee is contractually entitled to as at the date of termination.

Notice periods are normally regulated in terms of the contract of employment. Should the contract of employment be silent on notice, the BCEA provides for the following minimum notice periods –

- one week if the employer has been employed for less than 6 months;
- 2 weeks if the employer has been employed for more than 6 months but less than a year; and
- 4 weeks if the employee has been employed for more than a year.

Employment Equity Act, 55 of 1998

The EEA is aimed at achieving equality in the workplace, and seeks to achieve this by –

- promoting equal opportunity and fair treatment through the elimination of unfair discrimination; and
- implementing positive measures (such as affirmative action) to ensure the equitable representation of black people, women and the disabled at all levels in the workplace.

In the private sector, a "designated employer", is defined for purposes of the EEA as –

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees but has a total annual turnover that is equal to or above certain industry specific thresholds; and

- an employer bound by a collective agreement that appoints it as a designated employer in terms of the EEA.

A designated employer must collect certain prescribed information and conduct an analysis in order to identify employment barriers that adversely affect people from designated groups. When conducting this analysis, the designated employer is required to review its employment policies, practices, procedures and the working environment in order to identify employment barriers that adversely affect people from designated groups. All designated employers must have an employment equity plan which sets out the prescribed requirements that must be contained in the plan. The plan is aimed at assisting designated employers in reaching their goal of employment equity in the workplace.

Designated employers are required to submit a report to the Director-General every year. The first report should detail the initial development of the consultation around and implementation of the plan. Subsequent reports will record the progress made in implementing the plan within the workplace.

National Minimum Wage Act, 9 of 2018

The NMWA came into effect on 1 January 2019 and provides that every worker is entitled to payment of the wage in an amount not less than the national minimum wage. This amount is set by the Minister of Labour from time to time. Currently, the national minimum wage amount is ZAR27.58 per hour. The national minimum wage applies to all workers across all sectors subject to certain exceptions.

Furthermore, the national minimum wage for certain industry specific sectors are regulated by sector specific sectoral determinations. Where the sectoral determination entitles an employee to a wage rate that is more favourable than the national minimum wage, such sectoral determination will prevail over the national minimum wage.

Collective agreements concluded between trade unions and employers may also prescribe the minimum wages for particular levels of employees.

Due to the level of complexity of employment and labour laws in South Africa, it is important that employers and companies are acquainted with the relevant laws which govern employment relations in South Africa in order to ensure that their businesses run effectively in the South African labour market.

Employment Law

Fluxmans

08

Exchange Control

Author:
Jacqueline Peart

South Africa applies Exchange Control rules and regulations. In terms of the Constitution of South Africa, the primary object of the South African Reserve Bank (Financial Surveillance Department) ("SARB") is to protect the value of the currency in the interest of balanced and sustainable economic growth in South Africa.

The inflow and outflow of capital is regulated by South Africa's Exchange Control rules, regulation and policy. The concept of capital is widely construed and includes intellectual property ("**IP**").

Exchange Control Regulation 10(1)(c) stipulates that no person shall, except with permission granted by the Treasury, enter into any transaction whereby capital or the right to any capital is exported from South Africa. Regulation 3(1) prohibits any person from transferring funds out of South Africa without Exchange Control approval unless an applicable exemption applies.

Exchange Control is governed by the Exchanges and Currencies Act 9 of 1933, which gives the Minister of Finance the power to determine and change Exchange Control policy. Exchange Control policy is set out in various manuals, rulings and guidelines issued by the SARB. Exchange Control policy is subject to change, and can and does change from time to time.

Certain South African commercial banks have been authorised to act for the SARB. Such banks are known as *'authorised dealers'*.

A person deals with Exchange Control matters through an authorised dealer and such person may not approach the SARB directly. The Financial Surveillance Department of the SARB therefore only accepts requests or applications submitted by an authorised dealer on behalf of its client. Authorised dealers are permitted to grant certain requests and applications within certain thresholds and parameters. Any requests or applications submitted to the authorised dealer outside of these thresholds and parameters as defined, must be submitted to the SARB for approval. The Exchange Control Manual describes a *'resident'* as *'any person (i.e. a natural person or legal entity) who has taken up permanent residence, is domiciled or registered in South Africa (...)'.* A South African branch (i.e. registration as an external company in South Africa) may be seen as an Exchange Control resident.

South Africa's Exchange Control rules apply to Exchange Control residents and to a lesser extent, but in certain respects, to non-residents for South African Exchange Control purposes.

The rules for tax residence and Exchange Control residence differ in certain respects. For example, a South African incorporated company may be South African resident for Exchange Control purposes, but tax resident abroad if it is effectively managed offshore in terms of an applicable double taxation agreement (place of effective management being one of South Africa's domestic tests of tax residence).

Different rules apply to inflows and outflows of capital and funds from South Africa depending on the nature of the payment. Rules surrounding certain of the more common payments are set out below.

Outbound Investment by South African Companies

Authorised dealers may authorise new bona fide outward foreign direct investments outside of the Common Monetary Area ("**CMA**") not exceeding ZAR1 billion into

foreign companies, branches and offices. The CMA is comprised of South Africa, Lesotho, Namibia and Eswatini (formerly Swaziland). There are strict documentary requirements required, including details to be furnished of how the offshore investment will be funded, details of the proposed structure of the offshore entities, description of the type of business, percentage shareholdings of the offshore entities, the furnishing of the annual financial statements to the SARB on an annual basis, full details of future monetary benefits to South Africa (excluding dividend flows which are not considered to be a monetary benefit to South Africa), cash flow forecasts, etc. New *bona fide* outward foreign direct investments over ZAR1 billion require specific approval from the SARB.

