DOING BUSINESS

IN SOUTH AFRICA

The network for doing business

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1 – INTRODUCTION

UHY is an international organisation providing accountancy, business management and consultancy services through financial business centres in around 90 countries throughout the world.

Business partners work together through the network to conduct transnational operations for clients as well as offering specialist knowledge and experience within their own national borders. Global specialists in various industry and market sectors are also available for consultation.

This detailed report providing key issues and information for investors considering business operations in South Africa has been provided by the office of UHY representatives:

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A detailed firm profile for UHY's representation in South Africa can be found in section 8.

Information in the following pages has been updated so that they are effective at the date shown, but inevitably they are both general and subject to change and should be used for guidance only. For specific matters, investors are strongly advised to obtain further information and take professional advice before making any decisions. This publication is current at January 2018.

We look forward to helping you do business in South Africa.

2 – BUSINESS ENVIRONMENT

The South African economy is predominantly based on free market principles, with some areas of state control.

Foreign investment in all facets of the economy is essential and is actively encouraged by both the private and public sectors.

There is a long history of foreign investment in South Africa, with heavy involvement by British, German and American interests. In 2016 South Africa reclaimed its status as the leading economy in Africa having lost it briefly to Nigeria. Its well-developed infrastructure and established trade links with the rest of the continent make South Africa a suitable base for generating investment and trade with the rest of Africa, particularly in the sub-Saharan region.

Generally, there are no restrictions on foreign investment. However, certain ownership and control restrictions or specific authorisations apply in regulated sectors, such as in banking, insurance, defence, mining, telecommunications, broadcasting and security.

In addition, the government is committed to providing facilities and opportunities to communities which were disadvantaged by the pre-1994 apartheid system. There are therefore key initiatives in place for the empowerment of black persons (ie black, coloured and Indian persons). These include increasing ownership of companies by black persons and other forms of empowerment through employment equity and preferential procurement.

Income from investments may be paid to a foreign investor, and the proceeds of any sale of assets in South Africa may be transferred abroad by a non-resident seller.

THE ECONOMY

South Africa has the most sophisticated free-market economy on the African continent.

The country represents only 3% of the continent's surface area, yet it accounts for approximately 40% of all industrial output, 25% of gross domestic product (GDP), over half of generated electricity and 45% of mineral production in Africa. South Africa, ranked 61st in the World Economic Forum’s Global Competitiveness Report, 2017-2018, remains one of the most competitive countries in sub-Saharan Africa, and among the region’s most innovative (39th)— but it drops 14 positions in the overall rankings this year.

South Africa’s economy is nearly at a standstill, with GDP growth Forecast at just 1.0 percent in 2017 and 1.2 percent in 2018—hit by persistently low international demand for its commodities, while its unemployment rate is currently estimated above 25 percent and rising. Political uncertainty in 2017 and unrest in mining and other industrial sectors has decreased the confidence of South African business leaders and investors: although still relatively good in the African context, the country’s institutional environment (76th), financial markets (44th), and goods market efficiency (54th) are all rated as weaker than last year.

Since independence however, South Africa has achieved a good level of macro-economic stability, with economic activity occurring in four main metropolitan areas – namely theWitwatersrand area surrounding Johannesburg in the Gauteng Province, the Durban/Pinetown area in KwaZulu-Natal, the Cape Peninsula and the Port Elizabeth/Uitenhage area in the Eastern Cape.

While South Africa is now classified as an ‘upper middle-income country’ by the World Bank, the government nevertheless recognises key challenges which remain.

With rising unemployment and growing income inequality the government launched its National Development Plan 2030 in 2012 to tackle unemployment and poverty. This encompasses:

- The New Growth Path, which identifies five key areas for investment – energy (including significant investment in lower-carbon sources through a Green Fund), transport, communications, water and housing
- The National Industrial Policy Framework and Industrial Policy Action Plan (IPAP3), which has the aim of unlocking growth in non-traditional economic sectors and identifies nine areas of focus –industrial financing, procurement, developmental trade policies, competition policy, demand-side skills, innovation and technology, special economic zones, regional integration and sector development
- A 20-year Infrastructure Plan (developed by the Presidential Infrastructure Coordinating Committee – PICC) to support further investment and economic development, as well as to increase construction industry jobs.

PRIVATISATION

The public sector's role in South Africa's economy has historically always been substantial in comparison with the private sector's role.

However, the government is taking steps to commercialise, restructure and increase private sector involvement in government-controlled enterprises.

IMPORTS, EXPORTS AND FREE TRADE AREAS

Most of South Africa's exports to industrialised countries consist of primary and intermediate commodities. A large proportion of exports consist of unprocessed raw materials, with the mining industry contributing the greatest proportion of the country's total exports. However, more of South Africa's raw materials are now being processed in South Africa before being exported.

South Africa is a major exporter of gold, diamonds and platinum, as well as other metals and minerals. The country is also a key exporter of maize, wine and fruit. Main export partners are China, Germany, the USA, Botswana, Namibia, India and the UK.

Imports include mainly machinery and equipment, chemicals, petroleum products and foodstuffs, with China, Germany, the USA and India chief import partners.

INDUSTRIAL AND TRADE ORGANISATIONS

Numerous public and private development agencies, as well as other agencies, provide advice and assistance to further economic development.

BLACK ECONOMIC EMPOWERMENT AND AFFIRMATIVE ACTION

Black Economic Empowerment (BEE), a programme which promotes the accelerated integration of black people into the South African economy, has been a policy of the government since 1994.

It was crystallised into legislation with the Broad Based Black Economic Empowerment Act of 2003. The act provides the legislative framework for broad-based black economic empowerment (BBBEE) by defining the policy, outlining the mechanisms for the regulation and measurement of BEE, and establishing the Black Economic Empowerment Advisory Council.

BBBEE involves the economic empowerment of all black people (which, subject to certain limitations, includes black, Indian and coloured South Africans) within four interrelated contexts:

- Direct empowerment – increasing the number of black people who manage, own and control enterprises and productive assets
- Human resource and skills development – achieving equitable representation in all occupational categories and at all levels of the workforce
- Indirect empowerment – promotion of preferential procurement from empowered enterprises and investment in enterprises owned or managed by black people
- Socio-economic development initiatives.

IMPLEMENTATION OF BEE

Two primary mechanisms were introduced to ensure that these socio-economic strategies are implemented:

- Codes of good practice were gazetted in February 2007 by the Minister of Trade and Industry which specify empowerment targets consistent with the objectives of the Act, and the periods within which those targets must be achieved. The public sector is obliged to apply and adhere to the BEE goals and targets set out in the codes
- Section 9 of the BBBEE Act (2003) allows for the development and gazetting of sector codes, which enables a specific industry to tailor the requirements of the codes to allow for nuances that are unique to their industry
  - Sector codes have been concluded and approved for many sectors, including mining, petroleum, maritime, agriculture, health and tourism, and information communications technology.

CHANGES TO THE CODES

After a long period of consultation, amendments to the BEE codes of good practice came into effect on 11 October 2013, when a new set of codes replaced the existing ones. Companies had one year in which to follow the new codes, which had to be adopted by 11 October 2014.

Under the old system to measure the level of BEE compliance for each business entity, there was a scorecard with seven categories. The key elements and their respective weightings (the maximum number of points which may be attained for each element, excluding any bonus points) were:

- Ownership (20 points)
- Management control (10 points)
- Employment equity (15 points)

- Skills development (15 points)
- Preferential procurement (20 points)
- Enterprise development (15 points)
- Socio-economic development initiatives (5 points).

Under the new BEE codes gazetted on 11 October 2013, there are now five measures (instead of seven), with the following possible points available (excluding bonus points):

- Ownership (25 points)
- Management control (15 points)
- Skills development (20 points)
- Enterprise and supplier development (40 points)
- Socio-economic development (5 points)

Points are allocated in accordance with prescribed formulae to measure the level of an entity's compliance with the BEE targets for each element. The scorecard also provides for the award of bonus points if for example performance is in excess of the requisite targets.

In order to achieve the highest BEE status rating (level one out of a possible eight levels), a business entity must score more than 100 points. Entities scoring lower than 40 points were judged non-BEE compliant.

Qualifying small enterprises (with an annual turnover of between ZAR 10 million and ZAR 50 million) had a more lenient scorecard in relation to the weightings given to each element and measuring principles. Exempted micro enterprises, entities with annual revenue of ZAR 10 million or less, are deemed to have a BEE status of a 'Level Four Contributor' to BEE. However, under the new system, both small and micro enterprises can qualify for 'enhanced recognition', whereby if they are 100% black owned or at least 51% black owned, they are automatically given Level One or Level Two BEE status respectively.

Under the new system, where a sector code has been issued in terms of section 9 of the BBBEE Act (2003), a measured entity which falls within that sector may only be measured for compliance in accordance with its specific sector code (eg the chartered accountancy, construction, financial services, ICT, property, tourism and transport sector codes). This is a change from the previous system where the old BEE codes had equal status with the various sector codes

A review of the BEE Act has also been initiated and an amendment bill proposed which will tighten the law to address challenges such as 'fronting', where companies manipulate or misrepresent their BEE status to win contracts.

COMPLIANCE

All state bodies and various specified public entities are obliged to take into account the BEE status of the party concerned when implementing preferential procurement policies, selling state enterprises and entering into public private partnerships, etc.

Non-compliance will not result in any criminal sanction but will mean that government support will not be forthcoming. And a knock-on effect is created in business, since compliance requires entering into business relationships (such as supply contracts) with parties who are in turn compliant.

MULTINATIONALS

The codes of good practice allow foreign multinational companies doing business in South Africa some flexibility in how they structure their empowerment deals. In particular, the codes acknowledge that there may be multinationals whose global practices prevent them from complying with the ownership element of BBBEE through the traditional sale of shares to black South Africans.

In such cases, the codes allow for contributions in lieu of equity sales. These contributions, known as 'equity equivalent' contributions, count towards the ownership element of BBBEE and can allow companies to place extra effort on areas such as skills development, training, preferential procurement and social responsibility. The value of these contributions may be measured against 25% of the value of a multinational's South African operations, or against 4% of the total revenue from South African operations annually over the period of continued measurement.

