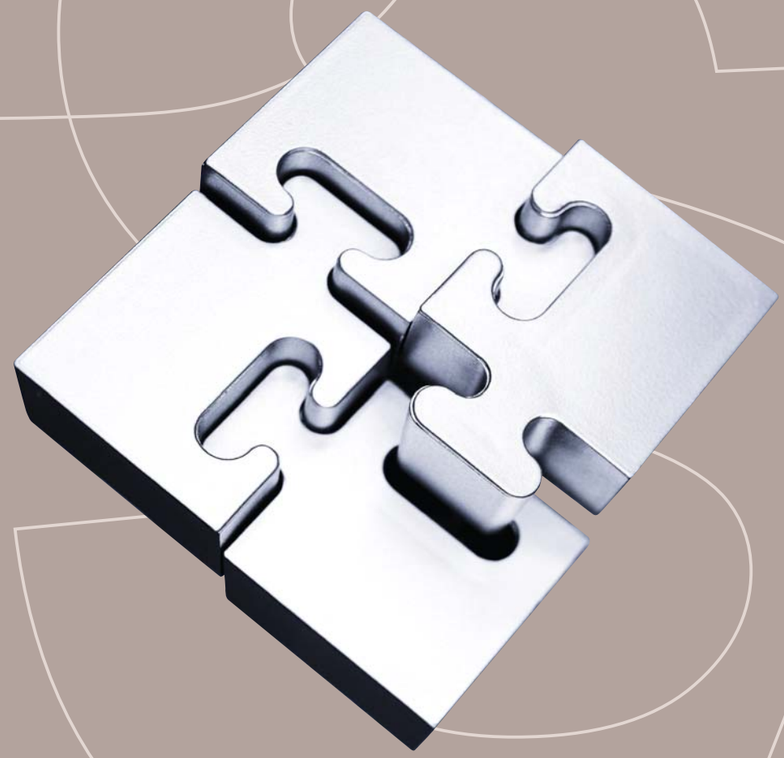
Bowman Gilfillan Attorneys

DOING BUSINESS IN SOUTH AFRICA



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FOREWORD

This guide to doing business has been written by Bowman Gilfillan Inc. Attorneys to give a broad overview of the considerations and procedures involved in making an investment in South Africa. It is based upon the law in force and circumstances existing as at 31 March 2004.

The contents of this guide are for general reference only and do not constitute legal advice. Potential investors contemplating doing business in South Africa should seek specialist legal and other advice with regard to proposed or contemplated ventures.

Bowman Gilfillan produces regular reports and special publications on South African legal developments.

For further information about these publications, please contact Merilyn Kron in our Sandton office by telephone at +27 11 699-9000, by fax at +27 11 699-9001, or by email at m.kron@bowman.co.za.

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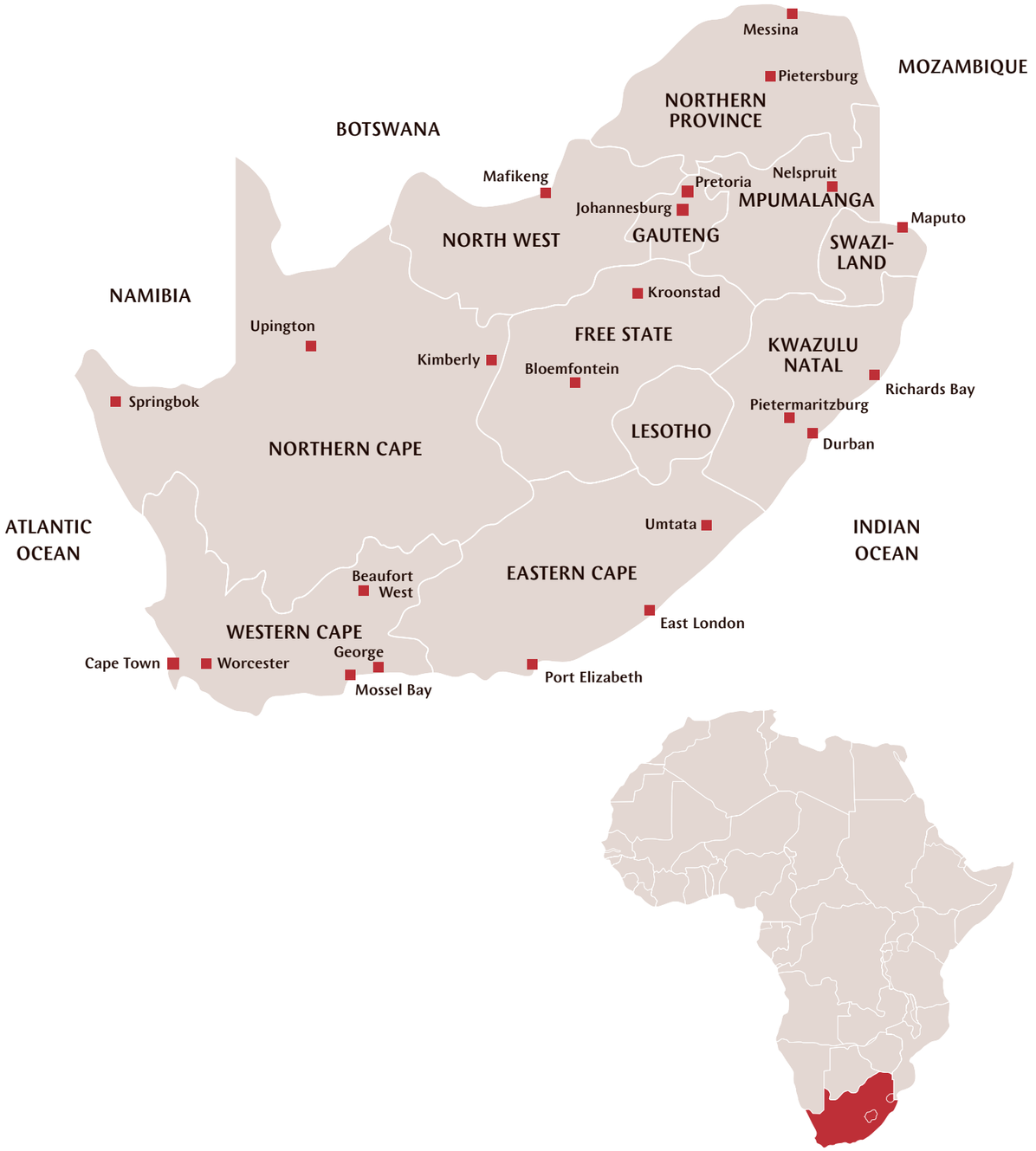
INTRODUCTION

1 General Information

Population 46.38 million*
Area 1 221 037 sq kms
Currency (471 445 sq miles)



ECONOMY

Total GDP (Rmil)	R1 209 497
Real GDP growth (%)	+1.3%
GDP per capita (R)	R26 077
Overall consumer price index (%)	+5.8%
Manufacturing production index (% change pa)	-2.0%
Mining production (% change for 2003)	+2.5%
Reserves including gold (US$bn)	US$24.9
Repo rate	8%
Total external debt at end of 1st quarter 2004 (US$mil)	US$36 462
Current account balance (Rbn)	-R10.1
Merchandise exports (Rbn)	R256.0
Net gold exports (Rbn)	R35.3
Merchandise imports (Rbn)	-R262.8
Net service, income and current transfer payments (Rbn)	-R38.6

Measurement	Metric system
International time	Two hours ahead of GMT in the northern hemisphere winter One hour ahead of GMT in the northern hemisphere summer

*estimate at June 2003

Exchange rate US Dollar/SA Rand: R6.61
(Week ending 26 March 2004)

1 billion (bn) = 1 000 000 000

All figures based on March 2004 Quarterly Bulletin and Economic and Financial Data Sheet for South Africa issued by the South African Reserve Bank and available from www.resbank.co.za.

STATUTORY HOLIDAYS

New Year's Day	1 January
Human Rights Day	21 March
Good Friday	
Family Day	
Freedom Day	27 April
Workers' Day	1 May
Youth Day	16 June
National Women's Day	9 August
Heritage Day	24 September
Day of Reconciliation	16 December
Christmas Day	25 December
Day of Goodwill	26 December

DISTANCES

Johannesburg – Pretoria	58 kms
Johannesburg – Cape Town	1 402kms
Johannesburg – Durban	588 kms
Johannesburg – Bloemfontein	398kms
Cape Town – Durban	1 753 kms

2 The Country at a Glance

The area of the Republic of South Africa is 1 221 037 sq km (471 445 sq miles).

It is surrounded by the Atlantic and Indian Oceans on the east, west and south, and by Zimbabwe, Mozambique, Namibia and Botswana to the north. Lesotho and Swaziland are entirely surrounded by South Africa.

The country is divided into 9 provinces with the 4 main regions of commerce being in the Western Cape (Cape Town), Eastern Cape (Port Elizabeth and East London), KwaZulu/Natal (Durban and Pietermaritzburg) and Gauteng (Pretoria, the Witwatersrand, i.e. Johannesburg and the areas to the east and west of it, and Vereeniging).

The latest national population census taken in 2001 sets the total population of South Africa at 44.8 million. A recent statistical survey now puts the total population at 46.38 million.

The largest population concentration is in the Gauteng Province. Most of the economic and industrial activity takes place in this province but the major cities and industrial centres in other provinces referred to earlier are also involved.

South Africa has 11 official languages, namely, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Most provinces have, however, opted for just two. From a practical point of view, English is the language of commerce.

South Africa is rich in mineral resources, has a well-developed mining industry and is one of the world's largest producers of minerals. It has a broad-based industrial manufacturing centre, making it the largest and most industrially developed economy in Africa, and it generates some 40% of the continent's electricity output. Agriculture is an important component of the economy and the country is a net exporter of food.

With its sophisticated financial services industry and Africa's most developed transport and telecommunications system, South Africa is among the world's 30 largest trading nations.

South Africa's climate is moderate and sunny. South African time is one hour ahead of GMT during the northern hemisphere summer and autumn and two hours ahead of GMT during the northern hemisphere winter and spring. South Africa has no daylight saving scheme.

3 Investment Framework

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 being 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.

As the leading economy in Africa, with a well-developed infrastructure and established trade links with the rest of the continent, South Africa is a suitable base for generating investment and trade with the rest of Africa, particularly in the sub-Saharan region.

Except in the banking, insurance and broadcasting industries, there are no restrictions on foreign ownership of local companies and businesses. There are, however, initiatives in place for the empowerment of black persons (i.e. African, Coloured and Indian persons). These include increasing ownership of companies by black persons and other forms of empowerment through employment equity and preferential procurement. This is dealt with in more detail in Chapter III (Black Economic Empowerment). There are also some restrictions on the borrowing levels of foreign-controlled companies, together with competition/anti-trust restrictions, which are dealt with in more detail in the section on Trade and Investment Regulations.

Generally speaking, there are few restrictions on investment. No permits are required and, to the extent that government agencies need to be involved, they are reasonably helpful and efficient. Income from an investment 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.

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INVESTMENT PRINCIPLES AND GENERAL CONSIDERATIONS

1 Political System

In South Africa's first democratic elections held in 1994, the African National Congress, with Mr. Nelson Mandela as president, was elected with an overwhelming majority. That election took place in terms of an interim Constitution which had been negotiated and agreed to by most of the interested parties. It required that the newly elected parliamentary assembly would draft and enact a final Constitution. The new Constitution was promulgated on 18 December 1996, after scrutiny by the Constitutional Court, and came into effect on 4 February 1997. Like the interim Constitution, the final version, which is based principally on German and Canadian constitutional principles, contains a strong Bill of Rights, conforming to generally accepted principles for the protection of fundamental human rights.

The South African government is constituted as the national, provincial and local spheres of government which are distinctive, inter-dependent and inter-related. The legislative authorities, executive authorities and judicial authorities are all separate from one another.

1.1 The Executive

The president is the head of state and head of the national executive. The president has powers entrusted by the Constitution and legislation and exercises the executive authority, together with the other members of the cabinet, by:

- implementing national legislation, except where the Constitution or an Act of Parliament provides otherwise;
- developing and implementing national policy;
- co-ordinating the functions of state departments and administrations;
- preparing and initiating legislation; and
- performing any other executive function provided for in the Constitution or in national legislation.

1.2 The Legislature

Parliament is the legislative authority of South Africa and comprises a National Assembly and a National Council of Provinces. The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution. The National Assembly consists of no more than 400 and no less than 350 members elected through a system of proportional representation. The National Assembly is elected to represent the people and to ensure government by the people under the new Constitution. It does this by choosing the president (currently President Thabo Mbeki), by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action. The National Assembly is elected for a term of 5 years.

The National Council of Provinces is composed of a single delegation from each of the 9 provinces consisting of 10 delegates, i.e. 90 members in all. The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

Each province has its own provincial government, with legislative power vested in a provincial legislature and executive power vested in a provincial premier and exercised together with the other members of a provincial executive council.

The premier is elected by the provincial legislature, as is the case with the president at national level. The premier appoints the other members of the executive council (MECs), which functions as a cabinet at provincial level, and which exercises the executive power by:

- implementing provincial legislation in the province;
- implementing all national legislation within certain functional areas;
- administering, within the province, national legislation outside certain functional areas;
- developing and implementing provincial policy;
- co-ordinating the functions of the provincial administration and its departments;
- preparing and initiating provincial legislation; and
- performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

Each province has a provincial legislature which consists of between 30 and 80 members elected for a 5 year term through a system of proportional representation. The number of seats awarded to each political party is in proportion to the outcome of the provincial election. Provincial elections are held concurrently with national elections every 5 years. The provincial legislature is empowered to pass legislation within its functional areas, as well as a constitution for the province should it wish to do so. A provincial legislature is bound only by the national Constitution, or by a provincial constitution if it has adopted one.

1.3 Local Government

The local sphere of government consists of municipalities.
The executive and legislative authority of a municipality is vested in its Municipal Council. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

1.4 Political Parties

The main political groupings are the African National Congress which enjoys approximately 70% of the representation in the National Assembly (based on the 14 April 2004 election results), followed by the Democratic Alliance, the Inkatha Freedom Party, the United Democratic Movement, the Independent Democrats, the New National Party and the African Christian Democratic Alliance. The African National Congress also controls all of the 9 provinces in South Africa.

2 Legal System

South African law is based on Roman-Dutch law as applied in the Netherlands in the seventeenth century. In practice, it was found to be inadequate or inappropriate in some areas of modern mercantile and commercial law. South African courts then tended to refer to and rely upon English law. Today, therefore, many aspects of South African commercial law, and more specifically company law, are similar to the laws of the United Kingdom.

The sources of South African law today are the constitution, common law and customary usage, case law and statutory law. In regard to the latter, parliament is the sovereign legislative body but government ministers and other public functionaries have limited powers to promulgate regulations, and each provincial parliament can legislate on matters of local interest.

South Africa has an independent High Court judiciary drawn principally from the ranks of senior advocates (barristers), attorneys (solicitors) and academics. At present there is a split bar divided between attorneys and advocates, but attorneys can acquire the right of appearance in the High Court. Both branches of the profession are well established and competent. There is an established and sophisticated hierarchy of courts, namely:

- Magistrates Courts in each town and city;
- High Courts with territorial jurisdiction over provinces or parts of provinces and the power to adjudicate, generally, on all disputes, plus certain appeal functions;
- the Supreme Court of Appeal, which sits in Bloemfontein, exercising appellate jurisdiction over all the High Courts; and
- the Constitutional Court which sits in Johannesburg and has both original and appellate jurisdiction on constitutional matters.

The High Courts and the Supreme Court of Appeal may make an order concerning the constitutional validity of an Act of parliament, provincial legislation or administrative conduct of the government, but an order invalidating the legislation of parliament must be confirmed by the Constitutional Court.

In addition, there are specialist courts to deal with certain specific issues. Examples of these courts are the High Court having Admiralty Jurisdiction, land claims court, court for income tax appeals, commercial court, labour and labour appeal courts, competition appeal court, children's court, maintenance court, family court, small claims court, equality court and environmental court.

3 Economic Environment

According to the South Africa yearbook 2002/03, compiled, edited and published by the Department of Government Communications and Information Systems, growth in total real gross domestic product accelerated from 0.8% in 1998 to 2.1% and 3.4% during 1999 and 2000 respectively. The weakening of the international economy was reflected in a slow-down of growth during 2001, to 2.2%. Generally, the country is self-sufficient and has the following characteristics:

3.1 Mining and industry operate mainly in accordance with free market principles. State control exists, directly or indirectly, in regard to railways, harbours and airports. There are national suppliers of electric power, radio and television broadcasting and telecommunication services. Recently, there has been a substantial degree of deregulation and some privatisation and restructuring of state-owned enterprises. More is anticipated.

3.2 The country has an excellent physical infrastructure - good railways, excellent roads, reasonably priced electric power, sufficient water for industrial use, a well-developed road transport industry including links with a number of African countries and a general availability of land. Internal airways are good and the country has established international air links with most major foreign cities through its national carrier, South African Airways, and a number of foreign airlines.

3.3 South African industry is able to produce most of the requirements of Southern Africa and many licences to manufacture are held by local businesses from overseas principals. The market is, however, small in comparison to European and US standards and in many instances a single enterprise is capable of satisfying the entire needs of the country with its products. There is a substantial need for exports. Decentralisation benefits are available to industries which base themselves away from main centres.

3.4 The mining industry is probably the most highly developed in the world and a substantial variety of minerals are extracted. The industry suffers from price fluctuations due to shifts in world demand for mining products, and also from the absence, in many cases, of beneficiation of minerals before export. The Mineral and Petroleum Resources Development Act, 2002 seeks to recognise the right of the government to exercise sovereignty over all the mineral and petroleum resources in South Africa and to promote equitable access to South Africa's mineral and petroleum resources to all the people of South Africa.

3.5 South Africa profitably exports a wide range of agricultural products and by-products (fruit and wine being particularly significant) and is, in most respects, self-sufficient in agriculture. Recurrent droughts necessitate substantial imports of grain from time to time and in some years, surpluses result in exports at a loss. The agricultural industry has a number of "Control Boards" which regulate the marketing of certain products, but some deregulation is taking place.

3.6 Exports from and imports into South Africa are comparatively unrestricted and currency is generally available to pay for imports.

3.7 The country has a well-developed financial infrastructure including active money markets, capital markets and financial markets. Listed shares and debentures, and options on those shares and debentures are traded on the JSE Securities Exchange South Africa (JSE), futures and options on those futures are traded on the South African Futures Exchange (SAFEX) and bonds are traded on the Bond Exchange of South Africa (BESA). Alt^{x}, the Alternative Exchange, a division of the JSE, has recently

been developed by the JSE as a securities exchange which focuses on small and medium businesses. There are many well-established commercial, merchant and investment banks, both domestic and international. The JSE has undergone a process of deregulation and in 1995 its members approved far-reaching measures to restructure the JSE, including the admission of corporate members with limited liability and the ownership of members by non-stockbrokers which enables, inter alia, banks to operate stock broking businesses. Following the closure of the open outcry trading floor in June 1996, an order driven, centralised, automated trading system known as the JSE Equities Trading (JET) system was introduced, together with dual trading and negotiated brokerage. With the introduction of STRATE (Share Transactions Totally Electronic), equities traded on the JSE are settled electronically. Paper share certificates are in the process of being replaced with electronic records of ownership. All information relating to a listed entity is communicated through SENS (Stock Exchange News Service). There is also a thriving Over the Counter (OTC) market in financial instruments and commodities.