South African registered trusts and individuals (natural persons) may not make the type of outward foreign direct investment as envisaged above.

Export of IP from South Africa

The direct or indirect export of IP or the right to IP from South Africa is not permitted unless the export takes place at arm's length and is at fair market value to a third party (unconnected party). An authorised dealer may accordingly approve the transfer of IP subject to sight of the transaction documents and third-party valuations confirming the basis for calculating the purchase price. The purchase price is required to be repatriated to South Africa within 30 days from the date of the South African resident becoming entitled thereto and reported as such on the SARB's balance of payments ("**BOP**") reporting systems.

Licencing by South African Exchange Control Residents

An authorised dealer may approve the licencing of IP by South African Exchange Control residents to non-resident parties at an arm's length price and at a fair and market related price for the term of the licencing agreement. The authorised dealer requires sight of the said agreement and an auditor's letter confirming the basis of calculation of the licence fee or royalty. All royalties and licence fees emanating from such transactions must be repatriated to South Africa within a period of 30 days from the date of becoming entitled thereto and reported as such on the SARB's BOP reporting systems.

International Headquarter Companies

As with the income tax legislation for headquarter companies, there are various percentage shareholding requirements and no more than 20% of such an entity may be held by South African Exchange Control residents. At the end of the financial year, at least 80% of the assets of the headquarter company must consist of foreign assets (cash, cash equivalents and debt with a term of less than one year are excluded). A South African headquarter company will be treated by the SARB as non-resident for Exchange Control purposes, but such companies are still required to report all cross-border transactions to the SARB. Annual and ongoing documentary and reporting requirements are required to be complied with.

Inbound Investment

Non-residents for South African Exchange Control purposes may freely invest in South Africa, provided that suitable documentary evidence is viewed in order to ensure that such transactions are concluded at arm's length, at market-related prices and financed in an approved manner.

Share certificates

Dividend and capital distributions may be remitted to foreign shareholders provided that the relevant share certificate is endorsed *'non-resident'* for Exchange Control purposes by the authorised dealer. In order to obtain the *'non-resident'* endorsement, the South African subsidiary will have to demonstrate that the funds have flowed into the subsidiary's South African bank account as share capital and reported correctly as such per the SARB's BOP reporting systems. On remittance of dividends and capital, certain documents are required such as an auditor's certificate.

Foreign Loans to South African residents

Within certain parameters, authorised dealers are permitted to approve inbound loans (both the capital amount of the loan and the interest payable on such loan). The terms of the loan require approval and the term of the loan must be at least one month. The permitted interest rate depends on the currency of the loan and whether the parties are related parties. Approval for the loan must be obtained prior to advancing the loan into South Africa.

Royalties paid to non-residents

Requests by South African residents to make royalty payments to related parties offshore require approval from the SARB. Authorised dealers may approve third party royalty agreements and royalty payments. Payment of percentage-based royalties is permissible provided that this is normal in the trade concerned. The applicant entity must present a letter in respect of the royalty payable from an independent auditor confirming the amount or percentage of the royalty on an annual basis.

Licence agreements involving the local manufacture of goods require approval from the Department of Trade and Industry.

Management and service fees

Payments for services rendered by non-residents are transferable offshore. The authorised dealer will generally require a copy of the agreement and in all instances the underlying invoices verifying the purpose of the service, the amount involved and how it is calculated. Management and service fees may not be calculated on a percentage of turnover.

Local Borrowing

The granting of local assistance to *'affected persons'* is prohibited in certain circumstances. An *'affected person'* includes a South African company which is 75% or more held or controlled by a person not Exchange Control resident in South Africa.

If a prospective borrower is an *'affected person'*, the lender may grant local financial assistance for financial transactions (i.e. the acquisition of shares) or residential property situated in South Africa, provided a 1:1 debt:equity ratio applies, i.e. for every ZAR1 that the non-resident introduces or lends, the equivalent amount may be borrowed locally.

Individuals

Authorised dealers may allow individuals (natural persons) to transfer as a foreign capital allowance, a total amount of up to ZAR10 million per calendar year. Such individual will need to be a taxpayer of good standing and a specific tax clearance from South African Revenue Service ("**SARS**") will be required. Authorised dealers must ensure that the amount transferred does not exceed the amount approved by SARS.

Individuals may also transfer an amount of ZAR1 million per calendar year in terms of a ZAR1 million annual discretionary allowance.

Loop Structures

A 'loop' structure for South African Exchange Control purposes is where a South African resident (or a resident of the CMA) holds a South African asset through an offshore entity. This type of structure has historically not been permitted from a South African Exchange Control perspective. Although there have been certain relaxations on this prohibition from an Exchange Control perspective in recent times, this is a complex area in the South African Exchange Control environment.

Crypto Assets

The SARB's historical stance has been that crypto assets do not constitute currency or capital under the Exchange Control regulations. This said, Exchange Control Regulation 10(1)(c) (as mentioned above) prohibits the export of capital from South Africa without the relevant Exchange Control approvals. This provision is wide enough to cover the transfer of crypto assets from a South African wallet to a wallet offshore. The current Exchange Control rules do not cater for the SARB to approve such a transfer and it is unlikely that SARB approval will be granted as there is no way to report such transactions on the SARB's BOP reporting systems. The Exchange Control treatment of crypto assets and the surrounding Exchange Control policy is fluid and subject to ongoing development and change.

Tax

Fluxmans

09

Intellectual Property

Author:
Ian Jacobsberg

Intellectual property is protected in South Africa both by statute and at common law. South Africa is also a party to various international treaties and conventions, guaranteeing recognition to intellectual property registered or originating in other countries.