Foreign multinationals can submit proposals for Equity Equivalent Programmes to the Department of Trade and Industry for approval by the Minister of Trade and Industry.

CONCLUSION

It is fundamental to doing business in South Africa that potential investors become familiar with and meet their obligations in terms of BBBEE laws and regulations.

3 – FOREIGN INVESTMENT

EXCHANGE CONTROL

Exchange control is administered by the South African Reserve Bank (SARB) which delegates powers to licensed authorised dealers (mainly large commercial banks) to deal in foreign exchange and handle international transactions.

Non-residents can freely transfer capital in and out of South Africa, where transactions are reported by the banks to the authorities.

However, exchange controls are exercised over residents and also transactions entered into between residents and non-residents. For exchange control purposes, a resident is a person (a natural person or legal entity), whether South African or of any other nationality, who has taken up residence, is domiciled or registered in South Africa.

There are, in principle, no restrictions on foreign investors acquiring companies or businesses in South Africa. The introduction of capital or the acquisition of shares does not require SARB approval. However, the acceptance of foreign loans by South African residents (including a South African subsidiary or branch of a foreign company) is subject to prior approval being obtained. Approval is required for the repayment of foreign loans by South African residents.

The sale or redemption proceeds of assets owned by non-residents may be freely transferred from South Africa. There are no thin capitalisation rules imposed in terms of exchange controls, but the rate of interest payable on foreign loans will be limited by the SARB, although, after approval has been granted, interest is freely transferable from South Africa.

Dividends declared by South African subsidiaries of foreign companies and profits distributed by a branch of a foreign company operating in South Africa may be remitted abroad, provided that the dividend has been declared out of (or the branch profits distributed from) realised reserves. Residents, including resident entities, may effect payment for services actually rendered by non-residents, provided that the fees payable are not calculated on the basis of a percentage of turnover, income, sales or purchases, nor may payments be made in respect of cost-sharing or cost-allocation arrangements.

The payment of licence fees and royalties to non-residents is subject to approval being granted by the SARB or the Department of Trade and Industry (DTI) where local manufacturing is involved.

SARB approval is required for the sale of all forms of South African-owned intellectual property rights (IPR). Approval is generally granted by SARB if the transaction occurs at arm's length and at fair market value. IPR owned by non-residents is not subject to any restrictions in terms of repatriation of profits, royalties, or proceeds from sales.

Payment for imports may be made through an authorised dealer, against the submission of customs stamped documentation evidencing the receipt of the merchandise in South Africa. The receipt of export proceeds by residents is controlled.
Foreign currency export proceeds must be repatriated within 30 days unless otherwise directed. However, exporters who are customer foreign currency (CFC) account holders can retain funds in these accounts and are not obliged to convert the funds into rand.

Income earned abroad by resident individuals can be held abroad unless it derives from merchandise exports.

Residents (natural persons) over the age of 18 years may avail themselves of a single discretionary allowance of up to ZAR 1,000,000 per calendar year (ZAR 200,000 for a child) which may be utilised for any one of or all of the following categories of allowances:

- Study
- Holiday and business travel
- Maintenance payments
- Gifts or loans to non-residents.

South African individuals may freely invest in foreign firms listed on South African stock exchanges. Individuals resident in South Africa, who are taxpayers of good standing and over the age of 18 years, are also permitted to make investments up to a total of ZAR 4 million in other countries, or alternatively hold foreign currency deposits with an authorised dealer.

Foreign nationals temporarily resident in South Africa may, subject to completing formalities through an authorised dealer, conduct their affairs on a residency basis while resident in South Africa and may expatriate accumulated earnings or capital introduced.

TABLE 1

Restrictions on earnings or capital

EARNINGS/CAPITAL	
Listed securities	No restrictions
Real estate	No restrictions
Equity investment	No restrictions
Loans	All foreign loans subject to approval

As of 2010, South African banks are permitted to commit up to 25% of their capital in direct and indirect foreign liabilities. In addition, mutual and other investment funds can invest up to 25% of their retail assets in other countries. Pension plans and insurance funds may invest 15% of their retail assets in other countries.

INWARD INVESTMENT

The Johannesburg Securities Exchange (JSE) is a valuable commodity in South Africa's economic landscape, providing a mature, efficient, secure market with world class regulation, trading, clearing, settlement assurance and risk management. This is why it is one of the top 20 exchanges in the world in terms of market capitalisation.

As South Africa's only full-service securities exchange, it connects buyers and sellers in five different markets:

- Equities, including a primary and secondary board
- Equity derivatives
- Agricultural derivatives
- Interest rate instruments.

The JSE provides companies with the opportunity to raise capital in a highly regulated environment through its markets – the Main Board and the Alternative Exchange (AltX). The Main Board is for established larger companies and the AltX is for vigorous younger companies which may become the powerhouses of the future.

Listing on the JSE can provide a company with many benefits including access to capital to grow the business, an enhanced public profile, an ability to attach a value to the company, the facilitation of black economic empowerment deals and, if an international company, a listing which can be used as a springboard into the rest of Africa.

The JSE has harmonised its listing requirements, disclosure and continuing obligations with those of the London Stock Exchange (LSE) and offers superb investor protection.

REPATRIATION OF FUNDS

TABLE 2
Repatriation of funds

FUNDS	
Dividends	No restrictions
Interest	No restrictions**
Royalties	12% withholding tax*
Equity investments	No restrictions**
Loans subject to approval	Readily granted**

* Assumes no double tax treaty relief exists
** Provided exchange control approval was obtained on initial investment

DIVIDENDS
Dividends can be freely remitted (provided the shares are endorsed 'non-resident' and the dividend will not cause the business to be 'over-borrowed'). The remitting bank may call for an auditor's report.

INTEREST
Provided that exchange control approval has been obtained in advance in respect of the loan and the interest payable (ie. approval is required for the receipt of the loan) and if prior approval for a loan has been obtained, interest may be paid without separate approval. Repayment of capital is subject to separate approval.

ROYALTIES
Earnings from royalties may be remitted provided that a royalty agreement has been approved by the SARB and / or the DTI, and provided the application for approval to remit the royalty is supported by the auditor's certificate.

MANAGEMENT FEES

For exchange control purposes, management fees can be freely remitted, provided that the fee is not based on a percentage of sales, turnover, purchases, etc. A detailed invoice specifying the services and the basis of the fee must be submitted to the entity's bankers when effecting payment.

INVESTMENT INCENTIVES

The government actively seeks to encourage commercial activity and attract foreign capital by offering investment incentives and industrial financing schemes.

Incentive schemes are listed below, with key schemes described in the following sections:

- Aquaculture Development and Enhancement Programme (ADEP)
- Automotive Investment Scheme (AIS)
- Black Business Supplier Development Programme (BBSDP)
- Business Process Services (BPS)
- Capital Projects Feasibility Programme (CPFP)
- Critical Infrastructure Programme (CIP)
- Co-operative Incentive Scheme (CIS)
- Clothing and Textile Competitiveness Improvement Programme (CTCIP)
- Employment Creation Fund (ECF)
- Export Marketing and Investment Assistance (EMIA)
- Film and Television Production Incentives
- Incubation Support Programme (ISP)
- Isivande Women's Fund
- The Manufacturing Competitiveness Enhancement Programme (MCEP)
- Manufacturing Investment Programme (MIP) – as of 20 September 2013, the DTI is not accepting new applications for this programme
- People-carrier Automotive Investment Scheme (P-AIS)
- Production Incentive (PI)
- Sector-Specific Assistance Scheme (SSAS)
- Section 12i Tax Allowance Incentive (12i TAI)
- Small Medium Enterprise Development Programme (SMEDP)
- Support Programme for Industrial Innovation (SPII)
- Seda Technology Programme (STP)
- Technology and Human Resources for Industry Programme (THRIP)
- Tourism Support Programme (TSP).

RESEARCH & DEVELOPMENT INCENTIVES

SUPPORT PROGRAMME FOR INDUSTRIAL INNOVATION (SPII)

The aim of the SPII is to promote technology development in South Africa through the provision of financial assistance for the development of innovative products and/or processes in industry. Focusing on the development stage, there are three SPII schemes to which South African registered enterprises may apply:

- SPII Product Process Development Scheme
  - This applies to all small and micro private sector enterprises and individuals
  - A grant is available of between 50% and 85% of the qualifying cost incurred during the technical development stage with a maximum grant amount of ZAR 2 million:

    - For enterprises with up to a 25% black shareholding, the grant amount is 50% of qualifying costs
    - For enterprises with a >25% to ≤50% black shareholding or >50% ownership by women/physically challenged people, the grant amount is 75% of qualifying costs incurred
    - For enterprises with a black shareholding >50%, the grant amount is 85%
- SPII Matching Scheme
  - A grant is available of between 50% and 75% of the qualifying cost incurred during the technical development stage of a specified development project, up to a maximum of ZAR 5 million:
    - For enterprises with up to a 25% black shareholding, the grant amount is 50%
    - For enterprises with a >25% to ≤50% black shareholding or >50% ownership by women/the physically challenged, the grant amount is 65%
    - For enterprises with a black shareholding >50%, the grant amount is 75%
- SPII Partnership Scheme
  - This is a levy-based grant based on a percentage of sales over a fixed number of years, with the levy percentage and repayment period established at the time of the grant
  - A grant is available for 50% of qualifying costs (regardless of BEE ownership levels) incurred during a development activity, with a minimum grant amount of ZAR 10 million per project, repayable on successful commercialisation of the project.

Assistance from the SPII determines that any development and subsequent production takes place within South Africa and that intellectual property resides with a South African registered company.

TECHNOLOGY AND HUMAN RESOURCES FOR INDUSTRY PROGRAMME (THRIP)

This programme aims to boost South African industry by supporting research and technology development, and by enhancing the quality and quantity of appropriately skilled people.