3.8 In the labour market most of the skills required for the operation of a business are readily available, however, there are shortages of skills in many technical fields. There is a gross over-supply of unskilled labour and accordingly, a very high level of unemployment. Should the economy grow materially in future years, there will be a greater shortage of skilled labour. However, the skills development strategy of the government is focussing on the development of skills in all areas. Trade unions are active and operate within a sophisticated labour law system, which is discussed in more detail in Chapter VII (Employment Law).

3.9 Customs and excise duties are imposed on most imports.

3.10 There is an independent South African Reserve Bank (central bank) whose governor is appointed by the State President.

3.11 The unit of currency is the Rand (R) which is divided into 100 cents. An exchange control system, once very rigid, but gradually being relaxed, is dealt with in more detail in Chapter IV (Trade and Investment Regulations).

3.12 There are several governmental and non-governmental organisations involved in assisting the establishment of new businesses, and in the funding of projects and schemes among disadvantaged communities. These include the Industrial Development Corporation (IDC), the Small Business Development Corporation (SBDC), the Development Bank of Southern Africa (DBSA) and the National Business Initiative. Two business organisations were recently formed to unite black and white business organisations, known as Commerce and Industry of South Africa (Chamsa) and Business Unity South Africa (Busa). Chamsa consists of the National African Federated Chamber of Commerce (Nafcoc), the South African Chamber of Business (Sacob), the AHI (formerly Afrikaanse Handelsinstituut) and the Foundation for African Business and Consumer Services (Fabcos). The 4 chambers will retain their independence and structures. Busa is a standalone entity.

3.13 Black Economic Empowerment (BEE) is a central part of the South African government's economic transformation strategy. The formulation of policy and legislation to achieve BEE has been driven by the Office of the Presidency, together with the Department of Trade and Industry. BEE has a number of components which aim to increase the number of black people and/or historically disadvantaged individuals (HDI) that manage, own and control the country's economy, and to decrease racially-based income inequalities.

4 Social Considerations and Sensitive Areas

South African society is characterised by marked imbalances in various fields. This has, and will continue to have, an influence on politics and economics. The following factors need to be considered in assessing investment possibilities:

4.1 Despite considerable government allocations, there is a severe shortage of schools and teachers in disadvantaged communities. Major steps to reform the education system have been taken by the Minister of Education.

4.2 There is a critical shortage of low cost housing. Government is making concerted efforts to address this issue, which should, in addition to supplying houses, lead to increased work in the construction industry and thus, to greater employment.

4.3 Many of those in permanent employment enjoy pension schemes and medical aid cover. Many employers pay or contribute to pension schemes and medical aid programmes. Public hospitals and state medical care are available for those who do not belong to medical aid schemes. Modest unemployment benefits are paid out of a government administered employment insurance fund, but only for those who have been employed and have contributed to that fund. An old age pension is paid to those of 60 years of age and over, subject to a means test.

4.4 South Africa still has a crime problem. However, the National Crime Prevention Strategy of the government is beginning to make an impact and serious crime levels are continuing to decrease or stabilise.

4.5 HIV/AIDS is one of the greatest challenges for both government and business. Government, business and non-governmental organisations have a number of programmes to combat the spread and effect of this disease. These are now being supported by the roll-out of anti-retroviral treatment programmes.

4.6 The labour laws which are applicable in South Africa are discussed in some detail in Chapter VII (Employment Law). These are sophisticated and largely based on practices in Western Europe and the United States. There is a strong trade union movement which has traditionally been much politicised, but is now less so in view of the country's political changes. Unions are tending to become more focused on work-related matters. Productivity is still a very sensitive issue, but the move away from the state control of some industries, plus the present tough economic climate, has forced companies to be more competitive. There have been a number of collective agreements linking wage increases to productivity, in particular in the mining industry. Safety in the work place is also becoming a key issue and is regulated at present by the Occupational Health and Safety, 1993 and the Mine Health and Safety Act, 1996. Because of the complexity of the labour relations laws, potential investors should seek professional advice in regard to specific situations.

4.7 The relatively newly enacted environmental and water legislation (both national and provincial) is having a profound impact on the South African investment scene. Accordingly, environmental issues and possible liabilities are becoming increasingly important considerations when contemplating an investment decision. Regulations dealing with environmental issues are being updated and brought into line with those in Europe and USA.

4.8 Except for certain basic foodstuffs and petroleum products, there is no price control system operating in South Africa. In the labour field there tend to be collective and statutory agreements regulating minimum wage levels.

4.9 Apartheid contributed to an economic imbalance amongst South African citizens. Black Economic Empowerment (BEE) is an essential part of the government's economic transformation strategy. The Broad-Based Black Economic Empowerment Act, 2004, which was promulgated in January 2004, is the enabling legislation for BEE. The Act introduces certain mechanisms by which the BEE status of enterprises in the public or private sector will be evaluated. The Act provides for the development of business sector-specific transformation charters and the government will use a generic "scorecard" to measure progress in BEE by both enterprises and sectors of economic activity.

5 International Relationships

The process of political change in South Africa has meant that the country has had a particular role to play in the arena of international relations. South Africa's foreign policy objectives are linked to its domestic objectives as a developing nation - focus has been placed on the promotion of human rights, the alleviation of poverty, the prevention of conflict and most particularly on the advancement of sustainable development. South Africa is regarded as one of the leading voices on the African continent and has been involved in a series of initiatives at both a political and economic level to promote and advance African interests and peace in Africa, including being a founder member of the New Partnership for Africa's Development (NEPAD). South Africa is also a prominent member of several international organisations such as the United Nations, the Commonwealth and the Non-Aligned Movement and has established diplomatic relations with over 150 nations.

SOUTH AFRICAN REPRESENTATIVES ABROAD	TOTAL
Embassies/ High Commissions	76
Consulates/ Consulates General	12
Honorary Consulates	54
Other (e.g. Liaison Office)	4
Non-resident Accreditation	101
International Organisations	7

FOREIGN REPRESENTATION IN SOUTH AFRICA	TOTAL
Embassies/ High Commissions	107
Consulates/ Consulates General	53
Honorary Consulates	7
Other (e.g. Liaison Office)	4
Non-resident Accreditation	15
International Organisations	23

5.1 South Africa and the United Nations

South Africa was a founder member of the United Nations (UN) in 1954 although, for political reasons, it did not have voting rights in the General Assembly between 1970 and 1994. South Africa has participated fully since 1994, contributing to international organisations, treaties and conventions on global policies. It has also been a member of several working groups in the General Assembly dealing with the reform of the UN and the restructuring of the Security Council. South Africa has also been elected to several bodies within the UN which focus on issues of particular concern such as the Commission on Human Rights, the Commission on the Status of Women, the Educational, Scientific and Cultural Organization, the Executive Board of the UN Development Programme (UNDP) and the UN Population Fund (UNPF), amongst others.

South Africa hosted the UN World Summit on Sustainable Development (WSSD) in Johannesburg during 2002 and hosted the UN World Conference against Racism, Racial Discrimination, Xenophobia and related intolerance in Durban in 2001.

South Africa is also a member of the Non-Aligned Movement (NAM), which comprises 115 of the UN member states which are considered developing nations.

5.2 South Africa and Africa

The major area of international relations on which South Africa has focused in recent years is the "African Renaissance", aimed at improving the position of Africa in the international arena to the benefit of all Africans and conflict resolution in Africa.

South Africa is a member of the African Union (AU) which replaced the Organisation of African Unity (OAU) in 2001 as the main multilateral body in Africa. The objectives of the AU are essentially the political and economic advancement of African countries and the strengthening of relations between the nations of Africa. The African Economic Community (AEC) was established under the auspices of the OAU to focus on the development of African economies, their integration, the establishment of a framework to achieve such development on a continental scale and the co-ordination of economic policy. The establishment of the AU has seen intensified efforts to implement these objectives of the AEC.

South Africa has been influential in promoting initiatives such as NEPAD, which has been mandated by the AU. NEPAD provides a comprehensive, integrated strategic framework for the socio-economic development of the continent. It has been important in placing a common African agenda and perspective before the international community. South Africa has brokered a peace initiative in Rwanda and has facilitated similar initiatives in Central Africa and in the Democratic Republic of Congo.

Within the Southern African Development Community (SADC) which comprises South Africa and its closest neighbours, Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe, there is a commitment to diplomatic, economic and security co-operation on a very close level. Focus is also placed on the adherence by SADC countries to human rights and democratic principles and on the preservation of regional stability and solidarity. The SADC Trade Protocol is aimed at the liberalisation of trade within the region, increasing the efficiency of production, improving the climate for investment, the enhancement of economic development, diversification and industrialisation and establishing a Free Trade Area for the region. On an even closer regional level, South Africa, Namibia, Botswana, Swaziland and Lesotho signed a Southern African Customs Union (SACU) agreement in October 2002 which replaced the 1961 SACU agreement. The agreement provides for common import and excise duties.

5.3 South Africa and the European Union (EU)

Since 1994 the EU has been increasingly involved in South African affairs through the provision of aid, as a trading partner and as a foreign investor. South Africa is a signatory to the Cotonou Partnership Agreement which provides the basis for co-operation between the EU and the African, Caribbean and Pacific (ACP) states. It is an active participant in the ACP-EU Joint Parliamentary Assembly (JPA). On a bilateral level, South Africa and the EU have finalised a Trade, Development and Co-operation Agreement (TDCA) which governs the parties' trade relations and co-operation on development. Most importantly, the TDCA provides a tariff liberalisation schedule for agricultural and industrial products and it also deals with intellectual property rights, competition policy and Rules of Origin, as well as co-operation between the EU and South Africa in the fight against crime across international borders. The ratification of the TDCA by the 15 member states is still ongoing but the trade related articles of the agreement are provisionally applied.

5.4 South Africa and the United States of America (USA)

Bilateral relations between South Africa and the USA are focused primarily on trade and investment. The USA is South Africa's single largest trading partner and total trade between the two countries continues to expand. The USA African Growth and Opportunity Act (AGOA), Title 1 of the Trade and Development Act, 2000, is a vehicle to promote the opening of African economies and the building of free markets through the provision of incentives to eligible countries. Such incentives include preferential access to the US market for nations which do not have Free Trade Agreements with the USA, improved access to US credit and technical expertise and dialogue on trade and investment in the US-Sub-Saharan Africa Trade and Economic Forum. In terms of AGOA, South Africa, as an eligible country, has been able to expand its US export market substantially under the General System of Preferences (GSP) programme. South Africa and the USA are in the initial stages of negotiating a bilateral free trade agreement.

5.5 South Africa and "South-South" relationships

South Africa is very involved in fostering relations and creating economic ties with other developing nations and has participated in several "south-south" co-operation initiatives. Trade between South Africa and the People's Republic of China (PRC) has escalated since diplomatic relations were established between the two countries in 1998. Likewise, South Africa trades extensively with India, as well as participating in a number of strategic partnership initiatives in the technological field. South Africa is also pursuing close co-operation with the Mercosur trading bloc, which consists of Argentina, Brazil, Paraguay and Uruguay (with Bolivia and Chile having associate status). A framework agreement for the creation of a Free Trade Agreement between South Africa and Mercosur was signed in December 2000.

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BLACK ECONOMIC EMPOWERMENT

1 Background

Black Economic Empowerment (BEE) is a central part of the South African government's economic transformation strategy. The formulation of policy and legislation to achieve BEE has been driven by the office of the Presidency, together with the Department of Trade and Industry (DTI).

While BEE has been part of government policy since 1994, there was an acknowledgement that the approach lacked an overall strategic framework and focus. In March 2003, DTI released a Policy Document setting out the government's proposed strategy for broad-based BEE in South Africa. The Policy Document defines broad-based BEE as:

"An integrated and coherent socio-economic process that directly contributes to economic transformation of South Africa and brings about significant increases in the numbers of black people [being a generic term meaning persons previously classified as Africans, Coloureds and Indians] that manage, own and control the country's economy, as well as significant decreases in income in equalities".

The three core elements of BEE are:

- Direct empowerment through ownership and control of enterprises and assets;
- Human resource development and employment equity;
- Indirect empowerment through preferential procurement policies aimed at ensuring that black people benefit from government tenders.

The central legislation relating to BEE is the Broad-Based Black Economic Empowerment Act, which was signed into law in January 2004. This will be the enabling legislation for BEE.

2 Transformation Charters

Several industries have taken the initiative to set their own specific targets related to the three core areas of BEE, together with other industry-specific targets, such as in the financial services industry, where targets have been set relating to BEE financing and banking services to black persons in certain categories. These initiatives have been incorporated in transformation charters, which have been guided by government policy on BEE, and the generic scorecard to be included in the Broad-Based Black Economic Empowerment Act.

The transformation charters each contain a scorecard against which industry members will be measured on their BEE progress. The scores achieved will be important in tendering for government and private sector business, each of which will set certain levels of BEE achievement to be reached in order for the company concerned to be considered for the tender. Several industry charters have already been adopted and certain of the main charters are discussed in more detail below. A charter for the Information, Communications and Telecommunications industries is in the process of being negotiated and is expected to be finalised by July 2004.

Although there are certain BEE targets in the scorecards from which foreign-owned companies will be excluded (i.e. in the Financial Services Sector Charter), in reality foreign-owned companies will, for commercial reasons, need to be BEE compliant. The scorecards have a cascading effect, with each and every commercial enterprise (private and public) requiring a measure of BEE compliance, in order that they too can reach their BEE targets. There is accordingly strong political and economic pressure to be committed to and achieve the BEE targets envisaged in the transformation charters and the Broad-Based Black Economic Empowerment Act.

3 The Broad-Based Black Economic Empowerment Act

The salient features of the Act are as follows:

- The Act establishes an Advisory Council to advise the President on BEE;
- The Act empowers the Minister of Trade and Industry to issue Codes of Good Practice on BEE. These Codes will be taken into account by all organs of state in determining whether businesses qualify for licences, permissions, concessions or other authorisations in terms of the law, and for the development and implementation of a preferential procurement policy, according to the criteria set in the Codes;
- The Act provides for the development of sector-specific transformation charters. The petroleum and liquid fuels industry, the mining industry and the financial services industry, the tourism industry and the rail, bus, maritime transport and road freight industries have all adopted transformation charters. The information, communication and telecommunications industry and construction industry have commenced discussions to adopt specific charters;
- Government will use a common 'scorecard' to measure progress in BEE by both individual enterprises and sectors of economic activity. The common scorecard will be utilised where there is not already an industry scorecard (encapsulated in a transformation charter) in place. The scorecard will measure progress according to the three core elements of ownership, employment equity and indirect empowerment (i.e. procurement and service provider profile) and will allow for the benchmarking of individual enterprises and economic sectors. The scorecard will be utilised by organs of state whenever any licence or concession is granted, an asset or state-owned enterprise sold, a public-private partnership entered into, or any other economic activity engaged in.

4 The Three Core Elements of BEE

4.1 Ownership

The Codes of Good Practice and sector-specific charters to be developed in terms of the proposed enabling legislation will determine specific levels of black ownership that must be achieved within a set period in each sector. For example, the Mining Charter envisages 15% black ownership of mining industry assets within 5 years and 26% black ownership within 10 years.

Ownership is regarded as "equity" ownership, with the owner or shareholder assuming liability for profit and risk. The definitions of black enterprises set out in the Codes of Good Practice also require significant levels of management and executive board participation by black persons. Ownership alone does not in itself constitute empowerment, but must be viewed in conjunction with the other elements.

The sector-specific charters and government's BEE Policy Document also contain definitions of what constitutes BEE for the purposes of categorising the level of ownership and control in general.

An enterprise that is more than 50.1% black-owned and controlled, will be classified as a "black company", one that has between 25.1% and 50.1% black ownership and control will be classified as a "black empowered company", while enterprises with black ownership and control that is between 5% and 25% will be considered "black influenced".

4.2 Employment Equity

The enabling legislation with regard to employment equity is the Employment Equity Act, 1998, which requires enterprises to implement affirmative action measures to bring about an equitable representation of black people in all occupations, and at all levels of involvement over a period of time. Accelerated skills development also forms part of employment equity.

Certain designated employers, such as those who employ more than 50 people or who have an annual turnover which exceeds the scheduled amount in terms of the Act, or who are bound in terms of an agreement made under the Labour Relations Act, 2000, are required to prepare employment equity plans for implementation in their enterprise. The Employment Equity Act also contains monitoring and reporting requirements.

4.3 Preferential Procurement

Section 217(2) of our Constitution provides that organs of state may implement policies that prefer Historically Disadvantaged Individuals (HDIs) (this includes black people, women, youth, the disabled and rural communities) when contracting for goods or services. The enabling legislation is the Preferential Procurement Policy Framework Act, 2000.

This Act and the Regulations promulgated under it, regulate the allocation of government tenders by organs of state. This allocation is based on a preference points system in which a maximum of 10 or 20 points (depending on the size of the contract) out of 100 points can be allocated on the basis of contracting with an HDI and/or on the basis of specific goals set out in the regulations. The remaining 90 or 80 points, as the case may be, may be allocated on the basis of price alone.

A private enterprise's BEE status is determined according to its procurement from black companies, black empowered companies and black influenced companies in its own contracts for goods and services, as a proportion of its total procurement.

5 Sector-Specific Transformation Charters

5.1 The Petroleum and Liquid Fuels Industry Charter

This transformation charter was adopted in 2000. It was the first charter to be adopted and predates the Broad-Based Black Economic Empowerment Bill and the Mining and Financial Services Sector Charters. The industry has undertaken, among other things, to facilitate the transfer of 25% ownership and control of all facets of the industry to historically disadvantaged South Africans over a 10-year period. This charter also provides that the industry will subscribe to employment equity policies and training programmes and will adopt supportive procurement policies to facilitate and leverage the growth of historically disadvantaged South African companies.

5.2 The Mining Industry Charter

This charter was adopted in October 2002. The charter was adopted on the back of the empowerment objectives contained in the new Mineral and Petroleum Resources Development Act – see Chapter XII (Mining, Oil and Gas). The conversion of existing mineral rights held by mining companies into the new order rights established in terms of the Mineral and Petroleum Resources Development Act has been made contingent upon the attainment of the 5-year targets set out in the scorecard which forms part of the charter.

The stated intention of the charter is to undertake the transfer of 15% of the assets of the South African mining industry to HDIs by 2007 and to increase this to 26% by 2013. The approach of the charter in assessing compliance is flexible in that under-achievement in one area may be set-off against over-compliance in another area.

In terms of the charter, mining companies are expected to have reached a target of 40% black representivity at management level by 2007. In addition, the charter requires the mining industry to increase the participation of women in mining to 10%, to improve mineworkers' housing and nutrition and to allow miners the chance to be literate and numerate and to co-operate in the development of mining and rural areas.

5.3 Financial Services Sector Charter

This charter was adopted in October 2003. The Financial Services Sector includes banks, long- and short-term insurers, reinsurers, managers of collective investment schemes in securities, investment managers who manage funds on behalf of the public, including retirement funds, and members of any exchange licensed to trade equities or financial instruments in South Africa and entities listed as part of the financial index of a licensed exchange. This charter sets a minimum of 25% black ownership of the South African operations of each institution in the Financial Services Sector, measured at holding company level, by 2010, of which at least 10% must be directly owned by black persons. Only if this target is achieved, will the institution concerned be entitled to achieve the additional 15% threshold through direct or indirect black ownership. "Direct ownership" means ownership of an equity interest, together with control over all of the voting rights attached to that equity interest. "Indirect ownership" refers to an economic interest only and excludes the requirement for direct participation in voting rights. The charter has set the following additional targets:

- *Employment Equity*
  to have 33% black representation at board level (25% at executive level – board and management), 20%-25% at senior level, 30% at middle level and 40%-50% at junior level by 2008;
- *Procurement and Enterprise Development*
  50% of the value of all procurement from BEE companies by 2008 and 70% by 2014;
- *Access to Financial Services*
  by 2008, 80% of LSM 1-5 and 0.2% of after-tax profits per annum in consumer education;
- *Empowerment Financing*
  a minimum of R75 billion by 2014;
- *Skills Development*
  2.5% of payroll per annum on black employees;
- *Corporate Social Investment*
  0.5% per annum of after-tax operating profits.