Certain categories of intellectual property– copyright, designs, patents, plant breeders' rights and trademarks – are protected by statute, while confidential business information and trade secrets not falling within any of the aforementioned categories are protected by the common law. The CIPC, which also administers the registration of companies, is the body responsible for registration of intellectual property in South Africa.

Copyright

Copyright is protected in terms of the Copyright Act, 98 of 1978. In terms of the Act, the author of any original work that is eligible for copyright owns the copyright in that work. In certain circumstances, the copyright vests in the author's employer or the person who commissioned the creation of the work. The owner may assign his copyright to another party or may license others to use it.

It is not necessary for copyright to be registered in order to be enforceable, all that is required is that the work be original.

The Act recognizes the following works as being eligible for copyright –

- literary works;
- musical works;
- artistic works;
- cinematograph films;
- sound recordings;
- broadcasts;
- programme-carrying signals;
- published editions;
- computer programs.

Ownership of copyright vests in the owner the exclusive right to reproduce the work in the same or a different form or make adaptations of the work, and to prevent other parties from doing so without authority.

South Africa is a member of the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property ("**TRIPS**") which provide for mutual protection of copyright by member countries.

Designs

Design rights are protected in terms of the Design Rights Act, 195 of 1993. Designs rights are associated with the shape, patterns, and configuration of an item, the combination of texture, shape and patterns or ornamentation associated with an item. In order for the rights associated with a design to be enforced, the design must registered.

Two types of designs may be registered, namely functional designs and aesthetic designs. A functional design protects the qualities of an item that are related to its function, to the extent they dictate its appearance, while an aesthetic right protects the ornamentation qualities of the item's appearance. A single design can qualify for both forms of protection, provided the essential aspects of both are satisfied and separate applications filed. Once registered, a functional design is protected for 10 years, while an aesthetic design is protected for 15 years.

It is also possible to obtain protection for a two dimensional design, which may also be protected under the copyright laws.

Patents

Patent law in South Africa is regulated by the Patents Act, 57 of 1978. Any new invention may be protected by a patent. in order to be

patentable, the invention must involve an inventive step and be capable of being used or applied in trade or industry or agriculture. An invention cannot be patented if the details have been disclosed, or the invention has been commercially exploited, anywhere in the world before the patent application has been lodged.

A South African patent is valid only in South Africa. In order to protect the patent in any other country, an application must be lodged in that country.

South Africa is a member of the Patent Cooperation Treaty and therefore affords recognition to patents that have been applied for in other member countries.

Plant Breeders' Rights

In terms of the Plant Breeders' Rights Act, 15 of 1976, a person who develops a new variety of a plant type recognized as eligible for registration may apply to the Department of Agriculture, Forestry and Fisheries for a registered pant breeder's right. For a plant breeders' right to be registered, the plant variety must be new, distinct, uniform, stable and have an acceptable denomination (variety name). A variety is considered –

- **new** if the seed or cutting from a plant from which it can be grown –
  - *has not been sold in South Africa for longer than one year;*
  - *in the case of a tree or a vine, has not been commercialised in another country for more than 6 years, or in the case of any other plant for more than 5 years;*
- **distinct** if it is clearly distinguishable from any other variety of the same species;
- **uniform** if all the plants of the variety look similar and are sufficiently uniform in relevant characteristics;
- **stable** if the plants of the particular variety still look like the original plants after repeated cultivation.

Plant Breeders' Rights for vines and trees are valid for 25 years from the date on which the certificate of registration is issued, and for 20 years for all annual varieties.

In terms of section 23 of the Plant Breeders' Rights Act, the effect of the grant of a plant breeder's right is that no person may without the authority of the right holder undertake, in relation to the plant variety in respect of which the right is registered –

- production or reproduction (multiplication);
- conditioning for the purpose of propagation;
- sale or any other form of marketing;
- exporting;
- importing;
- stocking for any of the above purposes.

Trademarks

In terms of the Trade Marks Act, 194 of 1993, any mark "used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person" may be registered as a trademark.

A trademark registration is generally effective for a period of 10 years but may be renewed.

Once a trade mark is registered, the registered owner may prevent –

- any unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
- any unauthorised use of a mark which is identical or similar to the registered trade mark, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;

- any unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a registered trade mark, if the registered trade mark is well known in South Africa and the use of the identical or similar mark is likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, even in the absence of confusion or deception.

South Africa is a member of the Paris Convention for the protection of intellectual property and accordingly protects trademarks that are entitled to protection as "well-known trademarks" under the Convention. The owner is entitled to restrain the use in South Africa of a trademark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the well-known trademark in relation to goods or services which are identical or similar to the goods or services in respect of which the trademark is well known if the use is likely to cause deception or confusion.

Confidential Business Information and Trade Secrets

In general, any confidential business information which gives the owner a competitive advantage and is not known outside the business may be protected as a trade secret. Trade secrets include technical information, like manufacturing processes, research data, algorithms and commercial information such as price lists and costings, distribution methods, details of suppliers and customers, and marketing methods.

To qualify as a legally protectable trade secret, the information must be –

- commercially valuable because it is secret;
- known only to a limited group of persons; and
- the owner must have taken steps to keep it secret and to protect it from unauthorised use and disclosure.

It is not possible to register trade secrets and confidential information. The owner must therefore take steps to prevent unlawful use or disclosure. It is advisable to obtain contractual undertakings from anyone to whom the information is disclosed including employees, business partners, suppliers and customers, binding them to use the information only for the specific purpose for which it was disclosed to them.