The THRIP supports all companies undertaking science, engineering and technology (SET) research in collaboration with educational institutions with the aim of addressing the technology needed within the participating firms. THRIP also encourages and supports the development and mobility of research personnel and students among participating organisations.

The ratio of THRIP contributions available is dependent on the size of the enterprise.

OTHER INVESTMENT INCENTIVES

BUSINESS PROCESS SERVICES (BPS)

In 2010, the BPS replaced the Business Process Outsourcing & Off-Shoring (BPO&O) investment incentive. The BPS is aimed at attracting investment and creating employment in South Africa through off-shoring activities and it is partly responsible for South Africa being named 'Offshoring Destination of the Year' at the 2016 Global Sourcing Association. Since 2012 the BPS market has experienced compounded average growth of 25%, year on year – this translates to 30,000 offshore jobs with the UK being the leading buyer of South African BPS services, followed by Australia and the USA.

To be eligible, companies must be performing BPS activities and either starting a new operation or expanding an existing operation, which may be taking place in more than one physical location in South Africa. By the end of three years of a new project or an expansion, at least 50 new offshore jobs must have been created and operations must commence no later than six months from the approval of the BPS incentive grant.

A base incentive is offered as a tax exempt grant paid over three years for each offshore job created and maintained; in 2013–2015, this grant is worth ZAR 32,000 for each job. In addition, a graduated bonus incentive is paid as follows:

- A 20% bonus for more than 400 but less than 800 offshore jobs paid once-off in the year in which the bonus level is reached
- A 30% bonus for more than 800 offshore jobs paid once-off in the year in which the bonus level is reached.

THE 12I TAX INCENTIVE

The 12i tax incentive supports green field investments (ie new industrial projects utilising only new and unused manufacturing assets), as well as brown field investments (ie expansions or upgrades of existing industrial projects). It offers support for both capital investment and training. The window for receiving applications under this programme was extended by two years to 31 December 2017.

The incentive offers:

- ZAR 900 million in the case of any green field project with a preferred status
- ZAR 550 million in the case of any other green field project
- ZAR 550 million in the case of any brown field project with a preferred status
- ZAR 350 million in the case of any other brown field project
- An additional training allowance of ZAR 36 000 per employee may be deducted from taxable income
- A maximum total additional training allowance per project, amounting to ZAR 20 million in the case of a qualifying project, and ZAR 30 million in the case of a preferred project.

SECTOR SPECIFIC ASSISTANCE SCHEME (SSAS)

The SSAS is a reimbursable 80:20 cost-sharing grant offering financial support to export councils, joint action groups and industry associations. Foreign companies can access SSAS funding through participation in one of these entities.

The scheme comprises two sub-programmes:

- ‘Generic Funding’ for not-for-profit business organisations in sectors and sub-sectors of industry prioritised by the dti, which may provide:
  - A ZAR 50,000 grant for establishing an export council
  - A matching grant based on membership income (for operational costs) in a 2:1 ratio to a maximum of ZAR 1 million
  - Local advertising and publicity
  - Marketing materials (export directories and brochures, video and CD-Roms)
  - Local exhibition assistance
- ‘Project Funding for Emerging Exporters’ (PFEE)

- This provides compensation for the costs in respect of activities aimed at the development of South African emerging exporters. Qualifying applicants are export councils, industry associations, provincial investment and economic development agencies, business chambers, (seda), local municipalities and metropolitan councils.

AUTOMOTIVE INVESTMENT SCHEME (AIS)

The AIS is an incentive designed to grow and develop the automotive sector through investment in new and/or replacement models and components that will increase plant production volumes, sustain employment and/or strengthen the automotive value chain.

Eligible enterprises are:

- Light motor vehicle manufacturers that have achieved or can demonstrate that they will achieve a minimum of 50 000 annual units of production per plant, within a period of three years
- Component or deemed component manufacturers that are part of the original equipment manufacturer (OEM) supply chain and will achieve at least 25% of a total entity turnover of ZAR 10 million by the end of the first full year of commercial production as part of a light motor vehicle manufacturer supply chain, locally and/or internationally.

CAPITAL PROJECTS FEASIBILITY PROGRAMME (CPFP)

The CPFP is a cost-sharing programme that contributes to the cost of feasibility studies likely to lead to projects outside South Africa that will increase local exports and stimulate the market for South African capital goods and services.

The size of the grant must fall within the range of ZAR 100,000 to ZAR 5 million to a maximum of 55% of the total cost of the feasibility study for projects in Africa and 50% for projects outside Africa.

A foreign entity will only be considered if it partners with a South African registered entity, and if the application is submitted by the South African entity.

CRITICAL INFRASTRUCTURE PROGRAMME (CIP)

The CIP is a cost-sharing cash grant for projects designed to improve critical infrastructure in South Africa. The grant covers qualifying development costs from a minimum of 10% to a maximum of 30% towards the total development costs of qualifying infrastructure. Private investors/companies or municipalities can apply.

It is made available to approved eligible enterprises upon the completion of the infrastructure project concerned. Infrastructure must be deemed to be 'critical' for investment.

THE MANUFACTURING COMPETITIVENESS ENHANCEMENT PROGRAMME (MCEP)

The MCEP was introduced in the Industrial Policy Action Plan (IPAP) 2012/13 – 2014/15 and its aim is to encourage manufacturers to upgrade production facilities in a manner that sustains employment and maximises value-addition in the short to medium term.

The MCEP provides production grants for five areas:

- Capital investment
- Green technology and resource efficiency improvement
- Enterprise-level competitiveness improvement
- Feasibility studies
- Cluster competitiveness improvement.

Through the Industrial Development Corporation (IDC), loans are provided for a:
- Pre/post-dispatch working capital facility
- Distress funding interest make-up facility
- Niche fund facility.

Non-taxable grants, calculated as a percentage of manufacturing value added (MVA), are offered and capped as follows:
- 7% of MVA – enterprises larger than ZAR 200 million in assets
- 10% of MVA – enterprises with assets >ZAR 30 million and <ZAR 200 million
- 12% of MVA – enterprises with assets >ZAR 5 million and <ZAR 30 million
- 15% of MVA – 100% black-owned enterprises and enterprises with assets below ZAR 5 million
  - MVA = sales/turnover – sales value of imported goods – sales value of other bought-in finished goods – material input costs used in manufacturing process.

Applicants can be a registered legal entity in South Africa.

INCUBATION SUPPORT PROGRAMME (ISP)

This is aimed at developing small, micro and medium-sized enterprises (SMMEs) as incubators that create successful enterprises with the potential to revitalise communities and strengthen local and national economies. The ISP also encourages partnerships in which big businesses assist SMMEs with skills transfer, enterprise development, supplier development and marketing opportunities.

The program is available to applicants that want to establish new incubators or wish to grow and expand existing ones. Support is on a cost-sharing basis between the government and private sector partner(s).

It is available for infrastructure and business development services necessary to mentor and grow enterprises to ensure that within two to three years they will graduate to a level of self-sustainability by providing products and services to the market. The programme is effective from 1 September 2012 to 31 March 2022.

The following costs are eligible for support:
- Business development services (e.g. business advisory services, training)
- Market access
- Machinery, equipment and tools
- Infrastructure linked to incubators (buildings, furniture)
- Feasibility studies for establishing and expanding incubators
- Product or service development
- Information and communication technology (ICT)
- Operational costs.

The grant approval is capped at a maximum of ZAR 10 million (VAT inclusive) per financial year over a three year period and is subject to the availability of funds. The ISP offers a cost-sharing support of 50:50 for large businesses and a cost-sharing of 40:60 for SMMEs.

Applicants can be a registered legal entity in South Africa, a higher or further education institution or a licensed and/or registered science council.

FILM AND TELEVISION PRODUCTION REBATE SCHEME

The government offers a package of incentives to promote its film production and postproduction industry, which includes:

- The Foreign Film and Television Production and Post-Production Incentive
- The South African Film and Television Production and Co- Production Incentive.

Further details on incentive schemes and investment programmes can be found on the DTI website at www.dti.gov.za.

LOCAL INCENTIVES

South Africa's various provinces have development agencies which offer incentives to encourage investors to establish or relocate industry to their areas. Incentives vary from province to province but may include reduced interest rates, reduced costs for leasing land and buildings, cash grants for the relocation of physical plants and employees, reduced rates for basic facilities, railroad and other transport rebates, and assistance with the provision of housing.

SPECIAL TRADE AREAS

INDUSTRIAL DEVELOPMENT ZONES (IDZS)

The aim of the IDZs is to promote manufacturing and increase the competitiveness of South African exports. There are currently five IDZs:

- The Coega (near Port Elizabeth)
- East London
- Richards Bay
- Saldana Bay

Dube TradePort

All manufacturers and exporters located in these designated zones are eligible for rebates on customs duties for imported goods, raw materials and components used in manufacturing and processing for export. They are benefit from simplified customs procedures and are eligible for subsidised infrastructure and tax relief/incentives on goods or machinery used in manufacturing processes.

The intention of IDZs is to provide investors in the zones with direct links to an international port and the facility to import inputs and goods into the zone free of customs duty and exempt from VAT.

SPECIAL ECONOMIC ZONES (SEZS)

It has recently been proposed that all IDZs will become SEZs in the future and the government has earmarked ten new SEZ sites in eight provinces for the future.

Once introduced, the aim of any SEZs will be to support businesses conducting specific economic activities and provide services and infrastructure to meet the needs of these activities. Under current proposals, SEZs will offer a wider range of incentives to businesses, such as a reduced corporate tax rate, accelerated depreciation allowances and tax deductions for employing low-income workers.

CUSTOMS AND EXCISE WAREHOUSES

These warehouses allow the deferment of payment of customs duties and import VAT on goods subject to customs duty. Payment is only due at the time the goods are removed from the warehouse.

Certain manufacturing operations may also be undertaken in these warehouses subject to special prior approval being received from the customs authorities. Special dispensations are applicable to exporters if the goods are not subject to customs duty.

4 – SETTING UP A BUSINESS

On 1 May 2011, the Companies Act No. 71 of 2008 was introduced, replacing the Companies Act of 1973 and the Close Corporations Act of 1984.