5.4 The ICT Empowerment Charter

The ICT sector is currently negotiating an industry charter. The third working draft was published on 10 May 2004. It is hoped that the charter will be finalised by the end of August 2004. The BEE numerical targets in the draft ICT BEE scorecard are divided into two terms, namely the mid-term target range (2009) and the long-term target range (2014). Although the numerical targets are still being debated by the working group, equity ownership in the form of direct shareholding by black people is expected to be in the range of 25% - 35% for the mid-term target, and 25% - 51% for the long-term target, according to the third draft ICT Charter. One of the main issues still being debated is whether or not foreign-owned and controlled multinational ICT Charter enterprises will be subject to the BEE ownership and control targets that will form part of the ICT Charter's scorecard.

6 Financing BEE

The DTI's Policy Document setting out the current strategy for broad-based BEE in South Africa outlines the government's approach to financing for BEE. One of the main factors that has hampered broad-based BEE has been the low level of access to capital resources by black investors. These investors have had to rely heavily on external, highly geared funding, mainly from institutional investors, and the repayment of the borrowings has depended on the need for an inordinate growth in the equity value of the underlying investments. With high interest rates and volatile markets over the period from 1994 to date, little if anything has been left for the black investors. In the end, the equity has ended up with the financial institutions which put up the money in the first place and bore the risk.

The Policy Document states that while government has set aside funds to support the BEE process (R10 billion in the 2003/2004 budget) and will facilitate access to capital and collateral, commercial risk must remain with the private sector. The government intends giving a new mandate to the National Empowerment Fund (originally established to acquire and hold investments in state-owned commercial enterprises on behalf of HDIs) and is reviewing the roles of other development finance and support institutions (for example, the Industrial Development Corporation, which is a self-financing, state-owned development finance institution). Financing mechanisms will include grants, guarantees, incentive schemes, loan and equity financing.

Given the difficulties that many black investors have faced in accessing institutional finance and the risks associated therewith, a significant number of the more recent empowerment transactions in South Africa have been

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TRADE AND INVESTMENT REGULATIONS

1 South Africa's Trade Policies

Developments in South Africa's trade policy have been significantly influenced by South Africa's continuing reintegration into the world economy, the global move from protectionism to trade liberalisation and the need to move from an isolated import substitution regime to a competitive, export focused, free market economy.

1.1 International Trade Arrangements

South Africa is a signatory to a range of multilateral and bilateral trade or trade-related agreements. It is also the beneficiary of a variety of preferential trading arrangements which other countries or trading blocks have put in place.

South Africa is a founder member of the General Agreement on Tariffs and Trade (GATT), and is a member of the World Trade Organisation (WTO), the basis of the multilateral trading system and the successor to GATT. South Africa is a signatory to all WTO Agreements dealing with a range of specific trade issues (for example, dumping, subsidies, intellectual property issues, services and dispute resolution) and has also concluded a number of bilateral trade agreements conferring Most-Favoured-Nation (MFN) status.

In 2000 South Africa and the European Union (EU) concluded the South Africa-EU Free Trade Agreement which aims to promote trade and co-operation between the (currently) 15 EU countries and South Africa. This bilateral trade treaty with the EU affords favourable treatment to South African exports to EU countries. The Agreement is structured so as to lower tariffs to zero on 85% of imports from the EU by 2012, resulting in a steady decline in duties collected on EU goods. The Agreement equally provides for the abolition of EU import tariffs on a large majority of South African imports within the same period but at an accelerated rate. The Agreement also requires further steps to be taken, no later than five years after conclusion, to aid the process of liberalisation of reciprocal trade.

A similar Free Trade Agreement is currently being negotiated between the United States of America and South Africa and it is expected that benefits similar to those achieved by the Agreement with the EU will be achieved. Other Free Trade Agreements are anticipated with a variety of countries, notably in the Middle and Far East.

South Africa is also a beneficiary of the the African Growth and Opportunity Act (AGOA) which the United States of America signed into law in 2000. The Act offers real incentives in the form of substantially free market access to the United States for African countries which continue their efforts to open their economies and build free markets. AGOA has more recently been amended (AGOA II) and substantially expands preferential access for imports from beneficiary Sub-Saharan countries, South Africa included.

Furthermore, some industrialised countries (the EU and the United States for example) have made available to South Africa their Generalised System of Preferences (GSP), giving a number of the country's export products preferential access to their markets provided that there is compliance with the rules of origin. South Africa is also a beneficiary under the EU's Lome Convention which provides a range of trade advantages, technical assistance, cooperation and funding to a grouping of African, Caribbean and Pacific countries.

The current Doha Round of the WTO negotiations known as the "Development Round" emphasises the WTO's commitment to continue to make positive efforts designed to ensure that developing countries, and especially the least-developed countries, secure a share in the growth of world trade commensurate with the needs of their economic development. South Africa is playing a significant role in maintaining the momentum of the negotiations in order to ensure a favourable result not only for South Africa but for the developing world too.

1.2 Regional Commitments

South Africa, together with Botswana, Lesotho, Namibia and Swaziland, is a member of the Southern African Customs Union (SACU) with common rates of duty applying to products entering any of these countries from outside of SACU and generally allowing free movement of products within SACU without the incurring of customs duties.

South Africa is also a member state of the Southern African Development Community (SADC) with Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe. The ultimate objective of SADC is to build a region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region. The implementation of a (free) Trade Protocol for the SADC is envisaged and the region hopes to attain a free trade area by 2008, although progress towards this goal has, to date, been slow. The ultimate objective is to enable SADC to effectively address the developmental needs of the region and to position the region to meet the challenges of the dynamic, ever changing and complex globalisation process, as well as to take advantage of the opportunities offered by globalisation.

1.3 National legislation

The Board on Tariffs and Trade Act, 1986, and the Import and Export Control Act, 1963, have been replaced by the International Trade Administration Act, 2002 (the ITA Act) which came into force on 1 June 2003.

The ITA Act was drafted, in part, to meet South Africa's international obligations in terms of the WTO. The Board on Tariffs and Trade has been replaced by the International Trade Administration Commission (ITAC). ITAC was established to foster economic growth and development in order to raise incomes and promote investment in South Africa and within SACU by establishing an efficient and effective system for the administration of international trade. It is this body that also conducts, for example, anti-dumping and countervailing investigations and makes recommendations to the Minister of Trade and Industry.

1.4 Trade Defence Mechanisms

South Africa has the full range of WTO-permitted remedies to counteract the effects of unfair trade on domestic industries. The most important of these is anti-dumping remedies, followed closely by anti-subsidy and safeguard measures.

The trade defence investigations and the ultimate remedies imposed are through ITAC, acting under the auspices of the Department of Trade and Industry. In such proceedings ITAC acts on behalf of the SACU industry rather than for South African industries only. The investigations are sanctioned not only by South African legislation (notably the ITA Act and the Customs and Excise Act), but also by WTO principles (for example, the WTO Agreement on Dumping) and more detailed Regulations (for example the Anti-Dumping Regulations published in November 2003. Similar regulations for anti-subsidy proceedings are anticipated).

1.5 Import Policy – Customs

Pursuant to WTO commitments, South Africa has substantially reduced its import tariff levels, cutting back tariff lines from approximately 80 different levels to 6 levels and replacing all remaining quantitative control and formula duties with ad valorem duties.

ITAC will, in addition, be responsible for the continued control of import and export of goods and amendment of customs duties, and for associated matters. As a priority, ITAC will address the complexity of the tariff system. A process is already underway which will result in further simplification of the tariff structure.

The Customs and Excise Act, 1964 (the CEA) governs the imposition of customs and excise duties, as well as various other charges imposed by the state on goods imported into the country and manufactured in the country for local consumption or use. These charges are contained in the schedules to the Act, with Part 1 of Schedule 1 detailing the various customs duties. Part 1 of Schedule 1 to the CEA has been constructed in accordance with the Harmonized Commodity Description and Coding System (Harmonized System) developed by the Customs Co-operation Council (now the World Customs Organisation), a supranational body established by a multi-lateral agreement of which South Africa is a signatory.

The Harmonized System was designed in order to ease international trade and trade negotiations by systematically classifying and numbering all products that are traded internationally. The system is comprehensive and is regularly updated to include new technologies and products. While the primary use of the system is for customs purposes, a number of countries, including South Africa, have also utilised it as the basis for internal charging purposes, such as excise duties.

1.6 Export Policy

South Africa actively encourages exports and provides assistance and information to that end, although within the limits required by the WTO. Few restrictions on exports are imposed. However, trade-sensitive products are strictly controlled normally by means of an export ban or only on successful application for export permits.

2 Competition / Anti-trust

Since the coming into operation of the Competition Act, 1998 (the Act) in September 1999, competition / anti-trust law and analysis has become increasingly important for lawyers and business persons operating in South Africa and for those intending to invest or conduct business in South Africa.

2.1 The Aims of the Act

In accordance with section 3 of the Act, the Act applies to all economic activity within, or having an effect within, South Africa. The Act aims to promote and maintain competition in South Africa through provisions relating to merger control, restrictive practices and the abuse of dominance (control of monopolies). However, the objects of the legislation are not merely limited to the promotion of competition but include public interest objectives.

2.2 Cartels / Prohibited Practices

Chapter 2 of the Act prohibits 3 categories of conduct: restrictive vertical practices, restrictive horizontal practices and the abuse of a dominant position. The first deals with conduct perpetrated by firms in a vertical relationship (such as suppliers and customers), the second by firms in a horizontal relationship (competitors) and the third deals with unilateral conduct by one firm (that is construed to be dominant in the market).

Certain "per se" / "hard-core" anti-competitive conduct is prohibited outright by the Act. Price fixing, dividing markets, collusive tendering and minimum resale price maintenance are restrictive practises that are per se prohibited. It is a per se abuse of dominance to charge customers an excessive price and to refuse a competitor access to an essential facility when it is economically feasible to do so, as well as to engage in certain specified exclusionary acts. In relation to anti-competitive conduct that is not per se prohibited by the Act, a "rule of reason" analysis is applied. Where an investigation involves a "rule of reason" analysis, in order for the conduct to be found to be prohibited, the conduct must substantially prevent or lessen competition and must not be justifiable on the basis of technology, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of that conduct.

2.3 Mergers and Merger Notification

The test for determining if a transaction is a notifiable merger has two main components. Firstly, it has to be considered if the transaction constitutes a merger, as defined in the Act. Section 12 of the Act defines a merger broadly and states that a merger occurs when "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". Secondly, it has to be considered whether the parties to the transaction meet the threshold values of assets and turnover in, and/or attributable to, South Africa. Notification of a merger is compulsory when the thresholds of turnover and assets of the firms involved are met or exceeded.

In short, a merger is required to be notified and approved as an "Intermediate Merger" in terms of the Act if:

- the combined annual turnover in, into or from South Africa of the acquiring and target firms equals or exceeds R200 million; or
- the combined assets in South Africa of the acquiring and target firms equals or exceeds R200 million; or
- the annual turnover in, into or from South Africa of the acquiring firm plus the assets in South Africa of the target firm equals or exceeds R200 million; or
- the annual turnover in, into or from South Africa of the target firm plus the assets in South Africa of the acquiring firm equals or exceeds R200 million; and
- the annual turnover in, into or from South Africa of the target firm equals or exceeds R30 million; or
- the asset value of the target firm equals or exceeds R30 million.

The threshold for a Large Merger is determined on the same basis as that set out above, except that the R200 million figure is replaced with R3,5 billion and the R30 million figure is replaced with R100 million.

Small Mergers are those which do not meet the thresholds and may be implemented without notification, unless the Competition Commission is of the opinion that the Small Merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. The Competition Commission may call upon the parties to notify a Small Merger within a period of 6 months after it is implemented.

In considering a merger which is required to be notified, the enquiry by the competition authorities is essentially two-pronged:

- after determining the relevant market/s, an assessment is made as to whether the merger is likely to "substantially prevent or lessen competition", taking account of a range of traditional economic and business efficiency factors;
- whether the merger may be justified on public interest grounds is considered by assessing the effect the merger will have on a particular industrial sector or region, employment, the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive, and the ability of national industries to compete internationally.

A notifiable merger in South Africa may not be implemented without the necessary approvals from the Competition Commission and/or the Competition Tribunal.

2.4 Merger Review Period Implementation

As noted above, 2 categories of notifiable mergers exist (from a threshold perspective), namely Intermediate Mergers and Large Mergers. The review process or periods in South Africa for these mergers are:

2.4.1 Intermediate Mergers

The review process or periods for Intermediate Mergers comprises an initial waiting period of 20 business days. This period may be extended by a single period not exceeding 40 business days. If upon the expiry of the initial period of 20 business days the Competition Commission has not extended the period or issued a decision, the Intermediate Merger will be regarded as having been approved. Although the Competition Commission has a maximum of 60 business days to review an Intermediate Merger, unproblematic Intermediate Mergers are normally approved within a period of 4 to 6 weeks, although the Competition Commission is starting to be more expedient. In addition, if grounds for urgency exist, the Competition Commission is prepared to consider expediting matters.

2.4.2 Fast Track Procedure

The Competition Commission has in place an informal "fast track" procedure in circumstances where a merger clearly does not raise concerns. This is likely to be the case if the merger has no (horizontal or vertical) overlap, a low combined market share (below 15%) or a low Herfindahl-Hirsch Index, as well as if the merger involves a new entrant, fixed property, firms in liquidation (failing firms) and/or management buy outs. If the fast track procedure is accepted by the Competition Commission, mergers are generally approved within 10 to 20 business days.

2.4.3 Large Mergers

In the case of Large Mergers, the Competition Commission must within 40 business days forward to the Competition Tribunal a written recommendation, with reasons, regarding the merger. This period is extendable with the consent of the Competition Tribunal by periods of no more than 15 business days at a time. If upon the expiry of the period of 40 business days (or any extended period of time granted by the Competition Tribunal), the Competition Commission has neither applied for a further extension nor forwarded a recommendation to the Competition Tribunal, any party to the merger may apply to the Competition Tribunal to begin the consideration of the merger without a recommendation from the Commission.

When the Competition Commission has forwarded a recommendation to the Competition Tribunal, the Registrar of the Competition Tribunal must schedule a date within 10 business days for either the beginning of the hearing of the matter or a pre-hearing conference. After completing its hearing in respect of a merger, the Competition Tribunal must issue its decision within 10 business days after the end of the hearing and within 20 business days thereafter issue written reasons for its decision. It is normally prudent to allocate about 3 months for the approval of an unproblematic large merger. If grounds for urgency exist, the Competition Commission and Competition Tribunal are prepared to consider expediting matters.

2.5 Enforcement

The Act establishes the Competition Commission, Competition Tribunal and Competition Appeal Court as independent bodies to enforce the legislation.

2.5.1 Competition Commission

Other than with regard to Intermediate Mergers, the Competition Commission performs an investigative and prosecutorial function. The Competition Commission is also empowered to grant or deny exemptions.

2.5.2 Competition Tribunal

The Competition Tribunal is the 'judicial' arm of the regulatory framework. It is headed by a Chairperson who is nominated by the Minister of Trade and Industry and appointed by the President. This body considers exemption appeals, analyses Large Mergers and considers any appeals in regard to Intermediate Mergers. Proceedings before the Competition Tribunal take the form of a public hearing with legal representation being permitted and interested parties with locus standi being entitled to participate. Organised labour also has the right to be heard.

2.5.3 Competition Appeal Court

The Competition Appeal Court may consider any appeal from, or review of, a decision of the Competition Tribunal, confirm, amend or set aside a decision or an order that is the subject of appeal or review by the Competition Tribunal and make any other appropriate order.

2.6 Penalties for Non-Compliance

Remedies created by the Act are largely civil in nature and include the imposition of administrative penalties. If a merger is implemented in contravention of the Act, divestiture may be ordered, in addition to an administrative penalty. A contravention of the "rule of reason" provisions of the Act referred to above will not expose firms to an administrative penalty unless the conduct in question is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice. The provisions that are "per se" prohibited will, however, immediately expose firms to an administrative penalty when a contravention is found by the Competition Tribunal to have taken place. An administrative penalty may not exceed 10% of a firm's annual turnover in South Africa and its exports from South Africa, during the firm's preceding financial year. The Act permits a person to claim civil damages resulting from a contravention of the Act.

3 Exchange Controls

The Exchange Control Department of the South African Reserve Bank (the SARB) imposes strict exchange controls upon South African residents and currency is not transferable by a South African resident into or out of South Africa except in terms of the Exchange Control Regulations made in terms of the Currency and Exchanges Act, 1933 (regulations). The South African government remains committed to the gradual relaxation of exchange controls.

3.1 Shares and Assets Acquired by Non-Residents

A non-resident may acquire any South African shares or other assets.

Under the regulations, no person is entitled to transfer South African shares from or into the name of a non-resident without the approval of the SARB. The approval is a mere formality which happens as a matter of course after the fact and is evidenced by the endorsement of the share certificate in the name of the non-resident with the words "non-resident". This endorsement ensures that sale proceeds of the shares, which belong to a non-resident, can be transferred abroad. In so far as listed shares are concerned, these are dematerialised and are freely tradable, subject to the brokerages or South African sellers (through their CSDPs) ensuring that full consideration is received from South African non-residents for the sale of such shares.

Any income, such as dividends and interest, derived from the South African shares or assets is freely transferable by the non-resident and may be remitted out of South Africa into any foreign currency at prevailing exchange rates. Where a non-resident sells any South African asset, the proceeds of the sale can be transferred on the same basis into any foreign currency at prevailing exchange rates. Any Rand balance held by a non-resident in a South African bank is no longer subject to exchange control and may be utilised in South Africa or transferred into any foreign currency on the same basis.

3.2 Transactions with Residents

No foreign currency commitments may, in terms of the regulations, be entered into by residents without prior approval from the SARB. However, there are a number of cases in which dealers authorised by the SARB to deal in foreign exchange (most of the main commercial banks in South Africa being authorised dealers) are authorised by the SARB to remit funds abroad without specific permission from the SARB. These include the remittance of funds abroad for the purposes of:

- the payment for imported goods;
- the remission of dividends declared by a South African company;
- interest earned on loans to a non-quoted South African company;
- profits distributed by a non-quoted South African company;
- the payment of directors' fees; and
- the payment of legal and other fees (i.e. advertising fees).

Although approval from the SARB is not required for the funds to be remitted abroad in certain instances (as indicated above),

authorised dealers are entitled to request the production of documentary evidence in respect of the relevant payment.

Agreements by South African companies to pay royalties, licence and patent fees to non-residents in respect of the local manufacturing of a product, are subject to the approval of the Department of Trade and Industry. The Department of Trade and Industry will communicate its decision to the licencee, or the SARB where applicable (this depends on the terms of the agreement), which will enable an approach to a commercial bank directly to transfer the royalty payments. Agreements by South African companies to pay royalties, licence and patent fees to non-residents where no local manufacturing is involved, are subject to the approval of the SARB. Any advance payments of royalties, even if such payments may be recouped from future royalties payable, are invariably declined. The SARB is also not in favour of minimum payments should the royalty not reach a certain amount during a specific period - the royalty payable should be in proportion to the production and sales achieved.