Corporate & Commercial

10

Ownership and Transfer of Land

Author:
Steven Fisher

Introduction

The system of land ownership and transfer of immovable property in South Africa is amongst the most secure and certain in the world. The Cadastral Surveying System, in terms of which all immovable property which is capable of ownership in South Africa, is surveyed by a qualified land surveyor and the diagrams are registered and recorded, by reference to a unique number in the office of the Surveyor General. Each title deed, which evidences ownership of an immovable property refers to the diagram of the property held by such deed. The structure of the system of ownership of immovable property, enables a Deeds Office search to be conducted with relative ease in order to confirm ownership of all immovable properties in South Africa, together with relevant details relating to all property or the registered owner/s thereof.

Agreements for the sale and purchase of land

- In terms of the Alienation of Land Act, 68 of 1981 ("**ALA**") in order for an agreement for the sale and purchase of immovable property in South Africa to be valid and legally binding, there must be an agreement in writing signed by, or on behalf of all parties to the transaction.
- The agreement must in addition contain certain essential elements in order to be enforceable, including the description of the parties, description of the property and the purchase price, in compliance with the general principles of South African contract law.
- The question as to whether digital signatures are acceptable to comply with the requirement for signature by the parties in accordance with the ALA has been the subject of a number of reported cases that had come before our courts recently, and it appears that the safest option at present, is for the parties, or their authorised representatives, to sign such agreement in "wet ink" in the traditional way.
- The format and contents of an agreement of sale will vary depending on the circumstances and details of the particular transaction, as well as the type of property that is being sold and acquired.

Registration of transfer of ownership of properties

- The process of registering the transfer of ownership of immovable properties and related matters, such as the registration of mortgage bonds, servitudes, notarial registration and cession of long leases, are governed by the Deeds Registries Act, 47 of 1937 ("**DRA**"), as well as certain other legislation relating to specific types of ownership of property. There are various Deeds Registry Offices throughout the country, each dealing with a particular geographic area, and all documents submitted for registration in the relevant Deeds Registry must be checked and signed off by a conveyancer, who is required to be an admitted, practicing attorney who has obtained this additional qualification and been admitted by the High Court as a conveyancer.
- The conveyancing process is a fairly complex and rigorous procedure and the transfer of immovable property requires certain approvals from local and governmental authorities, including the relevant Municipality and South African Revenue Service, as well as bodies corporate and homeowners associations in certain circumstances. Various checks and balances are carried out by the conveyancer, prior to finalisation and submission/lodgement of documents in a Deeds Register as well as part of the process followed by the Deeds Registry, before transfer can be registered and ownership of property passed. As a consequence of this, the process can sometimes be a fairly lengthy one, which is sometimes exacerbated by delays in obtaining consent from certain authorities, in particular, Municipalities.
- In general, the process from lodgement, or submission of documents in a Deeds Registry, until the date of registration, is

usually approximately 2 weeks, but the process of obtaining all relevant consents and coordinating with other attorneys involved in the process, such as those attending to the cancellation of existing mortgage bonds and the registration of new mortgage bonds which must happen before lodgement is possible, can sometimes take a number of weeks.

Types of ownership of immovable property

Freehold Title

Property either improved or unimproved, as defined on a diagram of the erf or farm portion is held by a conventional title deed.

Sectional Title

The Sectional Titles Act, 95 of 1986 and Sectional Titles Schemes Management Act, 8 of 2011 govern ownership and management of sectional title units and exclusive use areas in a sectional title scheme which allows for individual ownership of a part of a building (referred to as a section), as well as an undivided share in the common areas in the sectional title scheme, and exclusive use areas, which are part of the common property allocated to a specific section, which can include parking areas, gardens, balconies and storerooms. Sectional title ownership is most commonly used for residential apartments but is also utilised for commercial, industrial and mixed use developments.

- The common areas, as well as certain structures in a sectional title scheme are administered by a body corporate, which is an association of all owners, and each owner of a unit, automatically becomes a member of a body corporate on taking ownership of a unit, with certain voting rights and liability for levies determined in accordance with the participation quota, in relation to the area of the specific unit owned.
- There are very specific provisions that need to be included in an agreement for the purchase of a sectional title unit, which, if not incorporated in an agreement, could render the agreement void in certain circumstances.

Share Blocks

Although share block ownership is not as popular as it used to be, it does still exist as a form of property ownership in South African law. This type of ownership is governed by the Share Blocks Control Act, 59 of 1980 ("**SBCA**") and is essentially ownership of a share in a company which owns a property, usually a residential or holiday development. Shares in a share block company entitle the holder of such shares to use and occupation of a specified portion of the property, the terms of conditions of which are detailed in a use agreement which is entered into between the share block company and the holder of the shares on transfer of such shares.

There is a provision in the SBCA which allows for the holder of shares in a share block company to convert the share block ownership into sectional title ownership, by application to the directors of the share block company.

Registered Notarial Leases

Immovable property can be held for a specified period in terms of a notarial lease, which is registered against the title deed of a property in respect of such period. The consequence of registration of lease which is in excess of 10 years, is that in addition to the lease being legally binding on the parties as would be the case in any unregistered lease, it is also binding against creditors and successors in onerous title. The DRA regards a registered lease as a fixed property that can be mortgaged and accordingly, the rights under a registered notarial lease can be used as a collateral security for obtaining funding by registering a mortgage bond against the registered lease.

Property

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11

Tax

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Income Tax: Companies

A residence-based system of tax applies in South Africa. A company which is tax resident in South Africa is taxable on its worldwide income and capital gains. Companies which are not tax resident in South Africa are taxable only on South African-source income (in terms of actual or deemed source income tax principles).

A company is tax resident in South Africa if it is incorporated in South Africa or has its place of effective management ("**POEM**") in South Africa.

South African tax resident companies are taxable at a corporate income tax rate of 27% (for tax years of assessment ending after 31 March 2023). Likewise, a foreign company registered as an external company in South Africa (i.e. a South African branch) is also taxable at the corporate income tax rate of 27% on South African source income.