The Companies Act 2008 distinguishes between profit and not-for-profit companies:

- A not-for-profit organisation is incorporated for the benefit of the public, and its income and assets are not to benefit the organisation's stakeholders, but rather used to pursue the organisation's charitable goals.
- Profit companies exist to generate a profit for its stakeholders.

The principle types of business entity in South Africa are:

- Public (Ltd) or private (Pty Ltd) company
- Partnership
- Sole proprietorship
- Business trust
- External company/ foreign company branch.

METHODS OF INVESTMENT

FORMING A COMPANY

The most common procedure is to form a company in South Africa. This may be wholly-owned or held jointly with other local or foreign shareholders.

A limited liability company is generally the most suitable vehicle for foreign investors. The most common type in South Africa is the private limited liability company, as opposed to the public company. Both public and private companies are regulated by the Companies Act.

ACQUISITIONS/MERGERS

The investor can buy a yet-to-be-established business; it is possible to buy an off-the shelf company that has already been registered and is ready for sale. Alternatively, an investor can buy/take over the whole or some of the shares in an existing private or public company which has an established business.

If this happens, the requirements of the Competition Commission may have to be met, as well the requirements of the Takeover Regulations.

JOINT VENTURE

The investor can form a joint venture with a South African entity, either through a South African subsidiary or directly in partnership.

OTHER WAYS OF DOING BUSINESS

All of the methods of investment listed above can be used as a way to conduct business in South Africa by an investor. There are also alternative possibilities, such as the granting of licences to South African businesses, entering into management agreements, appointing distributors and agents, and other similar means. These are dealt with later in this section.

BUSINESS ENTITIES

PUBLIC (LTD) OR PRIVATE (PTY LTD) COMPANY

Incorporation proceedings in South Africa are relatively straightforward.

A public company – designated by the term 'Limited' – must have at least seven shareholders and there is no limit on the maximum number. The first shareholders of a company are persons who subscribe to the memorandum and articles of association of the company. For each new company, a memorandum and articles of association must be submitted to the Registrar of Companies, together with certain other statutory forms. There is no restriction on foreign shareholding levels. Share certificates in respect of shares purchased by foreigners should be endorsed non-resident for exchange control purposes. There is no minimum capital requirement.

A private limited liability company – designated by the term '(Proprietary) Limited' – may have between one and 50 shareholders. The articles of association of private companies generally restrict the transfer of shares to third parties unless they have first been offered to the other shareholders. Offers to the public for the subscription of shares or debentures are prohibited.

There is no requirement that shareholders, directors or managers be South African citizens or residents. However, a return must be filed in respect of each director stating his/her nationality and place of residence.

PARTNERSHIP

The investor can form a partnership with another investor or with a South African person. Partnerships may be formed by two or more persons up to a maximum of 20 partners.

Partnerships do not enjoy limited liability in South Africa; every partner in a general partnership is liable jointly and severally for all the debts and obligations of the partnership.

A partnership is not recognised as a separate legal entity ie distinct from the persons comprising the partnership, including for income tax purposes. However, for value added tax (VAT) purposes, a partnership is treated as a person and therefore registers as a vendor in its own name if it has supplies subject to VAT.

SOLE PROPRIETORSHIP

The investor can also establish a business on their own as a sole proprietor. Sole proprietors do not enjoy limited liability in South Africa.

BUSINESS TRUST

The investor can set up a business trust. A business trust is constituted by the lodging of a deed of trust with the Master of the High Court of South Africa. Trusts obtain separate legal personality only for certain purposes, such as for taxation. Ownership of trust assets is vested in the trustees who are limited to a maximum of 20 persons.

BRANCH OFFICES/EXTERNAL COMPANIES

A foreign company not wishing to incorporate a subsidiary in South Africa may set up a branch office. To do this, the foreign company must register as an 'external company' with the Companies and Intellectual Properties Commission within 20 business days after it first begins to conduct business (or not-for-profit activities) within South Africa.

MERGERS AND ACQUISITIONS

BUSINESS AND ASSET ACQUISITIONS

If an investor wishes to buy out or buy into an existing South African business, it is possible to acquire the business itself as a going concern from the company or person who owns it, or alternatively to acquire some of the assets of the company.

Approval of 75% of the voting rights by disinterested shareholders (ie excluding shares held by the acquirer and its concert parties) is required for a buy out. Even if the threshold is reached, any shareholder who voted against the resolution may apply directly to the court for a review of the transaction.

The requirements of South Africa's Takeover Regulations may also be applicable.

SHARE ACQUISITIONS

An alternative investment route is to acquire the whole or part of the shares in the company which conducts the business.

The acquisition of shares in private companies is usually achieved by agreement with the shareholders, although it is possible, if there are a number of shareholders, that in order to acquire control of the company, a formal offer may have to be made to all the shareholders. The mechanisms of the Companies Act 2008 and the Takeover Regulations (which replaced both the Securities Regulation code on Takeovers and Mergers and the Rules of the Securities Regulation Panel) may have to be complied with.

The acquisition of shares in listed companies is a great deal more complicated. Acquisition can be achieved either by making a formal offer to the shareholders in accordance with the formalities of the Companies Act, when, if 90% of the shareholders accept, it is possible to force the remaining 10% to accept. Alternatively, if the investor does not contemplate a simple acquisition of shares but rather a more complex exchange of shares for other shares or other mechanisms, a scheme of arrangement may have to be proposed.

If the company is listed on the JSE, the rules of the JSE require that substantial acquisitions or transactions involving related parties and the issue of new shares must be approved by shareholders, and the listing of any new shares issued must be approved by the JSE.

REGULATORY AND OTHER ISSUES

Mergers and acquisitions in South Africa are subject to screening and approval under the Competition Act of 1998. The act allows South Africa's Competition Commission to review any foreign investment for its effect on specific industrial sectors, employment, the ability of small businesses to be competitive and the ability of national industries to compete internationally. Acquisitions of businesses, either through the acquisition of shares or assets, may therefore in certain circumstances require the approval of the Competition authorities.

In acquiring any business or the shares in a company which conducts any business, it is important to be aware of the rights of employees. In the case of an acquisition of shares in a company, the target company continues in existence with all its rights and obligations, including its employee relationships.

This is not automatically the case with an acquisition of a business. But if the purchaser of a business does not provide for the continued employment of employees subsequent to the acquisition, on the same basis as their previous employment, this is likely to result in industrial action.

Retrenchments following an acquisition have to be carefully handled in order to avoid findings of unfair dismissals. The labour legislation (see Section 5 – Labour) protects employees in a take-over situation.

It is also necessary to ensure that existing pension fund rights and rights in respect of an existing medical aid scheme be preserved and if either pension funds or medical aid schemes are to be merged into those of the acquirer, care must be taken to ensure that the existing entitlements are passed across to the acquirer in whole or any part of the business or funds.

Where the undertaking is transferred as a going concern, the contracts of employment of the employees, unless otherwise agreed, will continue in rights and obligations as if they were new employer and employee. This is effectively a transfer of employment agreements by operation of the law.

In addition to the above, the acquisition of certain types of company (for example those in the banking, insurance, mining and defence sectors), entail special requirements and conditions for approval.

REPRESENTATIVES, DISTRIBUTORS AND FRANCHISERS

There is no specific legislation dealing with these areas, which are regulated by common law.

Foreign persons are free to conclude representation, agency, distribution and franchising agreements with local persons. These are common methods for overseas organisations to promote and sell their goods in South Africa.

No formalities are required for the conclusion of such agreements. They may be oral but it is obviously preferable that they be committed to writing. Legal firms should be able to provide all the necessary assistance.

Most contracts tend to be subject to South African law, but there is generally no bar to any foreign law serving as the governing law, as long as there is some nexus between that law and the contract. The parties are free to agree on which court will have jurisdiction, or alternatively, agree that any disputes will be referred to arbitration. In short, the parties have free scope to regulate their relationship as they deem fit.

Commission rates are not regulated and may be freely agreed upon between the parties. However, the following must be borne in mind:

- If the foreign company takes a shareholding in the local company, care must be taken not to fall foul of the transfer pricing provisions of the SA Income Tax Act. Where goods or services are supplied between a resident and a non- resident, and they are a holding company and subsidiary or if one company owns at least 20% of the equity share capital of the other company, and the cost for the goods or service is less than an arm's-length price, the Commissioner of the South African Revenue Service may, in determining the gross income of either party, adjust the price to reflect an arm's-length price. Similarly the Commissioner may disallow the deduction of an expense between such parties if the expense is not market-related
- Where a non-resident provides a loan to a locally registered company, in which the non-resident is entitled to exercise 25% or more of the votes or participate in 25% or more of the dividends, capital or profits of the locally registered company, and the Commissioner believes that the financial assistance is excessive in relation to the fixed capital of the locally registered company, the Commissioner may not allow the locally registered company to deduct from its income the interest which it pays on the excessive portion of the loan
- The exchange control regulations will apply to distribution and franchise agreements if any royalty or licence fee is payable to a foreign person. Where such agreements involve no local manufacturing, the parties will need to apply to the exchange control department of the South African Reserve Bank for approval of the proposed level of licence fee or royalty. Where local manufacturing is involved, the parties will have to make an application to the Department of Trade and Industry (DTI) for such approval. If the DTI gives its approval, the exchange control authorities will allow payments of the licence fee or royalty to be made.

South Africa is a party to the Convention on Agency in the International Sale of Goods of 1983. This treaty provides a uniform approach to situations where an agent of a principal from one treaty country concludes agreements on behalf of that principal with third parties in another treaty country.

5 – LABOUR

LABOUR RELATIONS ACT

The main law governing workers' rights in South Africa is the Labour Relations Act (LRA) of 1995.

The LRA provides key protections for employees and regulates for the resolution of disputes between employers and employees, thus covering areas such as:

- Unfair dismissal
- Unfair labour practices
- Dispute resolution
- Collective bargaining
- Strikes and lockouts
- Transfer of undertakings as a going concern.