Royalty payments are usually calculated as a percentage of the manufacturing cost or a percentage of the net ex-factory selling price, excluding any taxes such as value added tax. A distinction is made between royalty agreements covering consumer goods and those for intermediate and capital goods. For consumer goods a royalty of up to 4% of the ex-factory selling price is regarded as acceptable. In the case of intermediate and capital goods a payment of up to 6% may be considered favourably. The following factors, inter alia, are taken into account when considering an application for approval:

- the strategic importance of the product;
- the economic importance of the product in the furthering of industrial development by means of import replacement, export promotion or expansion of the domestic market and its contribution to national income and employment;
- the new technological know-how entering the country through the manufacturing process in question;
- the domestic content of the particular product;
- the financial interest of the licensor in the local venture;
- the duration of the contract; and
- the nature of any restrictions contained in the agreement, i.e. on the exportation of South African products.

3.3 Local Borrowings by Non-Residents and “Affected Persons”

Non-residents and "affected persons" may obtain financial assistance in South Africa subject to certain restrictions. An affected person is a body corporate, foundation, trust or partnership operating in South Africa, or an estate in respect of which:

- 75% or more of the capital, assets or earnings thereof may be utilised for payment to, or to the benefit in any manner of, a non-resident; or
- 75% or more of the voting securities, voting power, power of control, capital, assets or earnings thereof, are directly or indirectly vested in, or controlled by or on behalf of, a non-resident.

Non-residents may borrow up to 300% of the Rand value of funds introduced from abroad and invested locally.

Non-resident wholly-owned subsidiaries may borrow locally up to 300% of the total shareholders' funds (i.e. share capital, premium, shareholders' loans, reserves, realised capital profits). The formula for calculation of local borrowing is as follows:

$$100\% + \left(\frac{\%\ \text{South African interest}}{\%\ \text{Non-resident interest}}\right) \times \frac{300\%}{1}$$

The effect of local participation in non-resident controlled entities is that the restrictions imposed by the SARB are applied more liberally. Therefore, the greater the foreign shareholding the smaller the amount which may be borrowed locally.

3.4 South African Corporates

A South African resident requires the approval of the SARB in order to borrow or invest offshore. In this regard, the SARB permits South African corporates to transfer from South Africa up to R2 billion per new investment into any African country and up to R1 billion per new investment elsewhere. South African corporates may also use part of their local cash holdings to finance up to 20% of approved new foreign investments, where the cost of these investments exceeds the current limits, and to repay up to 20% of outstanding foreign debt raised to finance foreign investments. However, the total amount of South African funds exited during the first 2 years of the loan’s life must not exceed R1 billion per project and R2 billion in the case of African investments. In addition, South African corporates may apply to make use of corporate asset/share swaps to finance foreign investments. A foreign subsidiary of a South African company can retain income earned offshore for expansion abroad.

3.5 South African Institutional Investors

South African retirement funds, long-term insurers, collective investment scheme management companies and investment managers are allowed to transfer funds from South Africa for investment abroad. The exchange control limit on foreign portfolio investment by institutional investors depends on the total retail assets of an institution. The foreign exposure of retail assets may not exceed 15% in the case of retirement funds, long-term insurers and investment managers registered as institutional investors for exchange control purposes, and 20% in the case of collective investment scheme management companies. During 2004, a policy framework will be finalized to promote South Africa as a regional financial center able to cater more fully to the needs of the African continent. It is envisaged that inward listings by African companies, institutions and governments should be encouraged through a special allowance for institutional investors, allowing them to invest up to an additional 5% of their total retail assets in African securities listed on the JSE Securities Exchange or the Bond Exchange of South Africa.

3.6 South African Individuals

Authorised dealers may allow South African residents who are individuals to invest abroad but subject to the following:

- the individual must be over the age of 18 years;
- the individual may transfer from South Africa a total amount of R750 000 (inclusive of amounts already transferred);
- prior to the transfer of any funds abroad, a completed “TAX CLEARANCE CERTIFICATE (IN RESPECT OF FOREIGN INVESTMENTS)” issued by the South African Revenue Service, must be presented to the SARB to confirm that the relevant individual is a taxpayer of good standing;
- income earned abroad (for example, the net proceeds (after deduction of any related costs) of the shares sold abroad, or dividends declared and paid in respect of those shares) must be repatriated to South Africa unless application has been made and approval has been granted for the income to remain abroad; and
- income earned abroad and own foreign capital introduced into South Africa by individuals resident in South Africa may be transferred abroad, provided the authorised dealer concerned is satisfied that the income and/or capital had previously been converted to Rand, by viewing documentary evidence confirming the amounts involved. The sale proceeds of South African assets received from non-residents and export proceeds are, therefore, not eligible for retransfer abroad by individuals resident in South Africa.

3.7 Foreign Listings in South Africa

It was announced in February 2004 that non-resident companies (i.e. those that are more than 75% foreign owned) will now be able to list on the JSE Securities Exchange and on the Bond Exchange of South Africa. The JSE already has in place a relationship with the London Stock Exchange, which allows for seamless trading between the two exchanges’ listed companies. This relaxation in our exchange control regulations means that South African financial markets will now be open to foreign companies to raise capital. It also means that South African residents will be able to access foreign owned companies directly through local markets, up to the normal foreign exchange limits. The details have not yet been finalized, but it is expected that foreign companies raising capital in South Africa will be restricted to the limits for exporting capital that apply to South African coporates, i.e. R2 billion in Africa and R1 billion elsewhere.

3.8 Employee Share Incentive Schemes

It is permissible for non-resident parent companies to implement their global share incentive schemes in their local subsidiaries or branch offices, provided that the local subsidiary or branch office obtains the prior approval of the exchange control authorities for the scheme as a whole. This approval will be required even if the scheme is an award scheme and accordingly no cash is payable for the shares. South African resident employees will be permitted to acquire shares in terms of an approved scheme up to their R750 000 individual investment limit (less amounts already transferred offshore) (see papagraph 3.6). If they wish to acquire shares in excess of this value, they will need to apply to the SARB for special approval, and if granted, the SARB is likely to impose conditions relating to the repatriation to South Africa of amounts in excess of R750 000, if the shares are sold.

The non-resident parent company is not required to register the share incentive scheme in South Africa in terms of the Companies Act, 1973.

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1 Methods of Investment

1.1 Making the Investment

There are a number of ways in which investments may be made by a foreigner or foreign-owned company in South Africa.

- 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. There are two kinds of companies in South Africa. The first is a public limited liability company which is required to have a minimum of 7 shareholders. The second is a private limited liability company which may have between 1 and 50 shareholders and in which the right to transfer shares is usually restricted and offers to the public for the subscription of shares or debentures are prohibited. There is no requirement that either shareholders or directors be South African citizens or residents. The methods of setting up these companies are discussed later in this Chapter. A company so formed can then become engaged in business by setting up a greenfield operation, buying an existing business or setting up in partnership or joint venture with a South African person or company.

- The investor can buy, or take over, the whole or some of the shares in an existing private or public company which has already established a business or will establish a business. Such shares can be held directly by the foreign investor. If this is done, the requirements of the Competition Commission referred to earlier in this Guide may have to be met, as well the requirements of the Securities Regulation Panel and the JSE Securities Exchange South Africa (where applicable).

- The investor can set up a branch office, and if the investor is a company or corporation this will involve registering the branch as an external company in terms of the South African Companies Act.

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

- The investor can set up a close corporation. This form of body corporate is peculiar to South Africa and is designed for small businesses. The requirements for formation, accounting and taxation in respect of a close corporation are much simpler than those for companies. This vehicle is unsuitable for most foreign investors as no corporate entity may be a member (shareholder) of a close corporation.

- The investor can set up a business trust.

- The investor can form a partnership with another investor or with a South African person. He/she/it can also establish a business on his/her/its own as a sole proprietor. Partnerships and sole proprietors do not enjoy limited liability in South Africa.

All of these methods of investment contemplate the conduct of business in South Africa by the investor. There are, of course, the alternative possibilities of granting licences to South African businesses, entering into management agreements, appointing distributors and agents and other similar means by which a foreign investor can trade in South Africa, which are dealt with in paragraph 4 of this Chapter.

1.2 Business and Asset Acquisitions

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

The acquisition of assets usually requires the consent of the shareholders of the seller company if the assets which are the subject of the sale constitute all or a greater part of the total assets of the seller company. In addition, in certain circumstances, the requirements of the Securities Regulation Panel may be applicable.

1.3 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 and the mechanisms of the Companies Act and the Securities Regulation Code on Take-Overs and Mergers and the Rules of the Securities Regulation Panel (the Code) may have to be employed.

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, and, if 90% of the offerees accept, it would be 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 will have to be proposed, which scheme will be subject to sanction by the High Court of South Africa.

The Code, administered by the Securities Regulation Panel, regulates takeovers. The aim of the Code is to protect minority shareholders. It applies to all public companies, listed and unlisted, statutory corporations and large private companies (namely, those with more than 10 beneficial shareholders and having shareholders' interests and loan capital exceeding R5 million in value). In general, the Code applies to any transaction in respect of the shares of a company which has the effect of changing control in that company. For this purpose, control is 35%. Where any person or persons acting in concert acquire or hold more than 35% of the shares in the company a mandatory offer has to be made to all other shareholders.

If the company is quoted on the JSE Securities Exchange South Africa (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.

1.4 Regulatory and other Issues

Acquisitions of businesses, be it by way of an acquisition of shares, or of assets, may 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 the case in an acquisition of a business. 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 automatically unfair dismissals. The labour legislation (dealt with in Chapter VII (Employment)) now protects employees in a takeover 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 that existing entitlements are passed across to the acquirer funds.

In addition to the above, an acquisition of banks, pharmaceutical companies, insurers and aircraft transport companies have special requirements and conditions.

2 Branch Offices

2.1 The Concept

The term “external company” means a company accorded incorporated status in another country. For purposes of South African company law, the existence of an external company becomes relevant only when it establishes a place of business in South Africa or engages in a transaction in South Africa.

2.2 Recognition in South African law

The Companies Act, 1973 provides that where a company incorporated outside South Africa has established a place of business within South Africa, it must be registered with the Registrar of Companies as an external company and observe the provisions of the Companies Act relating to external companies. A company incorporated outside South Africa, and every director, officer or agent of it, commits an offence if it establishes a place of business in South Africa and fails to obtain registration with the Registrar of Companies in terms of the Companies Act.

2.3 Registration

Registration of an external company is effected by lodging the following documents with the Registrar of Companies within 21 days after the establishment of a place of business:-

- a certified copy of the memorandum of association of the company, and if the memorandum is not written in one of South Africa’s official languages, a certified translation thereof in one of those languages;
- a notice of the registered office and postal address of the company;
- the consent of, and the name and address of, the auditor of the company in South Africa;
- a notice of the financial year of the company; Va return of particulars in respect of each director (distinguishing between directors resident in South Africa and non-resident directors), the local manager and secretary; and
- a notice of the name and address of the person resident in South Africa who is authorised by the company to accept, on the company's behalf, all service of processes and notices.

Thereafter, the Registrar will register the company, allocate a registration number to the company concerned and issue a certificate of registration to the company. The certificate of registration issued by the Registrar is conclusive evidence that the registration requirements in terms of the Companies Act have been complied with.

Any changes to the company's constitutional documents must be communicated to the Registrar.

2.4 The Company Name

An external company is required to display its name and country of incorporation outside its places of business. Additionally, an external company must have its name, registration number and country of incorporation in all letterheads, notices, advertisements and official publications. Further, an external company must state the names of its directors, (their nationality if not South African,) the names of its local managers and its local secretary on all business letters, trade catalogues and circulars bearing the company’s name.

2.5 Immovable Property

Subsequent to registration, an external company is given the same power to own immovable property in South Africa as a local company.

2.6 Accounting

The external company is obliged to keep such accounting records as are necessary to fairly present the state of affairs and business of the company in South Africa and to explain the transactions concerning its trade and business and its financial position in South Africa.

Annual financial statements in respect of the company’s business operations in South Africa must be lodged with the Registrar within 6 months after the end of each financial year. A certified copy of the latest completed annual financial statements of the external company, prepared in accordance with the requirements of the

country in which it is incorporated, must also be lodged. It is possible to apply to the Minister of Trade and Industry for an exemption from these requirements and the Minister may exempt an external company if the Minister is of the opinion that the disclosure of information will be harmful to the company, or will be impracticable, or will be of no real benefit in view of the insignificant amounts involved.

2.7 Taxation

Branch profits are subject to income tax at 35%, but are not subject to Secondary Tax on Companies. This is dealt with in more detail in Chapter VI (Taxation).

2.8 Conversion

It is possible to convert an external company into a South African company with uninterrupted corporate existence.

3 Incorporation

3.1 Procedure

Incorporation proceedings in South Africa are relatively straightforward. A private company (designated by the term "(Proprietary) Limited") must have at least 1 shareholder, but may have no more than 50. A public company (designated by the term "Limited") must have at least 7 shareholders and there is no limitation on the maximum number. 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.

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. 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.

3.2 Timing and Cost

In the ordinary course, incorporation takes approximately 2 to 3 weeks after a name has been reserved, but in special circumstances, it can be effected in a shorter time. On registration, the Registrar will issue a certificate of incorporation and a certificate to commence business. Only when the latter certificate has been issued, may the company commence business. However, it is possible for pre-incorporation contracts to be concluded by persons acting as trustees for the company to be formed. Any such contract must be in writing, must be disclosed in the Memorandum of Association and must be ratified by the company on incorporation. Formation costs are not high and will usually be in the region of R10 000, depending on the complexity of the registration.

3.3 Ongoing Requirements

There is no requirement that directors must be South African citizens or residents. A return must be filed in respect of each director stating his or her nationality and place of residence. All companies have to make an annual return for each financial year and all public companies must also submit a full set of audited annual financial statements for each financial year. Every company is obliged to have an annual audit and have audited financial statements prepared, but only public companies are required to submit such statements to the Registrar.

3.4 Close Corporations

The registration formalities for close corporations are much simpler than for companies. Members of a close corporation must be natural persons and there may not be more than 10 members. They are not required to have audited accounts prepared. An annual return must be filed with the Registrar of Close Corporations. These entities have been designed for small businesses (a close corporation is cheaper and quicker to establish and maintain) and would generally not be appropriate for large or medium sized foreign investors.

3.5 Section 21 Companies and Guarantee Companies

A special class of company can be incorporated under Section 21 of the Companies Act to provide a corporate identity and structure for non-profit making operations. Under Section 19 of the Companies Act it is possible for a company to be formed without having a share capital, but having the liability of its members limited by the memorandum of association. These are known as companies limited by guarantee.

4 Representatives, Distributors and Franchisers

There is no specific legislation dealing with these areas, and they are regulated by the 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 reduced to writing. Legal firms are able to provide all 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 what 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 holding company and subsidiary or if one company owns at least 20% of the equity share capital of the other company, and the price 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 in 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 that 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. Details of the generally permissible rates and exchange controls in general are set out in the section dealing with Trade and Investment Regulations.

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 Corporate Governance

In common with Europe and the US, the last 10 years have seen a re-examination of corporate governance principles and practices in South Africa. The first such examination was conducted by the King Committee on Corporate Governance in 1994. The commission, headed by former High Court judge, Mervyn King S.C., published the King Report on Corporate Governance (the King I Report) in 1994 which incorporated a Code of Corporate Practices and Conduct. It was the first of its kind in the country and aimed to promote the highest standards of corporate governance in South Africa.

5.1 Integrated Approach

Over and above the financial and regulatory aspects of corporate governance, the King I Report advocated an integrated approach to good governance in the interests of a wide range of stakeholders. Although groundbreaking at the time, the evolving global economic environment, together with recent legislative developments, required that the King I Report be updated. To this end, the King Committee on Corporate Governance developed the King Report on Corporate Governance for South Africa, 2002 (the King II Report).

The King II Report contains proposals which are very similar to those contained in similar reports in Europe and the US, such as the Higgs Report in the UK and the European Union Final Report into the Modern Regulatory Framework for Company Law in Europe.

The King II Report explains that corporate governance principles were developed, inter alia, because investors, with the era of the professional manager, were worried about the excessive concentration of power in the hands of management. This protection against greed could encourage the sins of sloth and fear, with an erosion of enterprise and an encouragement of subservience. The King II Report acknowledges and encourages a move away from the single bottom line (that is, profit for shareholders) to a triple bottom line, which embraces the economic, environmental and social aspects of a company's activities.

According to the King II Report, the seven characteristics of good corporate governance are:

- Discipline
  (a commitment to adhere to 'proper' behavior);
- Transparency
  (ease with which an outsider can analyse a company);
- Independence
  (use of mechanisms to prevent conflicts of interest);
- Accountability
  (decision-makers must be accountable for decisions);
- Responsibility
  (for behaviour allowing for corrective action and for mismanagement);
- Fairness
  (systems must be balanced); and
- Social responsibility
  (awareness and response to social issues).

5.2 The King Code

The King Code is contained in the King II Report. It provides a set of principles, but does not give detailed guidance to companies on corporate governance. Accordingly, companies are encouraged not to use the King Code simply as a "tick box", but rather "to perform in accordance with" the principles. Furthermore, the King Code is seen as an enhancement of the general existing principles of company law and should not be seen in isolation from these. The King Code contains requirements regarding (amongst other things) board composition; independent and non-executive directors; audit committees; remuneration committees; risk management; internal audit; and integrated sustainability reporting.

The King Code applies mainly to public companies listed on the JSE Securities Exchange South Africa (JSE). The JSE has entrenched some of the King Code's provisions by incorporating them into the JSE Listing Requirements. The JSE is also planning a sustainability index on which adherence to corporate governance principles will be one of the criteria for listing. The specific provisions of the King Code are not mandatory, but listed public companies need to disclose it in their annual reports if they do not comply with the King Code and give reasons. All public sector enterprises and agencies are also required to comply with the King Code. The King Code suggests that all companies give due consideration to the application of the King Code.

5.3 "Legislation" of Corporate Government Principles

The King II Report accepts that the principles of the King Code coincide to a large extent with existing laws. The provisions of the Companies Act, 1973 already provide for criminal and civil remedies against directors who break the rules. However, the King II Report does contain several recommendations for amending the existing legislation and recommendations for reforms in other sectors to help enhance proper disclosure, including shareholder activism and creating an active profession of skilled financial journalists.

South Africa has not yet decided to follow the international move towards "legislation" of corporate governance principles, as has been done, for example, in the US with the Sarbanes-Oxley Act, 2002 and with the code of conduct for directors being developed in the UK. The practices required by the Sarbanes-Oxley Act are similar to those required in the King II Report but the legally binding nature of the Sarbanes-Oxley Act is, of course, significantly different.

A complete review of South Africa's corporate laws is presently underway. The review commission, headed by Mr Tshepo Mongalo, is expected to complete its review and make recommendations in approximately 2005. It remains to be seen to what extent the recommendations of the King II Report are implemented and the extent to which recent amendments to company laws in, for example, Australia and the United Kingdom, aimed at creating better corporate governance, are followed in South Africa.

6 Dissolution

6.1 Insolvency

Insolvency of individuals, partnerships and trusts is regulated by the Insolvency Act. Insolvency of companies and close corporations is regulated by that Act, read together with the Companies Act, 1973. Certain acts of insolvency are specified in the Insolvency Act, the commission of which will entitle creditors to apply to court for the sequestration of individuals even if actual insolvency cannot be proved. A company may be wound-up on a number of grounds not related to insolvency, as well as if it can be shown that it is commercially insolvent, i.e. that it is unable to pay its debts as and when these fall due for payment. It is possible for the shareholders of a company, by special resolution, to wind up a company.