Specifically, the mining income of gold mining companies is taxed under a specific formula, whilst non-mining income is subject to the corporate income tax rate of 27%. Life assurance companies and small business corporations (as defined) are subject to special rules from an income tax perspective.

South Africa applies controlled foreign company ("**CFC**") legislation. Where a South African tax resident/tax residents directly or indirectly hold more than 50% of the participation rights or voting rights in a foreign company, such foreign company qualifies as a CFC for South African income tax purposes. Subject to certain exemptions and exclusions, the *'net income'* of a CFC is calculated as if it were a South African tax resident and such *'net income'* is imputed into the hands of the South African tax resident/s on a proportionate basis and is taxed accordingly in the hands of the South African tax resident/s. The aim of South Africa's CFC legislation (which is a specific anti-avoidance piece of legislation) is to tax in South Africa passive income or diversionary income earned offshore by the CFC. Certain exemptions from imputation exist such as the *'foreign business establishment'* exemption or an exemption where the income in the CFC is taxed above a certain rate in the foreign jurisdiction (i.e. where the amounts taxed in the foreign jurisdiction are subject to tax of at least 67.5% of the amount of normal tax that would have been payable in respect of that CFC had the CFC been tax resident in South Africa in that foreign tax year of assessment). No attribution of the income of a CFC takes place in the hands of a South African tax resident where the South African tax resident (and any *'connected person'* to that tax resident for income tax purposes) holds less than 10% of the participation rights and voting rights in the CFC.

Subject to various rules and conditions being met, should a South African tax resident hold more than 10% of the equity shares in the foreign company, such foreign dividends will not be subject to tax in South Africa

Withholding Tax

Dividends

Payment of dividends (including a *dividend in specie)* is subject to a dividend tax of 20%. There may be a reduction of or exemption on the dividend withholding in certain circumstances if certain conditions (including applicable Double Taxation Agreement ("**DTA**") relief) and documentary requirements are met. In the case of such exemption or reduction of the rate of withholding, certain requirements and undertakings as to beneficial ownership are required.

On the assumption that beneficial ownership requirements are met, exemptions include dividends paid by one South African tax resident company to another tax resident company or dividends paid by a South African tax resident company to a specified tax-exempt entity (e.g. a dividend paid to a public benefit organisation).

With respect to a cash dividend, the company declaring the dividend is liable to withhold the necessary tax on dividends on behalf of the beneficial owner and to pay the same over to

the South African Revenue Service ("**SARS**"). A tax resident company that declares and pays a *dividend in specie*, is liable for the dividends tax, and not the beneficial owner as is the case with a cash dividend.

Interest

Interest payable to a non-resident is subject to a withholding tax ("**WHT**") of 15%, subject to applicable DTA relief and the meeting of certain conditions (inclusive of beneficial ownership requirements) and documentary requirements. The dividend WHT is a final tax. The interest WHT does not apply to interest paid by South African banks.

Royalties

Royalties payable to a non-resident for tax purposes is subject to a withholding tax of 15%, subject to applicable DTA relief and the meeting of certain conditions (inclusive of beneficial ownership requirements) and documentary requirements. The royalty WHT is a final tax.

Service/management/administration fees

There is currently no WHT on service, management and administration fees paid to non-residents.

Rentals

There is currently no WHT on rentals paid to non-residents.

Branch Remittance Tax

There is currently no branch remittance tax applied in South Africa.

Capital Gains Tax

Tax resident companies in South Africa are subject to capital gains tax ("**CGT**") on their worldwide capital gains. Tax resident companies pay CGT at an effective CGT rate of 21.6% (i.e. 80% of the net capital gain is taxed at the corporate income tax rate of 27%).

Companies which are non-resident for tax purposes are only subject to CGT in specific circumstances as outlined below –

- on the disposal of immovable property situated in South Africa or the disposal of an interest to or in immovable property situated in South Africa; or
- on the disposal of any asset effectively connected with a permanent establishment in South Africa.

An *'interest in immovable property'* held by a company not tax resident in South Africa, includes any equity shares held by a non-resident company if 80% or more of the market value of those equity shares at the time of disposal thereof is attributable directly or indirectly to immovable property situated in South Africa and in the case of a company, that non-resident person (together with any *'connected person'* as defined) holds directly or indirectly at least 20% of the equity shares in that company. Mineral and mining rights situated in South Africa also constitute *'immovable property'* for the purposes of South Africa's CGT legislation.

With respect to the disposal of immovable property or *'land rich'* shares (as explained above) held by non-residents, there are specific rules providing for the withholding of amounts payable to non-resident sellers by the purchaser in advance calculated at various percentage rates. This is an advance amount of tax which is required to be paid over to SARS. Where the non-resident seller is a company, an amount of 10% of the amount so payable must be withheld and paid over to SARS. Depending on the specific facts, the amount so withheld is required to be withheld by either the resident seller, property practitioner or conveyancer. In certain circumstances, an exemption from these withholding requirements may be possible.

A *'permanent establishment'* is defined in South Africa's domestic tax legislation as *"a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development(...)".*

Income Tax: Individuals

An individual (natural person) is tax resident in South Africa if he/she is considered to be *'ordinarily resident'* in South Africa or if he/she has spent over a certain number of days in South Africa over a 6-year period. The concept of *'ordinarily resident'* is not defined in South Africa's income tax legislation. This is a factual determination per the case law (local and international, noting that international case law is persuasive and is of guidance in South Africa as opposed to being binding) and per the guidance contained in the relevant Interpretation Note as issued by SARS. An individual that is tax resident in South Africa is subject to South African tax on his/her worldwide income and capital gains.