DISMISSAL

Employees' contracts cannot be terminated simply by the giving of notice and every employee has the right not to be unfairly dismissed. A fair dismissal is one where the employer acts for a fair reason (substantive fairness) and in accordance with a fair procedure (procedural fairness). Broadly, three reasons are recognised as fair reasons for dismissal, namely:

- Misconduct of the employee
- Incapacity (poor work performance or inability to perform due to ill-health or injury)
- The operational requirements of the employer.

UNFAIR LABOUR PRACTICES

The LRA protects employees against other forms of unfair labour practice, including unfair conduct of the employer relating to demotion, suspension or the provision of benefits.

DISPUTE RESOLUTION

The statutory dispute resolution system provides employees with reasonably easy access to a body known as the Commission for Conciliation, Mediation and Arbitration (CCMA), which has far-reaching powers to order reinstatement or compensation.

A Labour Court (which has high court status) and a Labour Appeal Court also form part of the dispute resolution system. Private dispute resolution is becoming increasingly popular, but it requires the agreement of both parties to the dispute.

COLLECTIVE BARGAINING

An important method of regulating conditions of employment in South Africa is the Bargaining Council system which divides industries into specific areas of specialisation ie construction, motor manufacturing, engineering, etc.

Legislation encourages employers (either directly or through employer associations) and trade unions (representing employees in their specific industry sector) to form what are termed as Bargaining Councils. The formation of these councils normally requires the support of the majority of the interested parties within the applicable sector or area. There is then a centralisation of wage and conditions of employment bargaining.

As the Labour Relations Act encourages and permits collective bargaining, statutory councils may be formed where there is limited support (ie not less than 30%) of the interested parties in a sector or area. These councils do not have the power to regulate wages and can only deal with certain prescribed matters of common interest between the parties.

In other cases, wage bargaining is dealt with on a voluntary basis at plant level or at a level on a basis agreed between the employer and the employees' collective bargaining agent.

RIGHT TO STRIKE

In South Africa the right to strike (subject to certain statutory limitations) is protected both in terms of the LRA and the constitution. Subject to employees and/or their trade unions complying with certain preliminary requirements (in particular, a compulsory conciliation meeting), employees have a right to strike and cannot be dismissed for doing so. This protection extends to secondary (sympathy) strikes and protest action to promote or defend the socioeconomic interests of workers.

TRANSFER OF UNDERTAKINGS

Investors must be aware that the LRA provides for the purchaser of a business (or part of a business or service) sold or transferred as a going concern to assume automatically (ie by operation of law) the contractual obligations of the seller to its employees.

THE BASIC CONDITIONS OF EMPLOYMENT ACT

The Basic Conditions of Employment Act 75 of 1997 (BCEA), last updated in 2014, sets minimum conditions of employment for employees in relation to:

- Working hours
- Leave
- Prohibition of child and forced labour
- Payment of remuneration
- Notice and payments on termination of employment.

BCEA conditions apply to any contract of employment unless more favourable terms have been negotiated or are provided for in law, or a term of employment is exempted under BCEA provisions.

In addition, terms of employment may be governed by collective agreements (eg through bargaining councils) and sector-specific determinations made by ministerial decree.

WORKING HOURS

The BCEA specifies that employees (other than people in senior management, staff who travel and those working less than 24 hours) may not work more than:

- 45 hours in any week
- Nine hours a day if a worker works five days or less a week
- Eight hours a day if a worker works more than five days a week.

Employees may not work more than three hours' overtime per day or ten hours' overtime per week and must be paid 1.5 times their ordinary wages in respect of any overtime work.

More flexibility of working time can be negotiated if there is a collective agreement with a registered trade union.

For Sunday work, employees must be paid double their ordinary wage rate unless they ordinarily work on Sundays, in which case they should be paid 1.5 times their ordinary pay.

Workers must be paid for any public holiday that falls on a working day. Work on a public holiday is by agreement and paid at double the rate. A public holiday is exchangeable by agreement.

LEAVE

A worker can take up to 21 continuous days' annual leave or by agreement, one day for every 17 days worked or one hour for every 17 hours worked. Leave must be taken not later than six months after the end of the leave cycle. An employer can only pay a worker instead of giving leave if that worker leaves the job.

SICK LEAVE

A worker can take up to six weeks' paid sick leave during a 36-month cycle. During the first six months, a worker can take one day's paid sick leave for every 26 days worked. An employer may want a medical certificate before paying a worker who is sick for more than two days at a time or more than twice in eight weeks.

MATERNITY LEAVE

A pregnant worker can take up to four continuous months of maternity leave. She can start leave any time from four weeks before the expected date of birth OR on a date a doctor or midwife says is necessary for her health or that of her unborn child. She also may not work for six weeks after the birth of her child unless declared fit to do so by a doctor or midwife. A pregnant or breastfeeding worker is not allowed to perform work that is dangerous to her or her child.

FAMILY RESPONSIBILITY LEAVE

Full-time workers employed longer than four months can take three days' paid family responsibility leave per year on request when the worker's child is born or sick or for the death of the worker's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

An employer may want proof that this leave was needed.

PAYMENT OF REMUNERATION

An employer must pay a worker:

- In South African money
- Daily, weekly, fortnightly or monthly
- In cash, cheque or direct deposit.

OTHER LABOUR/EMPLOYMENT ACTS

EMPLOYMENT EQUITY ACT

The Employment Equity Act, 1998, prohibits unfair discrimination in any employment policy or practice on grounds such as:

- Race
- Gender
- Sex
- Age
- Religion.

The act also regulates for affirmative action measures designed to ensure employees from specific groups have equal employment opportunities are represented equally in the workplace. Designated groups are black people (Africans, coloureds and Indians), women and people with disabilities. Affirmative action measures include preferential treatment and numerical goals, but they exclude quotas.

SKILLS DEVELOPMENT AND LEVIES ACT

The Skills Development Act, 1998, seeks to develop the skills of the South African workforce and establishes Sector Education and Training Authorities (SETAs) to develop and implement a skills plan for each sector.

The Skills Development Levies Act, 1999, imposes a compulsory levy on most employers which is equivalent to 1% of the payroll of companies. This is paid to fund the activities of SETAs.

UNEMPLOYMENT INSURANCE AND CONTRIBUTIONS ACT

The Unemployment Insurance Act, 2001, establishes the Unemployment Insurance Fund (UIF) to provide for the payment of unemployment benefits to employees, and for the payment of illness, maternity leave, adoption and dependent's benefits.

The Unemployment Insurance Contributions Act, 2002, requires employees and their employers to make contributions to UIF.

OCCUPATIONAL HEALTH AND SAFETY ACT

The Occupational Health and Safety Act, 1993 sets out the minimum rights and duties of employers and employees to maintain a healthy and safe working environment. Employers are required to ensure the health and safety not only of their employees, but also of all persons who may be directly affected by their activities.

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

Under the Compensation for Occupational Injuries and Diseases Act, 1993, employers must pay contributions to a fund which compensates employees for disablement or death caused by occupational injuries or diseases sustained or contracted in the course of their employment.

EMPLOYEE BENEFITS

There are a number of other employee benefits in existence.

These include share incentive schemes, housing and building loans, HIV/Aids education and treatment programmes, and post-employment medical subsidisation, among others.

They are generally dealt with in accordance with the ordinary common law principles of contract or trust law, but in a number of important respects they are subject to the provisions of the Labour Relations Act, the Employment Equity Act, the Basic Conditions of Employment Act and the Constitution, especially with regards to anti-discrimination provisions.

The Labour Relations Act contains provisions similar to those provided for in the European Union's Acquired Rights Directive. In that respect, the Labour Relations Act has significant consequences for the treatment of employees in relation to the variation of retirement funding arrangements and other employee benefits in the context of the transfer of businesses as going concerns.

6 – TAXATION

THE TAX SYSTEM AT A GLANCE

With effect from 1 January 2001, South Africa moved away from a source-based income tax system to a residence-based income tax system.

Under the residence-based income tax system, South African residents are taxed on their worldwide income. For non-residents, the source of income is relevant because non-residents are taxed only on income from a South African source, or a deemed South African source.

Taxes imposed in South Africa include direct and indirect taxes. Direct taxes include:

- Personal income tax
- Corporate income tax
- Capital gains tax (CGT)
- Dividends tax (DT).

Indirect taxes include:

- Value added tax (VAT)
- Securities transfer tax (STT)
- Transfer duty.

Income tax and CGT are imposed under the terms of the Income Tax Act (ITA) No. 58 of 1962.

PERSONAL INCOME TAX

TAX RESIDENTS

Residents are subject to South African tax on their worldwide gross income.

The definition of a resident is:

- Any natural person who is ordinarily resident in South Africa
- Any natural person who is not ordinarily resident, where he/she satisfies the requirements of the 'physical presence' test, where a person is physically present in South Africa:
  - For a period exceeding 91 days during the relevant tax year
  - For more than 91 days during each of the five preceding tax years
  - For a total of 915 days during those five preceding tax years.

INCOME

Income subject to tax includes (among other sources) the following:

- Salaries
- Annuities
- Remuneration or other benefits from employment
  - This includes lump sums received from pension or provident funds and gains from the sale of equity instruments granted to directors and employees (subject to specific rules regarding the vesting of equity instruments)

- Non-cash benefits or 'fringe benefits', such as the arrangement between an employee and the employer in terms of which the employee is offered the use of a company car as part of his/ her remuneration package, are specially valued to determine the amount to be included in the employee's 'gross income'

- Compensation for loss of employment or variation of employment
- Restraint of trade payments
- Income from sources other than employment, for example, investment income.

'Income' is calculated by deducting from the 'gross income' (all taxable sources) any income which is defined as 'exempt income'.

'Taxable income' means the aggregate of:

- Income less all permissible deductions or allowances, plus
- All amounts to be included or deemed to be included in the taxable income of a person in terms of the Income Tax Act such as net capital gains.

TAX RATES

Individuals pay tax at progressive tax rates depending on their taxable income, with the year of assessment for individuals running from 1 March–28 February.

The tax rates which apply to individuals range from 18% where income is below ZAR 165,000 to 40% for those whose income exceeds ZAR 638,600 per annum.