6.2 Trustees and Liquidators

A trustee is appointed to supervise the winding up of the insolvent estate of an individual, partnership or trust and a liquidator is appointed to wind up insolvent companies and close corporations. Both these officers act according to the directions of creditors who have proved claims, and are also subject to supervision by the Master of the High Court in the applicable jurisdiction.

Trustees and liquidators have the power to elect to enforce or cancel existing contracts where they remain unperformed or ongoing obligations for the benefit of the creditors. If they elect to cancel such contracts, the aggrieved party will have a claim for damages, as an ordinary concurrent creditor. Certain derivatives and futures contracts may be netted upon insolvency and cherry picking is prohibited in these instances.

Trustees and liquidators are entitled to make use of interrogation procedures to establish the existence and whereabouts of assets or possible claims against third parties. Shareholders of a liquidated company do not assume personal liability for the company's debts. Directors and corporate officers of a company or close corporation may in certain circumstances (usually fraud or mismanagement) be held personally liable for pre-liquidation debts.

6.3 Creditors

Certain creditors may be secured, such as the mortgagees of mortgage bonds over immovable property of the insolvent or the holders of book debts / recoverables. Other creditors may have preferred claims, such as the claims of employees for outstanding wages and the revenue authorities for arrear taxes. Creditors without secured or preferred claims are treated as concurrent creditors and only share in whatever excess remains after payment of secured and preferred creditors. Investors who choose to acquire equity in the company rather than simply loaning money to the company are not regarded as creditors at all and accordingly are unlikely to receive anything. Foreign creditors are treated in the same manner as local creditors and do not lose ranking. There is pending new legislation to assist foreign creditors by, for example, giving them more time to prove claims.

It is possible for agreements of compromise to be made with creditors, such compromise to be binding on all creditors if a requisite majority agrees. When all creditors agree, informal moratoriums or compromises are possible.

6.4 Judicial Management

It is also possible for companies (not close corporations) to be placed under judicial management if they are in financial difficulty. This is done by way of application to court, and a judicial manager is appointed by the court to manage the company in place of the directors. The purpose is to allow the company to trade itself out of financial difficulty. However, in practice, this does not often occur and judicial management is often followed by liquidation of the company.

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TAXATION

1 The Tax System at a Glance

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

Tax consists of direct taxes (corporate and individual) as well as certain indirect taxes including value-added tax (VAT), stamp duty, uncertificated securities tax etc.

The corporate rate of tax is 30%.

Secondary Tax on Companies (STC) of 12,5% is paid on dividends declared by any resident company. The combined effect of the corporate tax rate and STC is that companies who distribute the greater portion of their profits by way of dividends, are effectively taxed at a rate of 37,8%.

Individuals pay tax at progressive tax rates with the maximum tax rate of up to 40% at a level of taxable income of R255 000.

The VAT rate is 14%.

Dividends declared by local companies are exempt from tax. Dividends declared by foreign companies are taxable. This is subject to the proviso that foreign dividends received by a South African resident or a Controlled Foreign Company holding more than 25% of a foreign company's total equity share capital (including share interests held by other companies within the same controlled group of companies as the company receiving the dividend) will be exempt from tax. The exemption also contains rules designed to prevent it from becoming a mechanism for employing tax avoidance round tripping transactions.

A withholding tax of 12% is levied on royalties. The withholding tax on royalties or similar payments is not payable in the case of a non-resident company, if the royalty is derived by the company from any trade carried on through a branch or agency in South Africa and the royalty is subject to tax in South Africa, or a person (other than a person whose place of residence is in a neighboring country) in respect of the use of any printed publication of any copyright.

Capital Gains Tax (CGT) became effective from 1 October 2001. The effective maximum CGT rate is 10% for individuals, 15% for companies and close corporations and 20% for trusts.

South Africa has concluded a number of comprehensive double taxation agreements, the most recent being the double taxation agreement concluded with the Republic of the Seychelles.

South African tax legislation contains a number of anti-avoidance provisions, some specific and others general. Specific anti-avoidance provisions prevent the diversion of income, or avoidance of CGT. The general anti-avoidance provision is used to attack schemes which have the effect of avoiding, postponing or reducing tax, if they were entered into in a manner which would not normally be employed for bona fide business purposes, which create abnormal rights or obligations, and which are entered into solely or mainly to avoid, reduce or postpone tax.

In general, South African tax legislation does not recognize group taxation. However, rollover tax relief is made available to group companies entering into specific categories of group restructuring transactions.

Foreign residents are taxed on income from a source in, or deemed to be in, South Africa and on capital gains arising from immovable property or a specified interest in immovable property or assets from a permanent establishment of such a non-resident.

2 Direct Taxation (Income Tax)

Normal tax in respect of companies and individuals is calculated as follows:

	R
"Gross Income"	AAA
Less: exempt income	BBB
"Income"	CCC
Less: deductions	DDD
Add: Taxable Capital Gains	EEE
"Taxable income"	FFF
Normal tax at 30% (companies)	
Normal tax at progressive rates up to 40% (individuals)	

Because of the move to the residence basis of taxation, the following persons (excluding any person who is deemed to be exclusively a resident of another country for purposes of the application of any DTA) are liable for South African tax on their worldwide income:

- any natural person who is ordinarily resident in South Africa;
- any natural person who is physically present in South Africa for a prescribed period. The person only becomes a resident after he or she has been physically present in South Africa for the prescribed period; and
- any juristic person, incorporated, established or formed in South Africa or having its place of effective management in South Africa. Excluded from this definition are international headquarter companies.

"Gross Income" includes, in the case of a resident:

- the total amount;
- in cash or otherwise;
- received by or accrued to or in favour of such resident;
- during the year or period of assessment;
- not of a capital nature; and
- including specific amounts irrespective of whether they are of a capital or revenue nature.

"Gross Income" includes, in the case of a non-resident:

- the total amount;
- in cash or otherwise;
- received by or accrued in favour of the non resident;
- from a source within or deemed to be within South Africa;
- during the year or period of assessment;
- excluding receipts and accruals of a capital nature;
- including specific amounts, irrespective of whether they are revenue or capital in nature.

The gross income definition, which is the basis for taxation in South Africa, is responsible for the following distinctive features of the South African tax system:

- amounts which have accrued but have not necessarily been received are taxable in the year of accrual;
- the worldwide income of a resident is taxable;
- non-residents are taxed on income from a South African source, or deemed to be from a South African source, and on capital gains from immovable property or on interests in a corporate entity owning immovable property and on any assets which are attributable to their permanent establishments in South Africa;
- restraint of trade payments to natural persons or employment companies are taxed as income in the hands of the recipient.

"Taxable income" is calculated by:

- deducting the following amounts from "gross income":
  - exempt income;
  - specified deductions; and
  - general deductions, normally of all expenditure and losses incurred in the production of income, which are not of a capital nature and are incurred for the purposes of carrying on a "trade"; and
- adding taxable capital gains.

3 Individual Tax

The normal tax payable, calculated at progressive rates, on taxable income is, in the case of individuals, reduced by certain rebates. The maximum rate of tax is 40% in respect of individuals, which rate commences at a level of R255 000.

Income subject to normal tax includes the following:

- annuities (from employment or otherwise);
- remuneration or other benefits from employment;
- compensation for loss of employment or variation of employment;
- lump sums received from retirement funds;
- income from sources other than employment.

Non-cash benefits or "fringe benefits" received from employers are specially valued to determine the amount to be included in "gross income".

Remuneration from employment is subject to a final deduction system, known as "employees' tax" or pay as you earn (PAYE). The employer is required to deduct employees' tax at source, and to pay the amount so deducted to the South African Revenue Service (SARS).

Some of the PAYE tax may be designated as "SITE tax", which is a minimum non-refundable tax. If an employee earns below a certain amount of remuneration per annum, currently R60 000, the tax is designated SITE tax, and if the employee only earns income which is subject to SITE tax, the employee need not submit a tax return to the South African Revenue Service.

The tax year for individual taxpayers commences on 1 March each year and ends on 28 February the following year.

Persons in partnership are taxed on income attributed to them in accordance with their profit-sharing ratios at the rate applicable to such persons.

4 Corporate Tax

All resident companies are taxed on income irrespective of where in the world that income is earned.

All non-resident companies are taxed on income derived from South African sources or sources deemed to be South African and on capital gains in respect of immovable property and assets of their permanent establishments, unless an applicable double taxation agreement provides otherwise.

The corporate rate of tax is 30%. STC is levied at a rate of 12,5%. Gold mining companies are taxed according to a formula and additional normal tax is payable by companies deriving taxable income from mining for natural oil. Diamond and other non-gold mining companies are taxed at the same rates of normal tax applying to ordinary companies. A royalty on minerals has been proposed and is the subject of a draft Bill, which has not yet been approved by Parliament.

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 must be submitted within 2 months after the year-end, but extensions are normally allowed.

Foreign companies carrying on business in South Africa must be registered as "external companies", and may have to register as taxpayers and submit tax returns.

A branch of a foreign company is taxed at 35%. There are no withholding taxes on the remittance of branch profits and no STC arises.

Payments to Labour Brokers, Personal Service Companies and Personal Service Trusts are, in the absence of a certificate of exemption, subject to the deduction of employees' tax by the person making the payment, at the rate of 35%.

Any surplus on a pension fund paid to an employer is taxable.

Small and Medium Business Enterprises (SMMEs) pay tax at a rate of 15% on the first R150 000 of their income and 30% on the excess. In order to fully utilize the relief, SMMEs are required to generate no more than R5 million turnover.

Secondary Tax on Companies of 12,5% of dividends declared is payable by any company which is a resident. A company declaring all of its profits as a dividend thus pays tax at an effective rate of 37,8%.

5 Dividends, Interest and Royalties

Domestic dividends declared by South African companies are exempt from normal tax in the hands of resident shareholders, including companies. Dividends paid to non-resident shareholders are not subject to any withholding tax. Foreign dividends are taxed in the hands of South African residents. This is subject to the proviso that foreign dividends received by a South African resident or a Controlled Foreign Company holding more than 25% of a foreign company's total equity share capital will be exempt from tax. This greater than 25% share interest includes share interests held by other companies within the same controlled group of companies as the company receiving the dividend. The exemption also contains rules designed to prevent it from becoming a mechanism for employing tax avoidance round tripping transactions.

South African sourced interest received by or accrued to a non-resident is taxable in South Africa, but interest paid to a non-resident company is exempt, unless such interest is effectively connected with business carried on by the company in South Africa.

Royalties payable to a non-resident from a South African source are subject to a withholding tax of 12%.

6 Capital Allowances

The cost of new or unused industrial plant and machinery brought into use for the first time by a taxpayer for the purposes of his trade can be written off over a period of 4 years. The 4 year write off period applies in very specific circumstances and allows for the first 40% of the cost to be written off in the first year and 20% to be written off in each subsequent year.

Allowances are available for expenditure on scientific research, patents, trademarks, know-how etc. The capital expenditure incurred in research and development is deductible over a 4 year period with the first 40% being deducted in the first year and 20% in each of the subsequent years.

The cost of machinery and plant used in the production of biofuels can be written off over a period of 3 years, with 50% of the cost being written off in the first year, 30% in the second year and 20% in the third year.

There are also special allowances relating to agriculture, hotels, aircraft, ships and in respect of mining capital expenditure and also for gas pipe lines, electricity, transmission lines and railway lines.

Taxpayers investing in underutilized designated urban areas are entitled to special depreciation allowances for investment undertaken for the construction or refurbishment of buildings. Taxpayers refurbishing a building within a designated zone will receive a depreciation allowance over a 5 year period. The taxpayers will be entitled to an allowance of 20% in each year over the 5 year period. Taxpayers constructing a new commercial or residential building within a designated zone will receive a depreciation allowance over a seventeen year period. The taxpayers will be entitled to 20% allowance in the 1st year and a 5% allowance in each of the subsequent years.

7 Losses

Tax losses of a company may be carried forward to the succeeding tax year, and may increase an assessed loss or be set off against taxable income. Losses may be carried forward indefinitely, provided the company continues to trade. Schemes of arrangement involving creditors in respect of trade liabilities may reduce the assessed loss in certain circumstances. A tax avoidance provision in the Income Tax Act prevents trading in assessed losses for the purpose of utilising the assessed loss to avoid, postpone or reduce tax on income.

Recent amendments to the tax legislation provide for the ring-fencing of assessed losses from secondary trade, with the consequence that losses from these secondary trades may not be set off against any income that a taxpayer generates, other than the income from these secondary trades. There are also limitations on the utilisation of losses created by transactions taking place between connected persons.

8 Other Taxes

8.1 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.

8.2 Stamp Duties

Stamp duties are levied on a number of instruments and in respect of share transactions.

8.3 Uncertificated Securities Tax

This tax is payable in respect of the issue of, and change of beneficial ownership in, any securities which are transferable without a written instrument or are not evidenced by a certificate. It is levied at a rate of 0,25% and will eventually replace the Marketable Securities Tax, which is a tax on transactions involving certificated listed securities.

8.4 Excise and Customs Duties

Excise duties are imposed on the local production of a number of commodities, including alcoholic beverages, motor vehicles, and jewellery. Customs duties are payable in respect of imported goods at varying rates.

8.5 Estate Duty

This is a tax on the transfer of wealth, leviable on death. The duty is levied at the rate of 20% on the worldwide estates of deceased persons who were ordinarily resident in South Africa at the time of death, if the property was acquired while the deceased was resident in South Africa. It is also levied in respect of the estate of a deceased non-resident (consisting only of his or her South African assets). The first R1,5 million of a dutiable estate is exempt from estate duty.

8.6 Donations Tax

This is a tax on the transfer of wealth by way of donation and is payable at a flat rate of 20%. It is subject to certain exemptions, including certain donations between spouses and donations to public benefit organisations or other charitable organisations. A natural person is entitled to an exemption on donations that are made during the year of assessment of up to R30 000 per annum. Non-residents and resident public companies do not pay donations tax.

8.7 Transfer Duty

Transfer duty is payable on the acquisition of immovable property at the following rates: 10% in respect of corporate entities and trusts (save for special trusts); 5% on the excess of the value of the property between R140 001 and R320 000, and 8% on the excess of the value of the property above R320 000 for individuals. Where VAT is payable, no transfer duty is payable. The transfer of shares of companies or trusts, which own residential property, attracts transfer duty.

8.8 Capital Gains Tax (CGT)

CGT was implemented on 1 October 2001 from which date the taxable capital gain of any person for a year of assessment is included in the taxable income of such person for that year of assessment. The disposal of any asset by a resident, which does not attract income tax, will be subject to CGT. Death, emigration and donation of an asset are also deemed to be disposals for CGT purposes. Non-residents are not subject to CGT on assets in South Africa other than immovable property, shares in certain companies owning immovable property, and assets of a permanent establishment.

The effective tax rates on the taxable gain are:

- 10% for individuals;
- 7,5% for the individual policyholder fund of an insurer;
- 0% for the untaxed policy holder fund of an insurer;
- 20% for trusts; and
- 15% for companies and close corporations.

The following, amongst others, are exempt from CGT:

- primary residence in respect of the first R1 million of the gain;
- certain personal use assets of a natural person or a special trust;
- compensation for personal injury, illness or defamation;
- prizes/winnings from a South African competition.

9 Taxation of Pension Funds

Retirement funds are taxed on interest and rental income at the rate of 18%. The taxation of the income of retirement funds is the result of recommendations made by the Katz Commission in its third interim report. The Commission recommended that a new system of retirement fund taxation be introduced, which would be based on consistent treatment of private and public sector funds, neutrality between different forms of retirement provision, minimalisation of opportunities for tax arbitrage, an incentive in favour of life time annuities, rather than lump sum benefits on retirement, and the taxation of income as it arises rather than when it is paid out. In the budget for the 2003/2004 tax year, the Minister of Finance announced that there were plans to reform the retirement tax system in South Africa but these reforms were not incorporated in the budget for the 2004/2005 tax year.

10 Regional Service Council Levies

Regional Service Councils (RSCs) have been established throughout most of South Africa to provide regional infrastructure and regional administration. Their operations are financed by regional service levies. These are raised on employers and are in effect, payroll taxes. The rate of the levy varies from area to area and may be as much as 0,3% and as little as 0,001% of the gross payroll. The mean rate is 0,05878% of employees' remuneration. All enterprises are also obliged to pay regional establishment levies to RSCs, which are in effect taxes on turnover, amounting to 0,1% of the turnover of an enterprise.

11 Skills Development Levy

This levy is imposed on employers at 1% of the gross payroll.

12 Double Taxation Treaties

South Africa has concluded the following Double Taxation Agreements (DTAs):

- Comprehensive DTAs are in place with Algeria, Australia, Austria, Belarus, Belgium, Botswana, Canada, (People's Republic of) China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Korea, Lesotho, Luxembourg, Malawi, Malta, Mauritius, Namibia, Netherlands, Norway, Oman, Pakistan, Poland, Romania, Russian Federation, Seychelles, Singapore, Slovak Republic, Swaziland, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Uganda, United Kingdom, United States of America, Zambia and Zimbabwe. The treaty with the United Kingdom also extends to Grenada.

- Comprehensive DTAs have been signed but not ratified by South Africa with Ethiopia, Kuwait, Swaziland and Ukraine.

- The following comprehensive DTAs have been ratified by South Africa, but not yet by the other countries concerned, namely, Botswana, Brazil, New Zealand and Ruwanda.

- Comprehensive DTAs have been negotiated or renegotiated but not signed, with Bulgaria, Cuba, Democratic Republic of Congo, Estonia, Gabon, Ghana, Germany, Latvia, Lithuania, Malawi, Malaysia, Morocco, Mozambique, Namibia, Portugal, Qatar, Saudi Arabia, Spain, Sri Lanka, Tanzania, Turkey, United Arab Emirates, Zambia and Zimbabwe.

- A comprehensive DTA is being negotiated with Bangladesh.

- Limited sea and air transport agreements exist with Brazil, Portugal and Spain.

- A number of other countries have expressed the desire to negotiate DTAs with South Africa.

13 Exchange Control Amnesty

In 2003 the South African government introduced legislation that offered amnesty in relation to exchange controls and the Income Tax Act to South African taxpayers to allow the taxpayers to repatriate funds illegally held offshore. The amnesty lapsed on 29 February 2004. In terms of the amnesty, a levy of 5% will be charged on the value of assets that have been disclosed and repatriated and a levy of 10% will be charged on the value of assets that have been disclosed but not repatriated.

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1 Labour Law in South Africa

Employment in South Africa is regulated by the law of contract and statutory law. There is a network of legislation providing minimum protection for employees out of which employers and employees cannot contract. This legislation is found in a number of Acts that regulate, inter alia, minimum wages, maximum hours of work, overtime rates, minimum periods of annual leave, notice of termination, organisational rights in respect of trade unions, strike law, protection from unfair dismissal and the prohibition of unfair discrimination. During the course of 1999 the Department of Labour conducted a review of the employment legislation. This review process culminated in a number of amendments to certain Acts with a view to achieving a greater balance between the interests of employees and trade unions on the one hand and employers on the other.

Amendments were effected in inter alia the following four areas:

- collective bargaining and bargaining councils;
- dispute resolution by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court;
- basic conditions of employment and contractual relationships;
- rights and responsibilities of employers and workers in the event of retrenchments, insolvency and transfers of businesses.