A non-resident individual for South African tax purposes is only subject to South African tax on South African source income (actual or deemed source income). An example of South African source income would be interest earned from a South African bank account, rentals earned from immovable property situated in South Africa or income earned for services rendered in South Africa.

Individuals are taxed on a sliding scale from 18%-45%, depending on their level of taxable income. Each tax year, individuals are entitled to deduct a primary rebate (this amount is usually increased from year to year) from the normal tax calculated for the tax year of assessment. Persons of 65 years of age or older qualify for a secondary rebate as determined each year, and persons over 75 years are eligible for a further tertiary rebate as determined each year.

Capital Gains Tax

Individuals pay CGT at an effective CGT rate ranging from 7.2% - 18% (i.e. 40% of the of an individual's capital gain is taxed at the sliding scale of 18%-45%). There is an annual exclusion for CGT applicable to an individual of ZAR40 000 and where an individual dies during a year of assessment, that person's annual exclusion for that year of assessment is ZAR300 000.

Non-resident individuals for South African tax purposes are subject to CGT on immovable property or an interest in or to immovable property (i.e. *'land rich'* shares) as explained in the Corporate section above. CGT is payable on capital gains at an effective CGT rate applicable to tax resident individuals. In addition, with respect to disposals by non-residents, the CGT advance withholding as explained in the Corporate section above is also of application, except that in the case of a disposal by a non-resident individual, the rate of advance withholding by the South African tax resident seller, property practitioner or conveyancer is 7.5%.

There is rollover relief from a CGT perspective in respect of disposals between spouses.

There is no CGT on the disposal of *'personal-use assets'* by an individual. A *'personal-use asset'* is an asset that is used mainly for purposes other than the carrying on of trade. Such assets include cars, boats not exceeding 10 metres in length, aircraft not exceeding 450 kilograms and jewellery. The use of capital losses on the disposal of *'personal-use assets'* are not permitted.

An individual may also make use of a *'primary residence exclusion'* on the disposal of a primary residence. A *'primary residence'* is defined as a residence in which the individual (natural person) ordinarily resides or resided in as his or her main residence and is used or was used mainly for domestic purposes. In the case of the disposal of a *'primary residence'*, a capital gain or capital loss as does not exceed ZAR2 million must be disregarded. In order to make use of the *'primary residence exclusion'*, there are further conditions and requirements as to size of the *'primary residence'*, any non-residential use of such property, the continued occupation of the *'primary residence'*, the application of the 'ordinary residence' test with respect to individuals, the use of the *'primary residence'* for the purposes of 'trade', etc.

On the death of an individual, aside from any asset disposed for the benefit of his/her surviving spouse, a deemed disposal at market value for CGT purposes of the deceased's assets is deemed to take place.

Value-Added Tax

Value-Added Tax ("**VAT**") is applied in South Africa. VAT is an indirect tax levied on the supply of certain goods and services by a VAT vendor in the carrying on of an *'enterprise'* for VAT purposes. Depending on the circumstances, VAT will be levied either at a rate of 15% or 0% on the supply of goods or services by registered vendors. Certain goods and services are also exempt from VAT, e.g. *'financial services'* as defined.

A person is required to be registered for VAT if that person carries on an *'enterprise'* for VAT purposes in or partly in South Africa and the value of such person's *'taxable supplies'* exceeds or is expected to exceed ZAR1 million in any 12 month period. A person may also register voluntarily for VAT, if the threshold of ZAR1 million is not met, but *'taxable supplies'* of ZAR50 000 are made or are likely to be made, and certain other requirements in the VAT legislation are met.

The documentary requirements in terms of South Africa's VAT legislation are rigorous. There are specific requirements as to tax invoices, as well as debit and credit notes. Should a vendor's VAT documents not be in order, this may result in the denial of claiming of input tax credits and zero-rating, by way of example, as well as the levy of interest and penalties up 200% of the tax debt due.

Depending on the goods or services supplied, there are specific VAT rules pertaining to time of supply and value of supply (consideration). There are also specific VAT rules that apply to supplies between *'connected persons'* as defined for VAT purposes from both a timing and value of supply perspective.

Foreign electronic services entities are required to register for VAT. This means that a foreign supplier who provides *'electronic services'* via the internet to South African persons is required to register as a vendor for South African VAT purposes if that foreign supplier made taxable supplies over ZAR1 million in a 12 month period.

Miscellaneous

Thin Capitalisation/Transfer Pricing

South Africa applies thin capitalisation rules (which incorporate South Africa's transfer pricing legislation). The price payable for the supply of goods and services (including financial assistance) in terms of an *'affected transaction'* between resident and non-resident *'connected persons'* as defined must be at arm's length. The terms and conditions of the cross-border transaction must also be arm's length. In addition, in terms of recent legislative amendments, if the parties are *'associated enterprises'*, these transactions will also fall into the thin capitalisation/transfer pricing net. With respect to cross-border *'financial assistance'* (loans), there is no debt-equity safe harbour available.

With respect to cross-border transactions, should *'connected persons'* or *'associated enterprises'* not transact at arm's length, primary and secondary adjustments made by SARS will apply. In the case of a tax resident company, if there is a transfer pricing adjustment, this will result in a secondary adjustment in the form of a deemed *dividend in specie,* with the dividend withholding of 20% being payable. In the case of a tax resident which is not a company, a deemed donation by tax resident will ensue to the other party, with concomitant donations tax implications (see Donations Tax section below). Any adjustments will be subject to interest and potential penalties for non-compliance and understatement up to 200%.

Depending on various monetary thresholds, there are strict documentary requirements (including Country-by-Country ("**CBC**") reporting, Master and Local Files). There are also benchmarking requirements in certain instances.

In certain circumstances, in order to enjoy certainty, it is possible to apply to SARS for an *'advanced pricing agreement'* with respect to the 'arm's length pricing' in cross-border transactions.