For each tax year, tax thresholds apply for personal income which is exempt from tax. The table below shows the tax thresholds for 2014/2015.

TABLE 3

Income exemption thresholds, tax year ending 28 February 2018

CATEGORY	AMOUNT (ZAR)
For persons under 65	75,750
For persons 65 years and older	117,300
For persons aged 75 years and older	131,150

Tax rebates for individuals are as follows:

Primary rebate	ZAR 13,635
Secondary rebate (for persons 65 years and older)	ZAR 7,479
Tertiary rebate (for persons 75 years and older)	ZAR 2,493

EMPLOYMENT DEDUCTIONS

Tax resident employees also contribute 1% of their monthly remuneration to the Unemployment Insurance Fund (a social security equivalent), subject to a maximum of ZAR 14,872 per month. This amount is deducted by the employer at source from the employees' remuneration and paid directly to the South African Revenue Service (SARS), along with the employer's contribution of another 1%.

(The Standard Income Tax on Employees (SITE) was phased out over the 2012 and 2013 tax years.)

CORPORATE INCOME TAX

TAX RESIDENTS

Legal entities qualify as tax residents if they are incorporated, established, formed or effectively managed in or from South Africa.

INCOME

All resident companies are taxed on gross income, irrespective of where in the world that income is earned. Resident companies are entitled to foreign tax credits for taxes paid or payable offshore, subject to several restrictions.

Non-resident business entities, including branches of foreign companies, are taxed only on income derived from South African sources or sources deemed to be located in South Africa, as well as on capital gains in respect of South African immovable property or rights in immovable property and assets which are attributable to the permanent establishment (PA) of that company. However, a DTA with South Africa may provide otherwise.

In addition, the Income Tax Act (ITA) contains controlled foreign company (CFC) rules, which may function to attribute an amount equal to the net income of the CFCs to South African resident shareholders. Several exemptions are available, essentially in respect of a substantial business presence of the CFC offshore.

TAX RATES

The current corporate income tax rate is 28%.

A trust is subject to income tax at a rate of 40%, though special trusts are taxed on a sliding scale from 18–40%.

There are also separate tax rates for the funds of long-term insurance companies, ranging from 28–30% (tax year 2017/18).

There is no tax on undistributed profits. Companies that distribute after tax profits by way of dividends are subject to withhold dividends tax at the rate of 15% of the amount of any dividend paid by such company.

The distribution of profits by local branches of foreign companies is not subject to dividend withholding tax. There is no further tax payable on the remittance of South African branch profits offshore. These profits will have been taxed in South Africa.

Dividends paid to non-resident shareholders are currently subject to withholding tax at the rate of 15%. A DTA may however reduce the rate of the dividend withholding tax.

SMALL BUSINESS CORPORATIONS, TAX RATES

Small Business Corporations (SBCs) are subject to income tax at progressive tax rates.
For the tax year 1 April 2017 – 31 March 2018, annual income up to ZAR75,750 is subject to income tax at 0%, income between ZAR75,751–365,000 is subject to tax at a rate of 7%, income above ZAR 365,001 is taxed at 21%, while income in excess of ZAR 550,001 is subject to income tax at a rate of 28% (equal to the corporate tax rate).

A SBC is defined as a close corporation, private company or co-operative which generates no more than ZAR 20 million in turnover during the year of assessment. These companies are also required to comply with a number of additional requirements in order to be considered SBCs.

MICRO BUSINESSES, TAX RATES

Micro businesses are subject to a simplified income tax system, known as turnover tax. To qualify, businesses (sole proprietors/individuals, partnerships, close corporations, companies and co-operatives) must have an annual turnover of less than ZAR 1 million.

Turnover tax takes the place of various other taxes – VAT (where businesses have not elected back into the VAT system), provisional tax, income tax, capital gains tax, secondary tax on companies (STC) and dividends tax. Therefore, qualifying micro businesses pay a single tax instead of various other taxes and qualify for lower tax rates.

A change to the first tax band and tax rates for micro businesses came into effect in 2015, with the level at which taxable turnover becomes subject to tax increasing from ZAR 150,001 to ZAR 335,001, and the maximum tax rate being halved to 3%.

For the tax year 1 April 2017 – 31 March 2018, taxable turnover up to ZAR 335,000 is not subject to tax, income between ZAR 335,001 and 500,000 is taxed at 2%, and income in excess of ZAR 750,000 is taxed at 3%.,

CAPITAL GAINS TAX

Capital gains tax (CGT) is not a separate tax but forms part of income tax and applies to trusts, companies and individuals. A capital gain arises when an asset has been disposed of on or after 1 October 2001 (when CGT came into effect) for proceeds that exceed its base cost.

Not all assets attract CGT and certain capital gains and losses are disregarded.

A withholding tax applies to non-resident sellers of immovable property. The amount withheld by the buyer serves as an advance payment towards the seller's final income tax liability.

A resident entity is liable for CGT on assets located both in and outside South Africa. A non-resident is only liable to CGT on immovable property in South Africa or assets of a permanent establishment (branch) in South Africa. Certain indirect interests in immovable property such as shares in a property company are deemed to be immovable property.

Public benefit organisations may be fully or partially exempt from CGT.

For individuals, death, emigration and donation of an asset by a resident trigger a deemed disposal for purposes of the CGT provisions.

Capital gains are subject to CGT at an effective rate of 18.65% for companies and branches of non-resident companies, 13.65% for individuals and special trusts, and 27.31% for other trusts (tax year 2017-2018).

DIVIDENDS TAX

Dividends tax (DT) is a tax charged at 20% on shareholders when dividends are paid to an individual, trust or non-resident by South African companies, on or after 22 February 2017. Under normal circumstances, this is withheld from the dividend payment by a withholding agent (either the company paying the dividend or, where a regulated intermediary is involved, by the latter).

DT replaced the former secondary tax on companies (STC) in order to:

- Align South Africa with the international norm where the recipient of a dividend, not the company paying it, is liable for the tax (South Africa was one of a few countries with a corporate level tax on dividends, such as STC)
- Make South Africa a more attractive destination for international investment by eliminating the perception of a higher corporate tax rate (STC was an extra corporate tax).

DT is triggered by the payment of a dividend by any:

- South African tax resident company
- Foreign company whose shares are listed on the JSE.

Dividend payments by headquarter or non-resident companies are not subject to DT.

WITHHOLDING TAX

South Africa imposes a withholding tax of 15% on royalties payable to non-residents.

Furthermore, a withholding tax is imposed on the disposal of immovable property by non-residents at the rate of 7.5% for companies and 10% for trusts (and a rate of 5% for individuals). A double taxation agreement (DTA) may provide relief from such withholding taxes.

In general, South African tax legislation does not recognise group taxation. However, provided that certain requirements are complied with, rollover tax relief is made available to group companies in respect of certain inter-group restructuring transactions. For purposes of rollover tax relief, the definition of a 'group of companies' is limited and non-resident companies. Public benefit organisations do not form part of a group of companies as defined.

WITHHOLDING TAX ON INTEREST

From 1 March 2015, Withholding Tax on Interest (WTI) at a rate of 15% is imposed on interest from a South African source paid to non-resident individuals and companies.

Interest is exempt from WTI if paid by any sphere of South African government (national, provincial or local), by any bank or in connection with a debt listed on a recognised exchange. Non-resident recipients are exempt if they meet criteria relating to being present in South Africa for more than 183 days of the 12 months prior to the payment, or if the payment is connected with a permanent establishment in South Africa and the foreign person is registered as a taxpayer in South Africa. An applicable DTA may provide relief from WTI through a reduced rate of tax or exemption.

WITHOLDING TAX ON SERVICE FEES

As of 1 January 2016, a new withholding tax applicable to service fees paid to or for the benefit of foreign persons comes into effect. Where service fees are received or accrued from a South African source, a tax at a rate of 15% will be imposed.

A reduced rate may apply if an appropriate DTA is in place. Withholding tax on service fees will also not apply if the recipient was present in South Africa for over 183 days in total during the 12 months prior to the fees being paid, if the fees are connected with a permanent establishment in South Africa and the foreign person is registered as a taxpayer in South Africa, or if the fees are paid in respect of services rendered by any person in their capacity as an employee.

WITHHOLDING TAX ON ROYALTIES

South Africa imposes a withholding tax of 15% on royalties payable to non-residents. The withholding tax on royalties does not apply in respect of royalties paid to a foreign person if that person was physically present in South Africa for more than 183 days in total during the 12 months prior to the royalty being paid, or if the property in respect of the royalty paid is connected to a permanent establishment of that foreign person in South Africa and they are registered as a tax payer in South Africa. It also does not apply to royalties paid by a headquarter company in certain circumstances.

WITHHOLDING TAX ON IMMOVABLE PROPERTY

A provisional withholding tax is imposed on the disposal of immovable property by non-residents where the proceeds are in excess of ZAR 2 million, at the rate of 7.5% for companies and 10% for trusts (and a rate of 5% for individuals). A double taxation agreement (DTA) may provide relief from such withholding taxes.

GROUP TAXATION AND ROLLOVER TAX RELIEF

In general, South African tax legislation does not recognise group taxation. However, provided that certain requirements are complied with, rollover tax relief is made available to group companies in respect of certain inter-group restructuring transactions. For purposes of rollover tax relief, the definition of a 'group of companies' is limited and non-resident companies. Public benefit organisations do not form part of a group of companies as defined.

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SPECIFIC TAX REGIMES

Gold mining companies are taxed according to a formula. The taxable income of oil and gas companies is determined in terms of a separate schedule to the ITA. Diamond and other non-gold mining companies are taxed at the same tax rates applicable to ordinary companies. There are no specific rules which apply to these companies.

The recently promulgated Minerals and Petroleum Resources Royalty Act (MPRRA) will impose a royalty on the transfer of mineral resources. Different rates will apply to refined and unrefined minerals, with a maximum rate of 5% applying to refined minerals and a maximum rate of 7% to unrefined minerals. The royalty is payable by the extractor of the mineral resource as a percentage of gross sales in respect of that mineral resource. The MPRRA became effective on 1 March 2010.