1.1 The Labour Relations Act

The Labour Relations Act, 1995 is possibly the most important and far-reaching labour law statute in South Africa.

It deals most importantly with:

- collective bargaining rights between trade unions and employers;
- strikes and lockouts;
- dispute resolution;
- unfair dismissals; and
- the transfer of a business or a part thereof as a going concern.

Two aspects of this Act require special attention, namely strike law and the law on unfair dismissals. Collective bargaining is dealt with in paragraph 1.2 below.

In South Africa the right to strike (subject to certain statutory limitations) is protected both in terms of the Act 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 socio-economic interests of workers.

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 on the part of the employee, incapacity (poor work performance or inability to perform due to ill-health or injury) and the operational requirements of the employer.

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

The 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 re-instatement and/or compensation. A Labour Court (which has High Court status) and a Labour Appeal Court also form part of the dispute resolution system.

Investors must be aware that the Act provides for the purchaser of a business sold as a going concern to assume automatically (i.e. by operation of law) the contractual obligations of the seller to its employees.

1.2 The Bargaining and Statutory Council System

An important method of regulating conditions of employment in South Africa is the Bargaining Council system which divides industries into specific areas of specialisation, i.e. building, motor manufacturing, engineering, etc. Legislation encourages employers (either directly or through employer associations) and trade unions (representing employees in their specific industry) to form what are termed Bargaining Councils. The formation of these Councils normally requires the support of the majority of the interested parties within the applicable sector or area.

Bargaining takes place between the employers and trade unions under the auspices of the Bargaining Council, i.e. there is a centralisation of wage bargaining and the bargaining of conditions of employment. The collective agreements concluded in the Bargaining Council bind only the parties to the Bargaining Council. These collective agreements can be extended (and usually are) to apply to non-parties who fall within the registered scope of a particular Bargaining Council.

As an employer, the state, together with registered trade unions in the public service, may form a Bargaining Council. Provision is made in the legislation for the creation of a Public Service Co-Ordinating Bargaining Council, which regulates all matters which affect the public service nationally.

It is also the Labour Relations Act which encourages and permits the formation of Bargaining Councils and encourages bargaining. Statutory councils may be formed where there is limited support (i.e. 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.

Wage bargaining is otherwise dealt with on a voluntary basis at plant level or at a level on a basis agreed between the employer and its employees' collective bargaining agent.

1.3 The Basic Conditions of Employment Act

The Basic Conditions of Employment Act, 1997 provides that employees (other than senior managerial employees, that is employees who have the authority to appoint, discipline and dismiss employees and to represent the employer internally and externally, or persons who earn more than a prescribed amount, currently R115 572 per year) may not work more than 45 ordinary hours in any week. It is intended that this amount will be reduced progressively to 40 hours per week. Employees may not work more than 10 hours' overtime per week and they must be paid 1 ½ times their ordinary wages in respect of overtime work.

Employees must be paid double their ordinary wage rate in respect of work performed on Sundays, unless they ordinarily work on Sundays, in which case they should be paid 1½ times their ordinary wage rate. Employees must be paid at double their ordinary wage rate in respect of work performed on public holidays which fall on days when they ordinarily work.

All employees are entitled to 21 consecutive days' annual leave per year. During the first six months of employment, employees are entitled to one day's paid sick leave for every 26 days' work. Thereafter, they are entitled to 30 days' paid sick leave during each sick leave cycle of 36 months.

Female employees are entitled to 4 consecutive months' unpaid maternity leave. The Unemployment Insurance Act provides for payment of limited maternity benefits by the state. In addition, employees who have worked for an employer for longer than 4 months and who work for 4 or more days a week are entitled to 3 days' paid family responsibility leave per year, which may be taken in the event of the birth or sickness of the employee's child or in the event of a death in the family.

The Act also governs notice of termination, and severance pay in the event of a dismissal due to the operational requirements of the employer.

1.4 Employment Equity Act

The purpose of the Employment Equity Act, 1998 is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and by implementing affirmative action measures to redress disadvantages in employment experienced by people from designated groups.

The Act aims to eliminate unfair discrimination in any employment policy or practice. Unfair discrimination on a wide number of grounds including race, gender, sex, marital status and disability is prohibited. The Act, however, makes it clear that it is not unfair discrimination to implement affirmative action measures, nor to distinguish between persons on the basis of an inherent job requirement.

The provisions of the Act dealing with unfair discrimination apply to all employees and employers. It also applies to applicants for employment, so that certain unfair discriminatory recruitment practices are prohibited.

The provisions dealing with affirmative action apply only to designated employers and people from designated groups.
A designated employer is one who employs 50 or more employees or whose minimum annual turnover is equal to or ranges from R2m to R25m, depending on the sector in which the employer's business falls. Designated groups are black people (defined as Africans, Coloureds and Indians), women and people with disabilities.
A designated employer must consult with its employees, conduct an analysis, prepare an employment equity plan and report to the Director-General of the Department of Labour on progress made in implementing its employment equity plan.

1.5 Skills Development Act

The Skills Development Act, 1998 seeks to develop the skills of the South African workforce to increase the quality of working life for employees, to improve productivity in the workplace, and to promote self-employment and the delivery of social services.

The Act provides for the establishment of the National Skills Authority to advise the Minister of Labour on a National Skills Development Policy.

The Act provides for the establishment of Sector Education and Training Authorities for every national economic sector. Each Sector Education and Training Authority must develop and implement a sector skills plan within the framework of the national skill development strategy.

A compulsory levy, equivalent to 1% of the payroll of all companies, is paid by all employers to fund the activities of the Sector Education and Training Authorities.

1.6 Unemployment Insurance / Compensation for Occupational Injuries

There is no broad based national insurance scheme in South Africa as there is in the United Kingdom and Europe. However, the Unemployment Insurance Fund is set up under the Unemployment Insurance Act, 1966. In terms of the Unemployment Insurance Act, all employees and their employers make contributions to the Fund and, in the event of losing their jobs and being unable to find other employment, they can draw benefits from the Fund. Employees who contribute to the Fund and who go on maternity leave are entitled to claim maternity benefits from the Fund. The system has a number of limitations - benefits are limited in quantum and duration of payment; a person claiming from the fund must be able to show that s/he is unable to find alternative employment and benefits are only payable to persons who have been employed - persons who have never been employed cannot claim.

The Compensation for Occupational Injuries and Diseases Act, 1993 provides for compensation for disablement or death caused by

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occupational injuries or diseases sustained or contracted by employees in the course of their employment. This Act sets in place what is in effect a statutory insurance scheme for employers. Claims by employees for damages arising from injuries or illness endured in the workplace lie against the compensation fund established in terms of this Act. No claims of this nature lie directly against employers, who are required only to pay the required assessments towards the fund.

2 Pensions Law and Employee Benefits

The South African law relating to retirement funding and employee benefits is complex and rapidly evolving. The law is contained in and influenced by a number of statutory enactments, administrative regulations and practice notes, as well as the awards of the High Court, the Labour Court and specialist tribunals. Despite (and perhaps to a large extent because of) the immense body of law and regulation applicable in this field, it is characterised by a lack of clarity in a number of important respects, which makes it imperative for prospective employers to be suitably advised of their rights and obligations in relation to employees, trade unions, retirement fund boards, retirement fund administrators and the various regulators.

2.1 Retirement Funds

Under South African law, all retirement funds must be registered with the Registrar of Pensions Fund (the Registrar) in terms of the Pension Funds Act, 1956. Only registered retirement funds may conduct the business of providing pensions and related benefits, and receiving contributions for that purpose. Upon registration, a retirement fund becomes an independent corporation and acquires juristic personality. Therefore, it is not possible for a South African employer to provide a pension plan under its own administration, and employers who do offer pension plans to employees (it is not compulsory for any employer to do so) are required to subscribe to a registered retirement fund for that purpose.

2.2 Defined Contribution and Defined Benefit Funds

Retirement funds may run either on a defined contribution basis or on a defined benefits basis. Under a defined contribution arrangement, the contributions of the employer and the employee are defined in the rules of the retirement fund, usually being determined as fixed percentages of an employee's pensionable salary. It is common for those fixed percentages to differ. Since the contributions are defined, the benefits that will become payable to members upon the happening of different insured events will be determined primarily by the market performance of the fund. Under a defined benefits arrangement, only the employee's contributions are defined as a percentage of pensionable salary. The employer's contributions will fluctuate depending on actuarial assessments of the level of funding required from time to time in order for the fund to meet its projected defined liabilities. The Pension Funds Act requires that retirement funds undergo an actuarial valuation every 3 years.

2.3 Pension Funds and Provident Funds

Retirement funds may also be categorized either as pension funds or provident funds. The members of a pension fund are only entitled to commute one third of their total retirement benefit to cash upon retirement, while the remaining two thirds must be applied towards the purchase of an annuity which will provide monthly pension payments for the remainder of the life of the pensioner. Members of a provident fund have the freedom to utilise their entire retirement benefit as they deem fit upon retirement. The distinction between pension funds and provident funds is particularly relevant in relation to the provisions of the Income Tax Act, 1962, which prescribes different tax treatment in respect of the two types of retirement fund in a number of respects.

2.4 Private Retirement Funds

Many South African employers still subscribe to private or "closed" retirement funds, whose membership is restricted to employees of a particular company or group of companies. Such funds are governed by a board which must by law be comprised of at least the same number of employee-elected members as there are employer-appointed members. The management of private retirement funds therefore raises a number of significant governance issues, particularly in relation to potential conflicts between the fiduciary duties of directors and senior executives to the company and the fiduciary duty owed by them to the fund itself in their capacity as members of the board of the fund. Similar concerns arise in respect of employee-elected members of the board of the fund. In recent times more employers have migrated to multi-employer "umbrella" retirement funds, which are funds established and administered by a professional board appointed by a professional retirement fund administration company. However, even subscription to an umbrella fund poses certain difficulties particularly since the Pension Funds Act does not yet contemplate nor cater for the separation of the pooled assets of a retirement fund and the allocation of assets to a particular class of members, namely the employees of a particular employer.

2.5 Legislation

Retirement funds, their boards, administrators and subscribers are regulated by the Pension Funds Act, the Financial Institutions (Protection of Funds) Act, the Constitution and to some extent, the Labour Relations Act, the Employment Equity Act and the Financial Intelligence Centre Act. Besides these legislative enactments, there are also regulations, notices, practice notes and circulars issued by the Financial Services Board (FSB) or the Registrar from time to time. The retirement fund industry is regulated by the FSB and the Registrar and certain complaints relating to retirement fund administration may be brought before a specialist tribunal, the Pension Funds Adjudicator, rather than the High Court or the Labour Court.

The Pension Funds Act was amended in 2001, and those amendments introduced sweeping changes in the retirement funding industry. The Pension Funds Act now provides for defined minimum retirement benefits and provides that assets that are actuarially determined to be surplus to a retirement fund's projected liabilities must be quantified at a particular point in time (sometime before 7 December 2004) and must be distributed among employers, employees and former members of the retirement fund in accordance with a process set out in the Act. In order to ensure the efficacy of, and equity in, this process, the Act effectively prohibits employers from taking so-called "contribution holidays" and requires retirement funds to determine the value of any improper utilisation of a surplus in the retirement fund by the employer. The Act lists four instances of employer conduct that are to be regarded retrospectively as improper utilisation of surplus, namely the taking of contribution holidays, the funding of improved benefits for selected employees only, the purchasing of past service for selected employees and the delegation to the retirement fund of the employer's contractual obligation to subsidise former employees' medical premiums.

2.6 Other Employee Benefits

Other employee benefits, such as medical insurance, share incentive schemes, share purchase schemes, phantom share schemes and post-employment medical subsidisation are generally dealt with in accordance with the ordinary common law principles of contract 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.

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

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INTELLECTUAL PROPERTY

1 Patents

Patents are regulated by the Patents Act, 1978. The Act is administered by the Registrar of Patents, based in Pretoria, while patent disputes and litigation matters are dealt with by the Commissioner of Patents, who is a specially designated High Court judge. Parties wishing to register a patent generally consult with specialist patent attorneys.

Patents may be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture. A number of exclusions exist and certain things may not be inventions for the purpose of the Act. These include a discovery; a scientific theory; a literary, dramatic, musical or artistic work or any other aesthetic creation; a scheme, rule or method for performing a mental act, playing a game or doing business; a computer programme; and the presentation of information. Plant and animal varieties and biological processes for the production of animals or plants not being a micro-biological process are also excluded from patentability. In addition, methods of treatment of the human or animal body by surgery, therapy or diagnosis are unpatentable as they are deemed not to be capable of being used or applied in trade, industry or agriculture.

An invention is deemed to be new if it does not form part of the state of the art immediately before its priority date. An invention is deemed to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms, immediately before the priority date of any claim to the invention, part of the state of the art.

Only an inventor or his assignee may apply for a patent. Acceptance of a patent application can be expedited or delayed and may accordingly take between about 4 to 18 months. The Registrar does not examine or satisfy himself as to the novelty and inventiveness of the patent and special care must be exercised by the applicant. If subsequent to granting the patent proves not to meet these requirements, the patent may be revoked. Patents endure for a period of 20 years from date of application, provided that the annual renewal fees are paid.

South Africa is a party to the Paris Convention for the Protection of Industrial Property. This enables an applicant to claim priority from the date of an application in another convention country relating to the same subject matter, provided that the person claiming that priority is also the applicant in the other country and provided further that the prior application is less than 1 year old. The practical effect of this is that the novelty and inventiveness of a South African patent will be considered in the light of disclosures which were made available to the public before the priority date, and not before the date on which the patent was filed in South Africa.

South Africa acceded to the Patent Cooperation Treaty in 1999 (PCT). This allows for a single patent application to be filed designating various countries. Prior to the PCT, a patentee interested in obtaining patents internationally was required to apply for patent protection in each country separately within 1 year of filing a priority application. This proved to be a very costly process. The PCT provides for a single application to be filed within 1 year from the filing of a prior application (the priority application) in which various countries may be designated. National patent applications now need only be filed 30 or 31 months from the priority date, depending on the country. The PCT also provides for the patent application to be subjected to a search and examination, so that an applicant is placed in a better position to decide on the strength of the patent.

Patentees are free to enter into licensing agreements. In the absence of an agreement to the contrary, a license to make a patented article carries with it the right to use, offer to dispose of, or dispose of the patented article and a license to use or exercise a patented process carries with it the right to make, use, offer to dispose of, or dispose of the product of the processor. Licenses need not be registered or even be in writing. Parties may apply to the Court of the Commissioner of Patents for a compulsory license to be granted in the event of an abuse of rights.

Patents may also be assigned by patentees. Unless an assignment is registered it is only valid between the contracting parties.

2 Trade Marks

Trade marks are regulated by the Trade Marks Act, 1993. The Act is administered by the Registrar of Trade Marks, based in Pretoria, who controls the register of trade marks. The Act allows for the registration of trade marks capable of distinguishing the goods or services of a person in respect of which it is registered, or proposed to be registered, from the goods or services of another person either generally or (if applicable) subject to limitations.

Trade marks are registered for 10 years, but may on application be renewed for an unlimited further number of 10 year periods. Some protection is also provided for unregistered marks under the common law relating to unlawful competition and “passing off”.

It is possible to enter into license agreements for the use of trade marks. Licenses need not be registered. In order to bring the existence of the license to the notice of the public, the parties may also conclude a registered user agreement which is registered by the Register of Trade Marks. Trade marks may also be assigned.

The Paris Convention allows a 6 month period of priority of trade marks.

The Act makes provision for the protection of well-known international marks.

The Act also grants to proprietors of registered trade marks a broad right to prevent infringements.

3 Copyright

This is regulated by the Copyright Act, 1978. Literary, musical and artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, computer programmes and published editions are all eligible for copyright as long as they are original. No registration of copyright is required as it subsists automatically. The only exception is cinematograph films, in respect of which copyright may be registered. Such registration is desirable as although an injunction restraining threatened or continual infringement may be obtained, damages cannot be recovered if the infringer did not act with knowledge of the infringement. If a copyright is registered, the infringer may be liable on the basis of the constructive knowledge.

Computer software is protected by copyright law and the protection extends to source code and object code. The content of computer programs may be regarded as confidential information of the proprietor and enjoys protection at common law.

Copyright endures for a period of 50 years.

4 Designs

Matters relating to registered designs in South Africa are governed by the Designs Act, 1993. A registered design is generally used to protect the physical appearance of an article. Under the Designs Act, a design may be an aesthetic design or a functional design. The purpose of the former is to protect features which appeal to and are judged solely by the eye, irrespective of the aesthetic quality thereof, while the latter protects features which are necessitated by the function of the article to which the design is applied.

Both aesthetic and functional design applications may be filed for the same design. The duration of the registration of an aesthetic design is 15 years, whereas in the case of a functional design the protection endures for 10 years.

In order to be registrable, an aesthetic design must be new and original. A functional design must be new and not commonplace in the art concerned.

A design is deemed to be new if it does not form part of the state of the art immediately before the date of application for registration or the release date, whichever is the earlier; provided that where the release date is earlier, the design shall not be deemed to be new if the application for the registration of such design has not been lodged within 6 months of the release date (or 2 years in the case of an integrated topography, a mask work or a series of masks works).

Designs for articles which are not intended to be multiplied by an industrial process are not registrable under the Act. In the case of an article which is in the nature of a spare part for a machine, vehicle or equipment, no feature of pattern, shape or configuration of such article shall afford the registered proprietor of a functional design applied to any one of the articles in question, any rights in respect of such features.

An innovation of the Designs Act is the introduction of the concept of a release date. The release date means the date on which the design was first made available to the public, whether in South Africa or elsewhere, with the consent of the proprietor or any predecessor in title. Thus, in contrast to a patent application, application for a registered design may be made notwithstanding the fact that the design has already been made available to the public, provided that the application is made within 6 months of the release date (or 2 years in the case of an integrated topography, a mask work or a series of masks works). However, there are limitations on the enforceability of design rights against a person who commences with the performance of any act of infringement before the date of registration of the design. Thus, a registered design will not be enforceable against a person who copies the design after the release date, but before the date of the application for registration of the design. Also, where the design is released before the application date, it may not be possible to obtain valid design protection for the design in the majority of foreign states. Accordingly, where possible, it is advisable to file an application for a registered design before the design is made available to the public.

The Paris Convention confers on an applicant for a registered design in a member state the right to file corresponding applications in any other member state within 6 months of the filing of the first registered design application. This period is not extendable. It is important to bear in mind however that where a foreign applicant relies on a release date or similar provision, an application filed in South Africa under the Convention within 6 months of the foreign application may fail to meet our novelty requirements based on the prior disclosure of the article to which the design is applied. In these circumstances, the South African design should be filed within the allowable release date period, i.e. 6 months or 2 years from the date of disclosure.

5 Plant Breeders’ Rights

New varieties of plants developed by plant breeders do not constitute patentable subject matter and protection for such new varieties of plants is granted in terms of the Plant Breeders' Rights Act, 1976. A Plant Breeders’ Right enables a plant breeder to prevent others from propagating a plant variety.

Protection may be obtained for any plant variety which is new, distinct, uniform and stable. A variety is new if propagating material or harvested material thereof has not been sold or otherwise disposed of by the breeder or with the consent of the breeder for purposes of exploitation of the variety for a specific period of time. The duration of a plant breeder’s rights is 25 years for vines and trees, and 20 years for all other plants.

A variety is distinct if, at the date of filing of the application for a plant breeder's right, it is clearly distinguishable from any other variety of the same kind of plant, the existence of which is a matter of common knowledge on that date.