OECD

Although South Africa is not a member of the OECD, it follows OECG guidelines, including OECD arm's length principles.

South Africa is a member of the OECD's Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS**"). South Africa is also a signatory to the Multi-Lateral Instrument ("**MLI**") and has ratified the MLI.

South Africa's domestic transfer pricing documentary requirements are aligned with the OECD's 2017 Transfer Pricing Guidelines (BEPS Action 13), which includes the exchange of CBC reports.

As a signatory to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (the Common Reporting Standard ("**CRS**")), South Africa has enacted the enabling legislation which provides for obligations to disclose CRS Avoidance Arrangements or Opaque Offshore Structures to SARS.

Trusts

Trusts (excluding special trusts) are subject to tax at 45%. Capital gains are subject to an effective CGT rate of 36%.

The taxation of trusts is a complex area of tax law, with various attribution rules coming into play. Either the trust, its founder/settlor or its beneficiaries will be taxable at applicable rates depending on whether the trust is a vesting or discretionary trust, and depending on the attribution rules.

South Africa also has special trusts which need to meet various requirements. Special trusts are taxable at the individual rates set out in the Individual section above.

Headquarter companies

The South African *'headquarter company'* regime encourages the use of South Africa as an intermediary holding location by foreign multi-national corporations. The *'headquarter company'* regime serves as an alternative to Mauritius, for example, for investment in Africa.

A *'headquarter company'* is required to be South African tax resident and certain shareholding thresholds must be met. The South African tax residence requirement allows a *'headquarter company'* to benefit from South Africa's DTA network. At least 80% of the cost of the company's assets (excluding cash) must be attributable to investments in equity shares, loans and intellectual property ("**IP**") in the underlying non-resident companies in which the *'headquarter company'* holds an equity interest of at least 10%. If the gross income of the company exceeds ZAR5 million, at least 50% of such gross income must consist of rentals, dividends, interest royalties and service fees received from its underlying shareholdings, or proceeds from the disposal of such underlying equity shares or IP.

The benefits of a *'headquarter company'* include the exemption from WHT on dividends, interest and royalties. South Africa's CFC rules do not apply to a *'headquarter company'*, neither do South Africa's rules on foreign exchange gains and losses. South Africa's transfer pricing rules do not apply to *'headquarter companies'*.

Annual reporting requirements apply to *'headquarter companies'*.

Crypto Assets

Normal income tax rules apply to crypto assets. The onus is on taxpayers who need to declare crypto assets' gains and losses as part of their income in the year of receipt or accrual. This declaration will either be on revenue account or capital account depending on the facts and circumstances. If on revenue account, taxpayers may also be able to claim expenses associated with crypto

assets accruals or receipts, provided such expenditure is incurred in the production of the taxpayer's income and for the purposes of trade.

GAAR

South Africa has specific general anti-avoidance legislation ("**GAAR**") applicable to *'impermissible tax avoidance arrangements'* as widely defined. If the sole or main purpose of the 'avoidance arrangement' was to obtain a *'tax benefit'* (there is a presumption that such an arrangement was entered into with the 'sole or main purpose of obtaining tax benefit'), then it will be considered an *'impermissible tax avoidance arrangement'.* There are other aspects of GAAR which include and deal with abnormality, lack of commercial substance, misuse and abuse of the provisions, tax indifferent parties, round-tripping of financing, elements of a transaction that have the effect of cancelling or off-setting each other.

Aside from GAAR, South Africa also applies the doctrine of *'substance over form'*. This is dealt with in the body of South Africa's case law.

Reportable Arrangements

South Africa's tax administration legislation provides for reporting of certain transactions to SARS within certain prescribed time limits at the time of entering into the transaction. This reporting happens prior to the filing of the annual tax return after year end and serves as advance notice that a transaction as contemplated in the *'reportable arrangements'* legislation has taken place. Penalties apply for failure to report timeously.

A *'reportable arrangement'* includes arrangements where a *'tax benefit'* is or will directly or indirectly be derived or is assumed to be derived by a 'participant' in terms of an 'arrangement'. Such arrangements also include certain *'hybrid equity instruments'*, certain share buy-backs and certain payments to a non-resident trust by a South African tax resident.

Estate Duty

Estate duty is payable by persons who are ordinarily resident in South Africa at the time of death (estate duty will be payable in South Africa on such person's worldwide assets for estate duty purposes). Estate duty is also payable by persons not ordinarily resident in South Africa, but who owned assets in South Africa as at date of death.

Estate duty is payable on the dutiable amount of the estate at a flat rate of 20% with respect to the first ZAR30 million and a rate of 25% on the amount of the dutiable estate exceeding ZAR30 million.

An estate consists of all property and deemed property.

The dutiable amount of an estate is calculated by deducting a ZAR3.5 million primary abatement from the *'net value'* of the estate. In addition, there is an abatement of ZAR3.5 million for the first-dying spouse.

Certain expenses are deductible from the gross estate, resulting in the *'net estate'.* These expenses include deathbed and funeral expenses, debts due within South Africa, administration charges, etc.

Donations Tax

Donations tax is levied on donations at a flat rate of 20% on the value of property disposed of under any donation by a South African tax resident. The balance of donations in excess of ZAR30 million are subject to donations tax at 25%.

A donation is defined as 'any gratuitous disposal of property or any gratuitous waiver or renunciation of a right'. Aside from the definition of 'donation', there is also provision in the legislation that a disposition of property for an *'inadequate consideration'* in the opinion of the Commissioner of SARS, is also deemed to be a donation subject to donations tax. The Commissioner's discretion in this instance is not subject to objection and appeal.