A 'small business' may be exempt from the royalty if its gross sales in respect of all mineral resources transferred during that year do not exceed ZAR 10 million, subject to a number of further requirements, such as that the royalties would not have exceeded ZAR 100,000 and that the extractor must be a tax resident.

Farming operations, including game farming, are taxed under very specific provisions of the ITA.

FISCAL YEAR AND TAX RETURNS

A company's financial year end may vary, and the year-end determines the annual tax period for which the company is assessed for tax. Tax returns for companies must normally be submitted within twelve months after the company's year-end.

TRANSFER PRICING RULES

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

THIN CAPITALISATION

The ITA also contains thin capitalisation provisions which aim to avoid excessive debt funding of a subsidiary or an associated local company by a non-resident lender. In accordance with the SARS Practice Note on thin capitalisation rules, the basic guideline is that a shareholder's loan should not exceed the share capital in a ratio exceeding 3:1.

CURRENCY GAINS/LOSSES

The ITA contains several complex provisions dealing with the taxation of currency gains and losses.

DEDUCTIONS

The rules regarding the deductibility of expenses for income tax purposes are no different when claimed as a deduction by a resident or a non-resident.

The Act contains a general deduction formula with which an expense must comply in order to be deductible as well as various other provisions which allow for specific allowances/ deductions in respect of certain types of expenditure incurred.

In order for expenditure and losses to be deductible in terms of the general deduction formula they must be:

- Actually incurred
- During the year of assessment
- In the production of income
- Not of a capital nature
- Laid out or expended for the purposes of trade.

CAPITAL ALLOWANCES

Capital allowances (which are based on the diminution of value of an asset due to wear and tear) are calculated on amounts not exceeding the lesser of the cost of the asset to a connected person or the market value of the asset on the date on which it was acquired. In general, SARS has discretion to determine the rates of the allowance. The depreciation allowance allowed by SARS depends on the type of asset being depreciated.

Specific allowances/deductions (which will be deductible notwithstanding the fact that expenditure is of a capital nature), relate to, for example:

- Patents, inventions, copyrights, designs, other property and knowledge (intellectual property)
- Machinery, plant, implements, utensils and articles (excluding manufacturing)
- Expenditure and losses incurred in re-trade costs
- activities undertaken in South Africa for scientific or
- Activities undertaken for technological research and development purposes:
  - Taxpayers can deduct 150% of their research and development expenditure, if the expenses were directly incurred in scientific and technological research and development activities in South Africa
  - Taxpayers may also depreciate the cost of buildings, machinery or plant, utensils and articles used for the purpose of such research and development, over three years at the rate of 50% in the first year, 30% in the next year and 20% in the third year
- Commercial buildings and residential units
- Machinery or plant (manufacturing)
  - There is a special depreciation allowance for new or used plant and machinery brought into use for the first time by a taxpayer, and used in a process of manufacture, providing an allowance equal to:
    - 40% of the cost to the taxpayer, including the cost of any improvement thereto, in the year of assessment in which the machinery or plant is so brought into use for the first time
    - 20% of such cost in each of the three subsequent years of assessment.

There are also special allowances relating to, among other areas, bio-fuels, agriculture, hotels, ships, aircraft, mining, pipe lines, electricity transmission lines and railway lines, airports and ports.

Taxpayers investing in areas which are regarded as urban development zones are entitled to special depreciation allowances for the construction or refurbishment of buildings. Taxpayers refurbishing a building within a designated zone will receive a depreciation allowance over a five-year period, in which the taxpayer will be entitled to an allowance of 20% in each year. Taxpayers constructing a new commercial or residential building within a designated zone will receive a depreciation allowance over an 11-year period. These taxpayers will be entitled to a 20% allowance in the first year and an 8% allowance in each of the subsequent years.

LOSSES

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

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

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

Recent amendments to the ITA provide for the ring-fencing of assessed losses from secondary trades, with the consequence that losses from these secondary trades may not be set off against any income which a taxpayer generates, other than the income from such secondary trades.

There are also limitations on the utilisation of losses created by transactions taking place between connected persons.

OTHER TAXES

VAT

South Africa levies VAT at 14% on the supply of all goods and services by registered vendors at each stage within the distribution chain. Vendors collect output tax from their customers and are able to claim credits for input tax paid by them. Certain exemptions and zero ratings apply. VAT is also payable on the importation of goods or services, subject to certain exclusions.

Value Added Tax (VAT) is payable on the supply of most goods and/or services by a South African registered VAT vendor, or on goods and certain services imported into South Africa. Any person who carries on an enterprise in South Africa, and has taxable supplies which exceed the threshold of ZAR 1 million (excluding VAT) per annum, is obliged to register as a VAT vendor.

Taxpayers may voluntarily register as VAT vendors if their taxable supplies exceed ZAR 50,000 per annum. As from the 1 March 2012, qualifying micro businesses that are registered for turnover tax may also choose to register for VAT provided that all the conditions for voluntarily registration for VAT are met.

Goods exported from South Africa and services rendered offshore or rendered to non-residents of South Africa are generally zero-rated for VAT.

SECURITIES TRANSFER TAX (STT)

The Securities Transfer Tax Act 25 of 2007 came into operation on 1 July 2008 and provides for the levying of a tax on securities transfer tax on or after 1 July 2008. This replaces stamp duty and uncertificated securities tax which were previously levied.

STT is payable on the transfer of any security at a rate of 0.25% on the greater of the market value or consideration payable. A 'transfer' is defined widely to include the sale, assignment, cession or any disposal or cancellation of a security, but excluding any event which does not result in a change of beneficial ownership, any issue of a security, or the redemption or cancellation of a security in the context of the liquidation or deregistration of the company which issued the security.

STAMP DUTY

The Stamp Duties Act was repealed with effect from 1 April 2009. However, stamp duty remains payable on leases of fixed property executed before 1 April 2009, at a fixed rate of 0.5% on the quantifiable amount of the lease.

EXCISE AND CUSTOMS DUTIES

Excise duties are imposed on certain locally produced goods and an equivalent duty, customs duty, is charged on the same goods if they are imported. Duties apply at varying rates on items such as alcohol, cigarettes and perfumes.

ESTATE DUTY

This is a tax on the transfer of wealth, which is levied at death. The duty is levied at the rate of 20% on the worldwide estates of deceased persons in respect of all property owned by residents and South African property owned by non-residents. A basic deduction of ZAR 3.5 million is allowed from the value of the net estate before calculating estate duty. Further deductions are allowed in respect of, for example, liabilities, bequests to public benefit organisations and property accruing to surviving spouses.

DONATIONS TAX

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

The donations tax is payable at a flat rate of 20% on the value of any property donated. Certain donations are exempt from donations tax, including charitable donations made to public benefit organisations.

A natural person is entitled to an exemption on donations which are made during the year of assessment of up to ZAR 100,000 (from 2008 to 2018 years of assessment). Non-natural persons are exempt from donations tax in respect of casual gifts up to a threshold of ZAR 10,000. Non-residents do not pay donations tax, even if they donate South African assets. Public companies which are residents of South Africa are also exempt from paying donations tax.

TRANSFER DUTY

Property transfer duty is charged at a progressive rate in the case of immovable property acquired by natural persons, companies, corporations and trusts:

VALUE OF PROPERTY (Rand)	RATE
0 - 900	0%
900 001 – 125 000	3% of the value above ZAR 900 000
1 250 001 – 1 750	ZAR 10 500 + 6% of the value above ZAR 1 250 000
1 750 001 – 2 250 000	ZAR 40 500 + 8% of the value above ZAR 1 750 000
2 250 001 – 10 000 000	ZAR 80 500 + 11% of the value above ZAR 2 250 000
10 000 001 and above	ZAR 933 000 + 13% of the value above ZAR 10 000 000

CGT –INDIVIDUALS

CGT was introduced on 1 October 2001. Death, emigration and donation of an asset by a resident trigger a deemed disposal for purposes of the CGT provisions.

The effective CGT rate for natural persons (and special trusts) is 18% (from 2018):

TAXATION OF PENSION PAYMENTS

Receipts by residents from retirement funds may include lump sums, annuities or a combination of both. Annuities are specifically included in the definition of gross income and are therefore subject to normal tax.

In the case of non-residents, only annuities from a South African source are included in their gross income. Emigrants or residents who earned a pension in respect of offshore services may qualify for an exemption from tax on their foreign pension or social security payments, even if they are resident in South Africa for tax purposes.

Lump sums are subject to different provisions. A portion of the lump sum payment is exempt – in the case of withdrawal from a fund, a lifetime exemption of ZAR 22,500 applies, while a lifetime exemption of ZAR 300,000 applies on death or retirement. What remains is taxed at progressive rates varying between 18% and 36%, the latter rate applying to amounts in excess of ZAR 900,000.

A lump sum received by an emigrant or a resident from a foreign pension fund or social security system may also qualify for the exemption.

SKILLS DEVELOPMENT LEVY

This levy is charged for the purposes of funding the education and training of South Africa’s workforce and it is determined by an employer’s salary bill – if an employer expects to pay more than ZAR 500 000 over the next 12 months, they will be liable to pay SDL. It is imposed on employers at 1% of the gross payroll. The levy is collected by the SARS (along with employees’ tax and Unemployment Insurance Fund contributions).

DOUBLE TAXATION AGREEMENTS (DTAS)

South Africa is currently party to more than 90 Double Tax Agreements and Protocols, aimed at enabling the administrations of both countries to eliminate double taxation.

As at September 2017, DTAs were in force with the following countries:

- Algeria, Australia, Austria, Belarus, Belgium, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, China (People's Republic), Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Egypt, Ethiopia, Finland, France, Germany, Ghana, Greece, Grenada, Hong Kong, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Malawi, Malaysia, Malta, Mauritius, Mexico, Mozambique, Namibia, the Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saudi Arabia, Seychelles, Sierra Leone, Singapore, the Slovak Republic, Spain, Swaziland, Sweden, Switzerland, Taiwan, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, the United Kingdom, the United States of America, Zambia and Zimbabwe.