A variety is uniform if, subject to the variation that may be expected from the particular features of the propagation thereof, it is sufficiently uniform with regard to the characteristics of the variety in question.

A variety is stable if the characteristics thereof remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of such cycle.

6 Know-how and Trade Secrets

These are protected under the common law principles pertaining to unlawful competition. There are no registration formalities, but the information must in fact be secret in the sense that it is only known on a confidential basis to a limited circle of people and the information must be of economic value to the trader in his business. An action for damages for unlawful competition must be brought within 3 years of the infringement becoming known to the plaintiff. In the case of ongoing infringement, proceedings for an injunction may be brought for as long as the infringement continues.

7 Licensing in General

Licensing of intellectual property of all types is permissible. Where foreign owners license use of their intellectual property in South Africa, the royalties/licence fees payable are subject to approval by the Department of Trade and Industry and the exchange control authorities. This is described in more detail in the section dealing with Business Entities (Representatives, Distributors and Franchisers).

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INFORMATION TECHNOLOGY

The enactment of the Electronic Communications and Transactions Act, 2002 (ECT Act) has brought a great deal of legal certainty to the Information Technology industry in South Africa. While the provisions of the ECT Act are extensive, it certainly does not deal with all aspects of Information Technology Law, and in this regard existing legal principles still find regular application. Accordingly, it is necessary to take the provisions of the South African common law, as well as other pieces of legislation into account when looking at the legal aspects concerning Information Technology.

1 The Legal Status of Data Messages

Prior to the enactment of the ECT Act, the status of data messages in South African law was unclear. Indeed, it was uncertain, in terms of our common law, whether electronic text constituted writing.

In terms of the ECT Act, a data message is now defined as:

"*data generated, sent, received or stored by electronic means and includes -*

(a) voice, where the voice is used in an automated transaction; and

(b) a stored record;"

Sections 11 and 12 of the ECT Act clarify the position regarding the validity of data messages and writing by stating that information contained in a data message is not without legal effect and that electronic writing constitutes writing as contemplated at common law. The ECT Act states that where data retention is required by law, that requirement will be met if the data is stored in an electronic format which is accessible for subsequent reference, it is stored in the format that the information was generated, sent or received, and the origin, date and time can be ascertained. Accordingly, retaining information in an electronic format, instead of in a paper format, is now facilitated by the ECT Act. It is important to note though, that the ECT Act does not compel companies to store information in an electronic format, but merely facilitates the storage of electronic data in a legally acceptable manner.

The ECT Act goes on to provide that our courts are compelled to admit evidence contained in an electronic format. However, when admitting electronic evidence, a court should take the following factors into consideration:

- the reliability of the manner in which the data message was generated, stored or communicated;
- the reliability of the manner in which the integrity of the data message was maintained;
- the manner in which its originator was identified; and
- any other factor that the court deems relevant.

2 Online Contract Formation

Part 2 of Chapter 3 of the ECT Act regulates the formation of electronic contracts. Parties to an electronic agreement can however opt out of the provisions of Part 2 where they have reached agreement on the issues regulated. Where the parties have not reached agreement, the following will apply:

- An agreement is concluded at the time when and place where the offeror receives the acceptance of the offer. The acceptance of the offer could be made by way of e-mail, for example.

- A data message used to conclude an agreement or which is used in the performance of an agreement is regarded as having been sent by the person sending the data when it enters an information system (which is a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet) outside the control of the person sending the data message. If the person sending the data message and the intended recipient of the data message are in the same information system, then the data message will be deemed to have been sent when it is capable of being retrieved by the intended recipient.

- A data message is regarded as having been received by the intended recipient when the complete data message enters an information system designated or used for that purpose by the intended recipient and is capable of being retrieved and processed by the intended recipient.

- It is not necessary to obtain an acknowledgment of receipt in order for legal effect to be given to a data message which is used in the process of contract formation.

3 Electronic Signatures

The ECT Act draws a distinction between two types of electronic signatures: electronic signatures and advanced electronic signatures.

An electronic signature is defined as:

"*data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature"*

This definition of an electronic signature is very wide and could be interpreted to mean a "signature" attached at the end of an e-mail wherein the user's name and contact details appear.

An advanced electronic signature is defined as:

"an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37"

Section 37 then goes on to create an Accreditation Authority whose approval is necessary before a third party can offer advanced electronic signatures to the general public.

In addition to the above, the ECT Act also creates a number of deeming provisions regarding electronic signatures. In particular, Section 13(1) of the ECT Act states that when the law requires that a document be signed, that requirement will only be met where an advanced electronic signature is used.

What about instances where an electronic signature is required by the parties to an agreement, but the parties have not specified what type of signature must be used? Section 13(3) of the ECT Act states that in such instances the requirement that an electronic signature be used will be met if:

- a method is used to identify the person and to indicate the person's approval of the information communicated; and
- having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

Both of these requirements must be met in order for the provisions of Section 13(3) to have been complied with. Where a party has used an advanced electronic signature then that signature will be deemed to have been properly applied and will be a valid signature. Anyone stating the contrary will have to prove that the signature was not applied properly.

In instances where the parties have not agreed to the use of electronic signatures, then a data message which is an expression of intent will be legally binding on the parties.

4 Cryptography

In terms of the cryptography provisions of the ECT Act, cryptography service providers are legally required to register with the Director-General of the Department of Communications before they can offer their services in South Africa. Failure to comply with these provisions of the ECT Act constitutes a criminal offence.

It is important to note that cryptography service providers are not required to divulge any confidential information or trade secrets when registering with the Department of Communications. Cryptography service providers will only be required to provide the Department of Communications with the following information:

- the name and address of the cryptography service provider;
- a description of the type of cryptography service or cryptography product being provided; and
- such other particulars as may be prescribed to identify and locate the cryptography service provider or its products or services adequately.

5 Consumer Protection

5.1 Compulsory Website Information

The consumer protection provisions of the ECT Act provide basic (but not comprehensive) protection to South African consumers. In particular, website operators who offer goods and services for sale via their websites are required to provide information on their websites which enables consumers to identify with whom they are engaging. For example, website operators are required to provide their company registration number as well as a physical address for the company. Details such as returns policies, a full description of the goods and the full price for goods (including transport costs, taxes and any other fees or costs) must be provided on the website.

In addition to information about the proprietor and its goods and services, website proprietors must also provide consumers with an opportunity to review the entire transaction, to correct any mistakes and withdraw from the transaction before the transaction is completed.

Failure to comply with these provisions of the ECT Act entitles consumers to cancel the transaction within 14 days of receiving the goods or services, and the consumer is then obliged to return the goods or stop using the services purchased.

In limited circumstances, consumers are afforded a 7 day cooling-off period after receiving the goods or services,, within which the consumer may cancel a transaction concluded, for example, over the Internet.

5.2 Spam

Spam is a major source of frustration and wasted bandwidth to consumers. While the ECT Act does provide a measure of protection to consumers, the provisions could be reworked to provide a greater measure of protection. However, companies engaging in online marketing by means of unsolicited commercial communications (or spam) will need to comply with the provisions of Section 45 of the ECT Act.

Section 45 states that the sender of unsolicited commercial communications to consumers must provide the consumer with the option to cancel his or her subscription to the mailing list of that person. The sender must also provide the consumer with the identifying particulars of the source from which that person obtained the consumer's personal information, on request by the consumer. Furthermore, no agreement is concluded where a consumer has failed to respond to an unsolicited communication.

Any person who fails to comply with these provisions of the ECT Act is guilty of a criminal offence. In addition to non-compliance with the above being a criminal offence, any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence.

Section 47 of the ECT Act states that the sections dealing with consumer protection apply irrespective of the legal system applicable to the agreement in question.

6 The Protection of Personal Information

6.1 The ECT Act

For a long time South Africa has lacked legislation dealing with the protection of personal information. Indeed, South Africans still do not have any comprehensive legislation dealing with the protection of personal information, despite the provisions of the ECT Act. This is due to the fact that the relevant provisions of the ECT Act are voluntary, and in essence toothless.

Formal legislation dealing with the protection of personal information is currently being reviewed by the Law Commission of South Africa and a Bill dealing with the protection of personal information is anticipated towards the middle of 2005.

6.2 The Regulation of Interception of Communications Act (RIC)

The RIC Act has not yet come into operation and it is currently being reviewed before being implemented. There is a very strong likelihood that the Act will be amended before it comes into force, so while the current wording of the RIC Act may appear draconian, in all likelihood the provisions discussed below will be amended to reduce the onus placed on employers by the current wording of the Act.

In terms of the RIC Act, employers, under certain circumstances, are allowed to intercept and monitor employees' indirect communications. For purposes of the Act, indirect communications include e-mails and faxes.

In terms of the Act, an Internet Service Provider is defined as:

"... any person who provides access to, or any other service related to, the Internet to another person, whether or not such access or service is provided under and in accordance with a telecommunication service license issued to the first-mentioned person under Chapter V of the Telecommunications Act ..."

This is a very broad definition and would include an employer that provides Internet-related services to its employees.

Accordingly, employers would be required to comply with an Interception Directive issued by the High Court, as well as the provisions of the Act relating to Internet Service Providers. This would entail companies installing intercepting and monitoring devices on their IT systems in order to comply with an Interception Directive.

7 Domain Names in the .ZA Name Space

Since the founding of the .ZA name space in 1990, the regulation thereof has been left to industry. Chapter 10 of the ECT Act introduces regulation of the .ZA name space.

At present there is no requirement that persons wishing to register a domain name should obtain a license or meet any specific requirement (for example, that the Registrant should be a South African resident) before registering a domain name in the .ZA name space. However, this position may change once the Department of Communications issues regulations pertaining to the registration of domain names.

In addition to regulating the future registration of domain names in the .ZA name space, the ECT Act also makes provision for a domain name dispute resolution policy. It is anticipated that the domain name dispute resolution policy should be in effect by the end of 2004. The policy will provide a substantially cheaper and quicker mechanism for resolving domain name disputes compared to the past, where trade mark proprietors were required to institute proceedings in the High Court if they wanted to object to a domain name registration.

8 The Protection of Rights on the Internet

Consumer activists are increasingly using the Internet as a means of voicing their dissent to the current wave of globalisation. The ECT Act provides a mechanism to protect both individual and corporate citizens' rights.

Section 7 of the ECT Act makes provision for "take-down notices" to be sent to website hosts (which will normally be an Internet Service Provider), where the website being hosted infringes a third party's rights. A third party (Complainant) who feels his/her/its rights are being infringed by a website can have access to the website disabled if the Complainant deposes to an affidavit outlining the reasons why the website infringes his/her/its rights.

In order to successfully take down a website, a Complainant would need to depose to an affidavit stating the following:

- the full names and address of the Complainant;
- the written or electronic signature of the Complainant;
- identification of the right that has allegedly been infringed;
- identification of the material or activity that is claimed to be the subject of unlawful activity;
- the remedial action required to be taken by the service provider in respect of the complaint;
- telephonic and electronic contact details, if any, of the Complainant;
- a statement that the Complainant is acting in good faith; and
- a statement by the Complainant that the information in the take down notification is to his or her knowledge true and correct.

The affidavit is addressed to the Internet Service Provider who is hosting the website, or the Internet Service Provider's designated agent. Upon receipt of a take down notice, the Internet Service Provider is required by Section 75 of the ECT Act to remove or disable access to a website "expeditiously". Internet Service Providers will normally disable access to a website subject to a take down notice within 24 hours of receipt of the take down notice, and sometimes within 2 or 3 hours.

Any person who knowingly and materially misrepresents the facts in a take down notice will be liable for damages for a wrongful take down. Should a party wish to oppose a take down notice, this would probably necessitate the party approaching the High Court by way of application to have the notice overturned.

9 Specific IT-Related Intellectual Property Issues

9.1 Copyright

The Copyright Act, 1978 recognises a computer program as a sui generis form of copyrightable work, while databases are considered to be literary works.

Too often people make the mistake of assuming that because they have paid for a piece of software to be designed on their behalf that they own the copyright in and to the software. This is not the case in South Africa unless the parties enter into a written copyright assignment agreement. Where a company merely wants to license a piece of software it is advisable for that the company to enter into a formal software development and maintenance agreement, as well as a software license agreement. In this regard, exclusive copyright license agreements also need to be reduced to writing in terms of the Copyright Act.

In addition to entering into agreements with third parties, we also advise that employers include copyright assignment clauses in their employment contracts with their employees. Any such agreement will formalise the statutory provisions of Section 21(b) of the Copyright Act, which states that the copyright in and to work done on behalf of an employer automatically subsists in the employer.

9.2 Trade Marks

As mentioned earlier in this Chapter, trade mark proprietors have several options available to protect themselves on the Internet. These options include take down notices, when a trade mark is being used unlawfully on a website and launching High Court proceedings when their trade mark is being used unlawfully in a domain name within the .ZA name space. An Alternate Dispute Resolution (ADR) policy is currently being designed for the .ZA namespace and should be in force by August 2004.

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BROADCASTING AND TELECOMMUNICATIONS

Broadcasting

The provision of broadcasting and telecommunications services in South Africa is governed by the Independent Broadcasting Authority Act, 1993, the Telecommunications Act, 1996 and the Broadcasting Act, 1999. The first statute established the Independent Broadcasting Authority (IBA), which was responsible for regulating broadcasting matters. The Telecommunications Act established the South African Telecommunications Regulatory Authority (SATRA), which was responsible for regulating telecommunication matters. The Broadcasting Act provides for the conversion of the South African Broadcasting Corporation from a statutory body to a public company, and regulates the relationship between government and the regulatory authorities in the broadcasting and telecommunication industry.

1 ICASA

The Independent Communications Authority of South Africa Act, 2000 dissolved the IBA and SATRA on 1 July 2000 and established, with effect from the same date, the Independent Communications Authority of South Africa (ICASA) as the regulatory body responsible for the regulation of telecommunication and broadcasting matters in South Africa. ICASA must perform the duties imposed, and may exercise the powers conferred upon the IBA and SATRA by the Independent Broadcasting Authority Act, the Telecommunications Act and the Broadcasting Act. The creation of a single regulator reflects recognition of the increasing convergence in broadcasting and telecommunications technology.

ICASA's duties include:

- licensing telecommunication services and radio and television broadcasters;
- monitoring the compliance by licencees with their licence conditions;
- receiving, hearing and adjudicating complaints;
- formulating broadcast and telecommunication policies;
- formulating the regulatory framework for the licensing of radio and television broadcasting and telecommunication services;
- planning the broadcast and radio frequency spectrum.

The Minister of Communications is responsible for issuing policy directives of general application on matters of broad national policy consistent with the objects of the Independent Broadcasting Authority Act and the Telecommunications Act. The Minister also has powers to direct ICASA to undertake any special investigation and inquiry into any matter within its jurisdiction and to report to the Minister in that regard.

2 Telecommunications Licences

The categories of telecommunications licences that may be granted, and telecommunications services authorised by such licences, are the following:

- public switched telecommunication services (PSTS);
- mobile cellular telecommunication services;
- national long distance telecommunication services;
- international telecommunication services;
- local access telecommunication service and public-pay telephone services;
- value-added network services (VANS or ISP);
- private telecommunication networks (PTN);
- multimedia services;
- under-serviced area licence.

Broadcasting licences fall into three broad categories, namely public, commercial and community broadcasting services. Within these broad categories, broadcasting licences may be granted in respect of the following services:

- free-to-air broadcasting;
- terrestrial subscription broadcasting;
- satellite subscription broadcasting;
- cable subscription broadcasting;
- low power sound broadcasting; and
- any other class of licence prescribed by the Authority from time to time.

The telecommunications and broadcasting legislation sets out a regime requiring operators of telecommunication and broadcasting services to obtain licences to provide such services. An application for a licence to become a fixed-line operator, or to provide mobile services, or to provide a broadcasting service, may only be submitted after an invitation to apply has been issued by the Minister. Licence applications are considered by ICASA, which, in the case of a licence for a fixed-line or mobile service, makes a recommendation to the Minister, who has the ultimate power to award such a licence. Likewise, the Minister, acting on ICASA's recommendation, determines the licence conditions for these services. Licence conditions must promote fair competition in the telecommunications industry.

3 Fixed-Line Operators

Telkom, the incumbent fixed-line operator, and in which the Government has conducted a public offering of a percentage of its shares, is currently the only operator providing the following elements of the PSTS:

- the national long-distance telecommunication service;
- the international telecommunication service;
- the local access telecommunication service;
- the public pay-telephone service;
- all or any telecommunication facilities to be used by any person for the provision of value-added network services;
- all or any telecommunication facilities comprising fixed lines to be used by any operator for the provision of mobile telecommunication services; and
- all or any telecommunication facilities to be used by any person for the provision of certain private telecommunication networks.

It is expected that a second fixed-line operator (SNO) will be licensed to provide a PSTS. Until May 2005, no person other than Telkom and the SNO will be entitled to provide the above mentioned elements of the PSTS.

Only Telkom, the SNO and Under-Serviced Area licencees may provide voice over internet protocol for the time being.

4 Mobile Phone Operators

There are currently 3 licensed mobile phone operators in South Africa, namely, Vodacom, MTN and Cell C. Telkom holds 50% of the shares in Vodacom, while the other 50% is held by private shareholders. MTN and Cell C are both privately owned in full. The provision of mobile services is governed by the Telecommunications Act, and is subject to the terms and conditions of the licences granted to the operators.

5 The Convergence Bill

The Department of Communications has recently published the draft Convergence Bill for public comment, which will repeal parts of the Telecommunications Act and the Independent Broadcasting Authority Act. The intention of the legislature is to introduce a completely new licensing regime, which will be technology neutral and which will take into account the convergence of telecommunication, broadcasting and information technologies. The draft Bill makes provision for the conversion of existing licenses that have been issued under the Telecommunications Act, Broadcasting Act and Independent Broadcasting Authority Act into licenses issued in terms of the new legislation.

6 BEE and Telecommunications

Black economic empowerment plays an increasingly important role in the telecommunications and broadcasting sector in South Africa. Persons wishing to provide broadcasting or telecommunications services must obtain licences from ICASA. In considering licence applications, ICASA takes into account the BEE credentials of licence applicants.

The Telecommunications Act, as well as the Independent Broadcasting Authority Act and the Broadcasting Act provide that a primary object of each of these Acts is the encouragement of ownership and control of telecommunications and broadcasting services by persons from historically disadvantaged groups (HDIs). For example, the Telecommunications Act provides that in considering licence applications, ICASA must have due regard to applications submitted by HDIs, and that preference will be given to applicants with up to 30% (or such higher percentage as may be prescribed) equity ownership held by HDIs.

Conditions relating to empowerment have also been specified in telecommunications operators' licences. For example, HDIs are required to hold, exercise all voting rights and be entitled to dividends in respect of a minimum of 40% of Cell C's issued share capital and to appoint a minimum of 40% of the members of its board of directors. Cell C is required to obtain approval from ICASA where any transfer of shares or change in ownership will have the effect that 10% or more of its issued share capital held by HDIs will be transferred, or where there is a change in a quarter or more of its directors. Cell C is also required to support independent contractors from historically disadvantaged groups.

ICASA has published regulations relating to applications for VANS licences. These regulations provide that such applications must set out strategies for the employment of HDIs, and that where an applicant is a juristic person, a minimum of 15% of the applicant's shares must be held by HDIs.

ICASA has also made regulations regarding the limitation of ownership and control of telecommunication services. These regulations require each licencee to maintain records reflecting the ownership and control interests of HDIs in that licensee during the first two years of the licence period. This does not apply to licensees trading on the JSE Securities Exchange or another internationally recognised securities exchange. The regulations provide, further, that ICASA's prior approval is required, during the first two years of a licence, for a transfer of ownership or control interests that will result in a decrease in the ownership interests of HDIs in the licensee.