The donor is liable for donations tax. However, should the donor not settle the donations tax with SARS within the specified time period, the donations tax legislation provides for joint and several liability for the donations tax between the donor and donee.

There is generally no donations tax between spouses. There is no donations tax between South African tax resident companies, being members of the *'same group of companies'* as defined.

Securities Transfer Tax

Securities Transfer Tax ("**STT**") is payable on the transfer of the beneficial ownership of shares in companies incorporated in South Africa. STT is generally payable by the transferee of the share at a rate of 0.25% of the market value of the share or consideration, whichever amount is higher. However, in the case of the transfer of an unlisted share, the STT is payable the underlying company, with a right of recovery against the transferee.

STT is also payable on the cancellation of a share (by the underlying company), unless the company which issued the share is being would up, liquidated, deregistered or its corporate existence is being finally terminated. In such case, there would be no liability for STT on the cancellation of such a share.

No STT is payable on the issue of shares.

Non-Resident Entertainers and Sportspersons

Any non-resident who performs entertainment or takes part in any sport in South Africa for reward is subject to a final WHT known as the tax on foreign entertainers and sportspersons. The WHT is levied at a rate of 15% on any amount received by or accrued to such entertainer or sportsperson. The South African tax resident who is liable to pay such entertainer or sportsperson is required to withhold the tax from such payment and pay it over to SARS by the end of the following month. Should the resident fail to withhold such tax, he will become personally liable for the tax.

Tax Administration Legislation

South Africa has specific tax administration legislation. The general provisions of this legislation deal with the administration of the entire tax life cycle (verification, information gathering, audit, assessments, objections, appeals, the alternative dispute resolution mechanism and the special income tax court), confidentiality and secrecy, reportable arrangements, private binding and general binding rulings, APA's for transfer pricing purposes, interest and penalties, public officers and representative taxpayers and criminal offence provisions.

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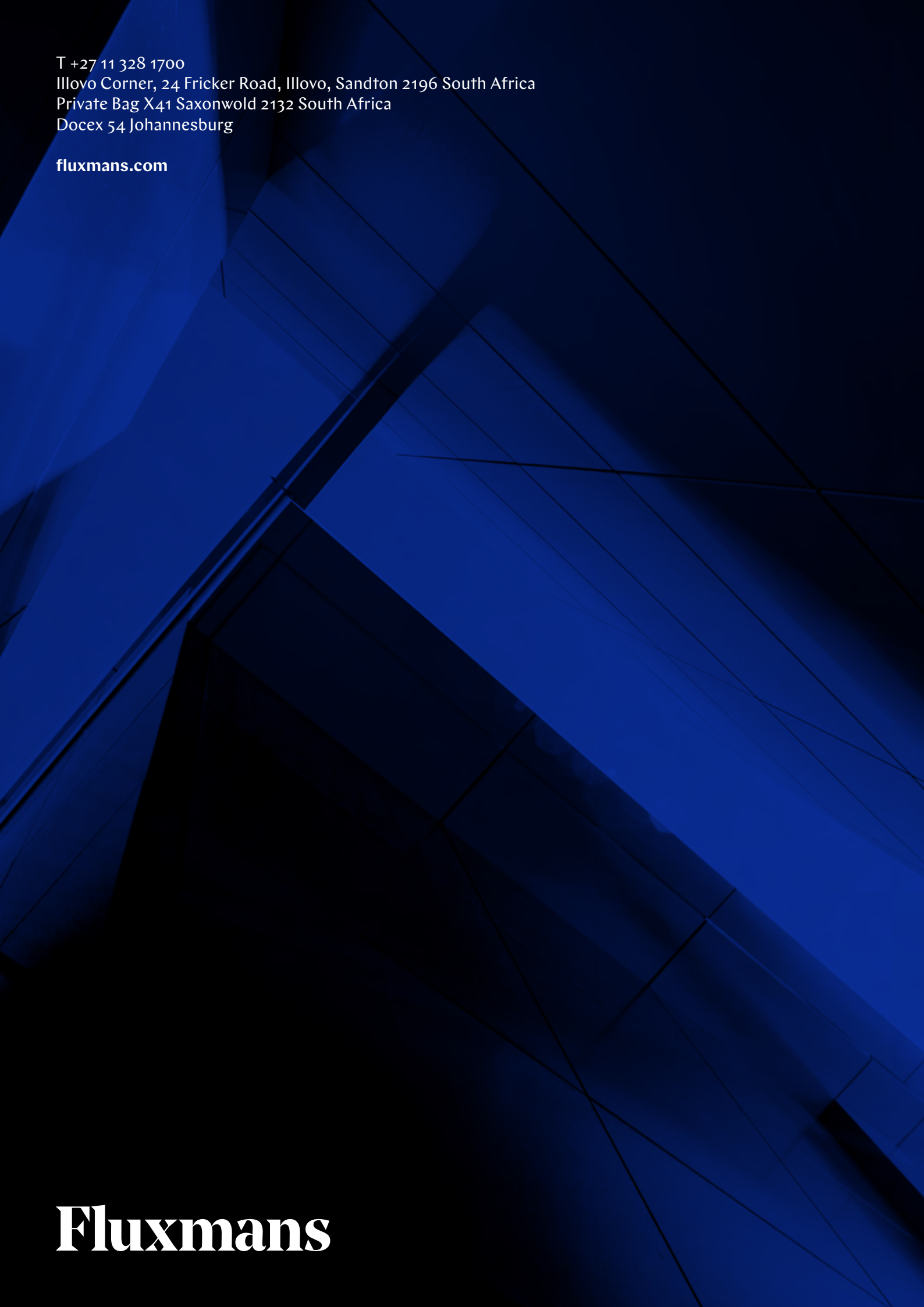

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