DTAs have been signed and ratified by South Africa, but not yet by the other country for:

- Gabon, Germany (renegotiated), and Sudan

DTAs have been or are in the process of being negotiated or renegotiated but not signed with:

- Cuba, Isle of Man (limited), Malawi (renegotiated), Morocco, Namibia (renegotiated), Senegal, Syria, Vietnam and Zambia (renegotiated)

Protocols have been signed and ratified with:

- Australia, Austria, Botswana, Cyprus, India, Ireland, Malaysia, Malta, the Netherlands, Norway, Oman, the Seychelles, Sweden, Turkey and the United Kingdom.

A number of other protocols are in the process of being negotiated.

7 – ACCOUNTING & REPORTING

INTRODUCTION

The Companies Act 2008 (the Act) constituted a new corporate law for South Africa and came into effect on 1 May 2011, replacing the Companies Act 1973 (and amending certain provisions in the Close Corporation Act 1984).

The Companies Act is characterised by flexibility, simplicity, transparency, corporate efficiency and regulatory certainty. It is drafted in plain language and is not as detailed and prescriptive as the former act. Companies are allowed flexibility to change certain requirements to suit their specific circumstances.

DIFFERENT FORMS OF COMPANIES

The act provides for the classification of companies into either profit companies or not-for-profit companies.

Not-for-profit companies have to comply with a set of principles which relate mainly to the purpose or objects and policies of the company, matters related to directors and members, fundamental transactions and the winding-up of not-for-profit companies. The act exempts not-for-profit companies from certain provisions.

With regard to profit companies, the act distinguishes between four different types of companies, namely:

- Private companies
  - Companies which are not state-owned and where the Memorandum of Incorporation prohibits offering securities to the public and restricts the transferability of securities
- Personal liability companies
  - Companies and their directors are jointly and severally liable for any debts and liabilities of the company
- State-owned companies
  - Enterprises, registered as a company, which fall within the meaning of ‘state-owned enterprises’ in terms of the Public Finance Management Act, or are owned by a municipality
- Public companies
  - Companies which are not state-owned companies, private companies or personal liability companies.

TRANSPARENCY AND ACCOUNTABILITY

The act requires companies to adhere to a number of measures to ensure transparency and accountability.

Among these measures, all companies are required to:

- Have at least one office in the republic, and to register the address of such office (or its principal office) with the Commissioner
- Keep certain records in written or electronic form for a period of seven years
- Keep accurate and complete accounting records
- Prepare annual financial statements

- Submit an annual return, including a copy of the annual financial statements and any other prescribed information. The content of this report will be prescribed in regulations to the act.

The act requires public companies and state-owned companies to have audited financial statements. Certain categories of private companies may also be required by the Minister in Regulations to have their annual financial statement audited.

All companies which are not required (either in terms of the act, or by the regulations) to have their financial statements audited may opt to either have their annual financial statements audited voluntarily or to have them independently reviewed. Regulations will set out exactly what is meant by independent review, what standards should be used and what professional qualifications are required for reviewers etc.

ENHANCED TRANSPARENCY AND ACCOUNTABILITY

Although all companies are subject to transparency and accountability requirements as set out above, public companies, state-owned companies and certain categories of private companies (as determined by the Minister in Regulations) are obliged to appoint a company secretary, audit committee (comprising at least three members) and an independent auditor. All other private companies, personal liability companies and not-for-profit companies may choose to include these enhanced transparency and accountability requirements in their respective memoranda of incorporation.

COMPANY FINANCE

The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, must be set out in the company's Memorandum of Incorporation, and may only be changed by special resolution of the shareholders.

However, directors are given special powers, in that the board of the company may (except if the memorandum of incorporation provides otherwise) change the number of authorised shares of any class of shares or classify or reclassify any shares. The interests of minority shareholders are protected by requiring shareholder approval for shares and options issued to directors and other specified persons, or financial assistance for share purchases.

CAPITAL ADEQUACY

The act introduces a new arrangement for capital adequacy. This arrangement abolishes the concept of par value shares and nominal value shares, and requires a solvency and liquidity test. In terms of this test, when one considers all reasonably foreseeable financial circumstance of the company at a particular point in time, the company's total assets, fairly valued, should equal or exceed its total liabilities (including contingent liabilities) fairly valued and it should be clear that the company will be able to pay its debts as they become due in the course of business for a period of 12 months thereafter.

A new framework for debentures provides companies with significant freedom to create financial instruments.

GOVERNANCE

Governance includes a range of matters, including a shareholder's right to be represented by proxy, notice for and conduct at meetings, election of directors, disqualification of persons to be directors, removal of directors, board committees and board meetings, director's personal financial interests, standards of directors' conduct, liability of directors and prescribed officers, and the indemnification of directors.

STANDARDS OF DIRECTORS' CONDUCT

Directors of all types of companies are required to meet the same standards of conduct and behaviour, which are defined in the act.

A person, acting in the capacity of director, must exercise his/her powers and perform his/her functions:

- In good faith and for a proper purpose
- In the best interests of the company
- With a degree of care, skill and diligence which may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that director.

DIRECTOR LIABILITY

Directors of a company may be held jointly and severally liable for any loss, damage or costs sustained by the company as a result of a breach of the director's fiduciary duty or the duty to act with care, skill and diligence. In addition, a director may also be held liable where he/she:

- Acts in the name of the company without the necessary authority
- Is part of an act or omission while knowing that the intention was to defraud shareholders, employees or creditors
- Signs financial statements which were false or misleading in a material respect
- Issues a prospectus which contains an untrue statement.

The strict standards for directors' conduct and liability are somewhat tempered by the fact that companies are allowed to advance funds to cover the expense of litigation against directors, to indemnify directors in certain circumstances or purchase insurance to protect either the director(s) or the company. Directors may never be indemnified for liability resulting from wilful misconduct or wilful breach of trust.

ENFORCEMENT

The Companies and Intellectual Property Commission (CIPC) is responsible for:

- Monitoring proper compliance with the act by companies and directors
- Receiving and investigating complaints concerning alleged contraventions of the act
- Promoting the reliability of financial reports by investigating non-compliance with financial reporting standards
- Registering and de-registering companies, directors, business names and intellectual property rights.

The Companies Tribunal is responsible for assisting in the resolution of disputes where any person/entity applies to the Companies Tribunal as an alternative to applying to a court. An arbitration decision by the Companies Tribunal is binding on the Commission or the Takeover Regulation Panel.

The Takeover Regulation Panel is responsible for regulating fundamental transactions such as mergers and acquisitions.

The Financial Reporting Standards Council is responsible for consulting with the Minister of Trade and Industry on the making of Regulations establishing financial reporting standards.

KING III REPORT

INTRODUCTION

Boards of directors are confronted with many difficult decisions on a regular basis. The King III Report on Corporate Governance 2009 provides a list of best-practice principles to assist and guide directors in making the right choices for their company.

The King III Report came into effect on 1 March 2010 and provides guidance to corporate entities on various governance related aspects, including:

- Boards and directors
- Corporate citizenship, leadership, integrity and responsibility
- Audit committees
- Risk management
- Internal audit
- Integrated sustainability reporting and disclosure
- Compliance with laws, regulations, rules and standards
- Managing stakeholder relationships
- Fundamental and affected transactions.

KING III AND THE COMPANIES ACT

There is no statutory obligation on companies to comply with King III. The underlying intention of King III is not to force companies to comply with recommended practice (King II required companies to 'comply or explain'), but rather for companies to 'apply or explain'.

Directors are accountable to shareholders, and where directors opt not to implement the recommended practices as set out in King III, they should be able to explain their reasoning and motivation to their shareholders. Since directors can be held personally liable for non-compliance with their statutory duties (as set out in the Companies Act), they need to ensure each of their decisions is taken with care.

Most, if not all of the recommended best-practice principles set out in King III relate to the legislative duties of a director to exercise their powers and perform their functions in good faith and for a proper purpose in the best interests of the company, and with the degree of care, skill and diligence which may reasonably be expected of a director. As such, King III constitutes a valuable guide to directors and other office bearers to ensure compliance with the provisions of the Companies Act. It is recommended that directors pay close attention to the enumerated principles, and aim to apply all such principles.

8 – UHY REPRESENTATION IN SOUTH AFRICA

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Number of partners: 3
Total staff: 43

CONTACTS

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BRIEF DESCRIPTION OF FIRM

UHY Hellmann's partners and managers have extensive audit and tax experience in relation to the firm's clients, whose businesses fall into numerous industries and sectors such as manufacture, wholesale, retail, farming, real estate, technology, finance, leisure and professional services. The firm joined UHY in 1998.

SERVICE AREAS

Audit and accountancy
Corporate secretarial services
Due diligence assignments
Estate planning
Mergers & acquisitions
Payroll services
Preparation of business plans
Taxation services
Winding-up of deceased estates

PRINCIPAL OPERATING SECTORS

Manufacturing
Wholesale
Retail
Farming
Real estate
Technology
Finance
Leisure
Professional services

LANGUAGES

Portuguese, Gugerati, Hebrew, English.

CURRENT PRINCIPAL CLIENTS

Confidentiality precludes disclosure of clients in this document.

OTHER COUNTRIES IN UHY CURRENTLY WORKING WITH, OR HAVE WORKED WITH IN THE PAST

Australia, Portugal, UK, Brazil, US, Spain.

APPENDIX – USEFUL WEB ADDRESSES

Department of Trade and Industry:	www.dti.gov.za
South African Revenue Service:	www.sars.gov.za
The South African Reserve Bank:	www.reservebank.co.za
Industrial Development Corporation:	www.idc.co.za
VAT live	www.vatlive.com
World Economic Forum	www.weforum.org
World Factbook (CIA)	www.cia.gov

LET US HELP YOU ACHIEVE FURTHER BUSINESS SUCCESS

To find out how UHY can assist your business, contact any of our member firms. You can visit us online at www.uhy.com to find contact details for all of our offices, or email us at info@uhy.com for further information.