BEE in the telecommunications and broadcasting sector will also be facilitated through the ICT Empowerment Charter, which is being developed by stakeholders in the ICT sector. This Charter will include guidelines for BEE and a scorecard for empowerment in ICT industries. It will also establish an ICT BEE Council which will implement, monitor and enforce the objectives of the Charter. The Charter will address equity ownership, management and control, skills development, employment equity, enterprise development and preferential procurement as they relate to the ICT sector.

Property

The right to own property is entrenched in the Constitution.

1 Registration System and Legislation

South Africa has in place an advanced land registration system. Title registration is possible because each registered unit of land is surveyed and represented on a diagram or general plan. South Africa has an accurately beaconed boundary system.

In addition to the conventional title deed registration system there is also a sectional title system in place to cater for larger buildings, such as blocks of flats and commercial property complexes, similar to condominium development in many other countries. Each major regional centre in South Africa has a Deeds Registry Office covering all land in the region and controlled by a Registrar of Deeds.

A person domiciled in another country is free to acquire immovable property in South Africa.

An external company may also acquire immovable property in South Africa, provided the company registers its Memorandum and Articles of Association in the Companies Office.

2 Forms of Ownership

In addition to the conventional land registration and the sectional title system, other forms of ownership are recognised by share block and time share systems. In both instances, the property is registered in the name of a company and a person acquires title by purchasing an interest or becoming a shareholder in the company.

3 Costs

The property market in South Africa is covered by a network of estate agents whose activities are regulated by the Estate Agents Board. The commission charged by an estate agent is approximately 7% of the purchase price.

Tax is payable on property transactions in the form of either VAT or transfer duty. If the seller is a registered vendor (for VAT purposes) VAT at 14% of the purchase price is payable and it is usually included in the purchase price. However, if the seller is not a VAT vendor, transfer duty is payable by the purchaser. Transfers of fixed property attract transfer duty of 10% on the purchase price for corporate entities and is calculated on a sliding scale for individuals at the rate of 0% on the first R140 000 and 5% on the excess above R140 000 and less than R320 000 and 8% on the excess of R320 000.

The legal costs involved in the registration of the transfer of the property amount to roughly 0,5% to 1% of the purchase price. Finally, a minimal registration fee is payable to the Deeds Registry.

In urban areas monthly rates and taxes are payable for municipal services such as water, electricity, sewerage and refuse removal. These rates will depend on the value of the property. In the case of sectional title, time share, share block and similar developments, monthly levies are payable which include the rates and taxes as well as provision for the maintenance of the property.

4 Finance

Unless property is bought for cash, finance raised can be secured by means of a mortgage bond which is registered over the title deed of the property.

5 Capital Gains Tax

Capital Gains Tax applies when a disposal of immovable property occurs. The legislation became applicable from 1 October 2001.

Private homes owned by individuals, which qualify as primary residences, will be exempt from the payment of Capital Gains Tax up to the first R1 million of capital gains. This exemption does not apply if the home is registered in the name of a trust or a company or a close corporation.

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MINING, OIL AND GAS

Presently, South African mining law is regulated by the common law and by the Minerals Act, 1991, which is applicable for the whole country. The state controls prospecting and mining by issuing prospecting permits and mining authorisations and only the holder of the right to the mineral or someone to whom such holder has granted consent to prospect or to mine for his or her own account may apply for a prospecting permit or mining authorisation. The Department of Minerals and Energy regulates the enforcement of the legislation with regional offices in various areas of jurisdiction. Through the permit and authorisation system, the state aims to ensure that the mineral resources of South Africa are utilised optimally, with due regard to safety and health. Any permit or authorisation is subject to the requirement that rehabilitation of the surface occurs and that an environmental management programme report for the prospecting or mining operations is approved.

1 The Mineral and Petroleum Resources Development Act

The Mineral and Petroleum Resources Development Act, 2002 (the MPRD Act) proposes radical transformation of the law governing rights to mineral resources. The already enacted MPRD Act should come into operation in the first half of 2004, subject to the finalisation of a statute governing the payment of royalties.

In the past, private individuals and companies were entitled to ownership of mineral rights. The new MPRD Act sees natural resources as the natural heritage of all South Africans. The MPRD Act therefore vests the state with custodianship of all mineral resources to grant, refuse, control, administer and manage prospecting and mining rights, mining permits and retention permits and gives the state authority to grant permission to remove or dispose of any minerals to companies and private individuals. The rights granted by the state in terms of the MPRD Act are generally known as “new order rights”.

The MPRD Act does make provision for the conversion of existing mineral rights, prospecting rights and mining rights into new order rights upon application to the Department of Minerals and Energy Affairs (DME). Old order mining rights originated from the old Minerals Act and the statutes prior to it and are widely held by participants in the industry. Existing mining rights in force at the commencement of the MPRD Act continue to be in force for a period of 5 years from the date of commencement of the MPRD Act. Such holders will have to apply for conversion within a period of 5 years from this date.

2 The Mining Charter and Black Economic Empowerment

An agreement regarding black economic empowerment was entered into in October 2002 between the DME, the Chamber of Mines representing the mining industry, the South African Mining Development Association and the National Union of Mine Workers. This agreement is known as the Broad-Based Socio Economic Empowerment Charter for the Mining Industry Agreement (the Mining Charter).

The Mining Charter recognizes that as a result of South Africa's past racially discriminatory practices, black persons, mining communities and women in particular, have been largely excluded from participating in the mining industry. Through the Mining Charter, the mining industry has committed itself to the following black ownership targets:

- 15% for the initial 5 year period (2002 – 2007) and 26% black ownership of mining industry assets in respect of individual operations in 10 years time by each mining company (i.e. by 2013). If a company has achieved in excess of these targets for a particular operation, then the excess may be credited to any shortfall in its other operations;
- transactions are to be entered into in a transparent manner and for fair market value.

The Charter also contains commitments relating to amongst other things, employment equity, human resource development, migrant labour, housing and living conditions and procurement.

To give effect to broad-based black economic empowerment, the MPRD Act imposes certain empowerment requirements on applicants for prospecting and mining rights, which include a prescribed social and labour plan and an undertaking regarding the manner in which the applicant will achieving the black economic empowerment objectives imposed by the Act.

When applying for a conversion of new order rights, a “scorecard approach” will be adopted by the DME, based on the recognition of the applicant’s commitment to the Mining Charter as a whole within the prescribed 5 year window period. A draft scorecard has been issued but implementation standards, processes and units of assessment remain unclear. The indication is that attributable units will be allocated to the extent of compliance with all of the requirements of the Charter. A similar approach will be followed for the issue of a new right.

The MPRD Act aims to ensure that holders of old order rights “use it or lose it”. As such, unused old order rights remain valid for 1 year upon the commencement of the MPRD Act, subject to their terms and conditions. The holders of these rights to minerals have the exclusive right to apply for prospecting or mining rights in terms of the MPRD Act within the 1 year period. The existing rights will remain valid until such time as the application for the prospecting or mining right is granted or refused. Where no application is made, the existing rights to minerals will cease to exist upon the expiry of 1 year after the commencement of the MPRD Act.

3 Mine Health and Safety

Another important statute affecting mining in South Africa is the Mine Health and Safety Act, 1996, which provides for the health and safety of persons by way of enforcement of various health and safety measures at mines and provides for employee participation in these matters.

4 Financial considerations

Mining operations are taxed on the nature of their income as determined by South Africa’s normal taxation rules, with certain special features such as the distinction between income derived from mining operations and non-mining operations (flat company rate) and whether the income is derived from gold (formula rate) or other ore (flat company rate). Capital expenditure may be deducted and provision is made for a capital allowance for gold mines due to the high capital investments incurred. Mining operations are also required to provide for a Trust Fund for their environmental rehabilitation obligations. Contributions to such Trust Funds are deductible from income.

5 Oil and Gas

The offshore petroleum exploration and production industry is at the present time regulated by the Minerals Act, 1991. This will change when the MPRD Act comes into operation, which is expected in the first half of 2004. Offshore operators are also required to comply with legislation in addition to that applicable to mines on dry land. This further legislation is directly related to all manner of activities on the high seas, for example, the Merchant Shipping Act, 1951, Marine Pollution (Control and Civil Liability) Act, 1981, Marine Pollution (Prevention of Pollution from Ships) Act, 1986, to which the International Convention for the Prevention of Polution from Ships, 1973 (MARPOL) is a Schedule and a variety of environmental laws. The South African government has granted the Petroleum Agency the exclusive right to prospect for natural oil in the territorial waters and continental shelf of South Africa. The Petroleum Agency has in turn entered into prospecting agreements and mineral leases with various offshore petroleum operators, which have given them the rights to explore for and produce oil and gas offshore.

shipping

1 Ports

South Africa has fully developed ports in the cities of Durban, Cape Town, Port Elizabeth and East London, and at Saldanha and Richards Bay. Durban also has an off-shore oil terminal. The ports serve the carriers involved in the country's trade with Europe, the United States, South America and the Middle and Far East and provide bunkering, chandling and repair services for passing vessels. The Port of Ngqura (Coega) (about 30 kilometres from Port Elizabeth) is currently under development and will form the hub of an industrial development zone.

Local and foreign companies run substantial fleets which operate between South Africa and its trading partners and between the various local ports.

2 Ship Owning

Merchant shipping is regulated by the Merchant Shipping Act, 1951. Vessel registration and mortgage registration are regulated by the Ship Registration Act, 1998, which commenced on 25 April 2003.

Prior to the commencement of the Ship Registration Act, for a vessel to be entered in the South African registry, it was required to be wholly owned by a South African citizen or legal person. South Africa did not permit dual registration into or out of the flag. The Ship Registration Act now regulates both the registration of vessels on the South African Ships registry and the registration of mortgages over ships. This Act is designed to encourage the re-registration of South African ships on the South African Register and requires a "genuine link" between South Africa and any ships entered on its register. The purpose of the Act is to develop an accurate and comprehensive register of all South African ships. The Act further aims to create a balance between the above while encouraging foreign investment, by providing for ships to be owned in part by non-South African nationals and by permitting dual registration to a limited extent.

Under this Act, in order for a small vessel to be entered on a South African Registry, it must be either wholly or largely owned, or operated solely by South African residents or nationals. A ship must be South African owned or on bareboat charter to South African nationals.

Subject to survey, there is no age restriction on vessels seeking registration. The South African Maritime Safety Authority (SAMSA), which is the specialist division of the Department of Transport dealing with maritime matters, conducts an inspection of vessels for the issuance of safety equipment, safe radio and marpol certificates. All other surveys may be conducted and certificates issued by most of the recognised classification societies.

Registration is a prerequisite for a mortgage under the Ship Registration Act. A South African ship of not less than 25 gross registered tons, or share therein may be mortgaged as security for a loan or other debt. The deed of mortgage is registered by SAMSA at the ship's port of registry. SAMSA records mortgages in the order in which the deeds creating them are produced to it and earlier registered mortgages rank ahead of those registered later in respect of the same vessel. Once the mortgage has been registered on the prescribed form, the mortgagee enjoys the protection of the Act and also the Insolvency Act, in the event of the owner being a company or a close corporation which is wound up.

3 Taxation

Income derived from business carried on by a South African resident or domestic company as owner or charterer of any ship is taxable wherever the ship may be operated. Company income tax is levied at the rate of 30%, but ship owners are entitled to certain allowances.

The following applies exclusively to ship owners:

3.1 In respect of ships acquired before 1 April 1995, ship owners are entitled to deduct a straight line annual allowance of 10% on the cost of ships instead of the ordinary wear and tear allowance and a special initial allowance of 40% of the cost of certain ships. In respect of ships brought into use on or after 1 April 1995, ship owners are entitled to deduct a 20% depreciation allowance. This allowance is available on the cost of both new and used ships and offers a deduction equal to 20% of the cost of any ship and must be based on the adjustable cost as determined in terms of the Income Tax Act. The entire cost of a ship may be deducted in 5 equal annual instalments subject to certain further provisions of the Income Tax Act.

3.2 Ship owners are entitled to deduct a reserve for expenditure on future extraordinary repairs. This deduction will be for repairs to be undertaken within a period of 5 years and this allowance is in addition to the deduction for normal annual expenditure on repairs to ships. The ship to be repaired must be used by the taxpayer for the purposes of his trade.

3.3 Ship owners are liable for tax on recoupment arising on the sale of a ship.

3.4 Special provisions of the Income Tax Act are applicable to parent and subsidiary companies. Where the subsidiary company acquired ships under agreements entered into on or before 12 March 1997 and the parent company has elected or does elect that the 2 companies (the parent and subsidiary companies) be deemed to be and to have been one and the same company for the purposes of the Income Tax Act, the parent company will be the taxpayer in respect of the subsidiary's profits or carry forward its losses. In respect of ships acquired under agreements entered into after 12 March 1997, the subsidiary company itself will be taxable on its profits, or may carry forward its losses.

3.5 An allowance is granted for ships scrapped during the year of assessment.

3.6 No allowance for wear and tear may be claimed on the cost of the ship qualifying for the annual or initial allowance.

3.7 In general, expenses associated with the acquisition or use of ships are deductible according to the normal rules and in terms of the general deduction formula.

4 Double Taxation Agreements

There are some double taxation agreements entered into between South Africa and the governments of Belgium, Brazil, Greece, Ireland, Italy, Japan, Portugal and Spain, which are limited to income derived from the business of sea or air transport. These agreements generally exempt enterprises of these states from South African tax and South African enterprises from foreign tax on such income.

Double taxation agreements entered into between South Africa and countries such as Australia, Norway, China, Denmark, Germany, Poland, Sweden, Switzerland, Thailand, the United Kingdom, Austria and Canada are wider in scope and, inter alia, make provision for the avoidance of double taxation in respect of income generated by the operation of ships in international traffic.

5 Jurisdiction in Maritime Matters

The High Courts of the several littoral provinces exercise a special admiralty jurisdiction to deal with "maritime claims". The Admiralty Jurisdiction Regulation Act, 1983, has resulted in the development of a substantial body of local case law and expertise among maritime lawyers and this Act allows associated ship arrest by a maritime creditor claimant. Heavily influenced by English admiralty law (as it was in the 1890s) which was applied prior to 1983, the South African law is recognised as a sophisticated system conforming to international maritime standards and principles.

Besides the innovative associated ship arrest provisions (which allows for the arrest of a ship other than the ship concerned where there is the exercise not only of ownership, but also control), the arrest of property as security for arbitration proceedings in other jurisdictions is also possible. There are also provisions for the inspection of ships and documents for the purposes of determining claims even if the litigation is not proceeding in South Africa.

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ENVIRONMENTAL LAW

Enviro Law

1 Environmental Law at a Glance

South Africa has a large body of environmental law. These laws often require that the environmental offender must repair and/or bear the cost of repairing or remediating the environmental damage for which the offender is responsible. In recent years the environmental regulatory bodies have been scaling up enforcement of these statutes and this, combined with growing public awareness of environmental matters, places ever increasing pressure on corporate bodies to clean up their polluting, or potentially polluting, operations.

In the national sphere of government the Departments of Environmental Affairs and Tourism and Water Affairs and Forestry are the most important departments responsible for the administration of environmental regulatory controls. South Africa's Constitution has also given legislative and executive competency, in respect of certain environmental matters, to the provincial and municipal spheres of government. With the advent of democracy in South Africa, a number of important environmental law reform initiatives were commenced in South Africa. These lead to the development of an integrated approach to environmental regulation and management, which takes cognisance of South Africa's international obligations, as well as the need to ensure development that is sustainable from a social, environmental and economic perspective.

The most important national law relating to the environment is the right that is contained in the Bill of Rights of the Constitution. This stipulates that everyone has the right to an environment that is not harmful to health or well-being. This is a "people-centred" approach to environmental rights that places emphasis on creating a clean environment but does not insist on the preservation of wilderness at the expense of sustainable development. The Constitution places obligations on both the public and the private sector and must be adhered to by individuals and corporations. South Africa has an overarching environmental protection and management statute, the National Environmental Management Act, 1998, which provides for general "polluter-pays" obligations, environmental policy, integrated environmental management and co-operative governance matters. However, there is also resource-based legislation administered by a number of government departments. Some of the most important national statutes relating to the environment are set out below.

2 Water

The National Water Act, 1998 gives effect to a public rights system in terms of which water is allocated on an administrative licensing basis. This Act contains stringent polluter-pays provisions in the event of on- and off-site water contamination.

3 Air

The Atmospheric Pollution Prevention Act, 1965 is a comprehensive air pollution control statute regulating air emissions, particularly with respect to industrial pollution from scheduled processes, smoke and dust, and vehicular emissions. It is currently under review and will be replaced by the Air Quality Act some time in 2004. The new act will provide for maximum emissions standards and will bring South Africa's atmospheric pollution legislation in line with international developments and practices. The existing Act controls noxious or offensive gases resulting from the operation of scheduled processes including, hydrocarbon refining processes, tar processes, lead processes, acid sludge processes, macadam preparation processes, acrylonitrile and nickel processes. No person may carry on a scheduled process in or on any premises anywhere in South Africa unless s/he is the holder of a current or provisional registration certificate.

4 Human Health

The Health Act, 1977 designates certain forms of pollution emanating from factories or industrial or business premises a nuisance.

The Occupational Health and Safety Act, 1993 provides for the health and safety of persons at work and provides protective measures in connection with the use of plant and machinery, as well as any hazards to health and safety arising out of specific working conditions. Numerous regulations are promulgated under this Act governing different types of environmental and human health hazards.

5 Toxic Industrial Waste

South Africa regulates certain hazardous substances and wastes separately to other substances and places additional obligations on an employer in respect of the disposal of hazardous chemical substances.

6 Land Use Change

Land Use is generally governed at a local level through Town Planning Schemes and zoning provisions, any changes in land use require application to the Local Authority. In addition, the Environment Conservation Act, 1989 and regulations made in terms of that Act provide for compulsory Environmental Impact Assessments to precede most large industrial construction operations and almost all land use changes.

7 Mining

The Minerals Act, 1991 (and the Minerals and Petroleum Resources Development Act, 2002 which will soon replace it) places an obligation on mining companies to rehabilitate the damage caused by mining operations. Environmental management and rehabilitation plans have to be drawn up at the commencement of any prospecting or mining operations and a rehabilitation trust fund must be established to fund all rehabilitation which will be required.

8 Liability

In South Africa, contravention of an environmental statute is generally a criminal offence in respect of which a fine and/or imprisonment may be applied. The National Environmental Management Act makes provision for damages to be awarded by the courts in the event of the contravention of an environmental statute. Those damages awards are compensatory in nature or may be applied to decontamination, remediation or clean-up measures ordered by the courts. South African law does not generally impose strict liability, unless a statute specifically provides otherwise, for example in respect of radioactive material under the National Nuclear Regulator Act, 1999.

The Minerals and Petroleum Resources Development Act imposes a form of strict liability on the directors of mining companies for environmental damage caused by mining operations.

9 Directors'/Employees' Liability

A company is held responsible for the damages suffered by third parties. A director, official or employee of a company who is party to the making of decisions or the carrying out of certain actions and activities which are found to have been negligent, will also be liable to a third party who suffers damages. There is a duty of good faith and to exercise reasonable skill and diligence imposed on directors and on other employees of a company. Negligent conduct imposes criminal and/or civil liability. Ordinarily, the Companies Act, 1973 affords its shareholders limited liability, unless the shareholder acts fraudulently. Furthermore, the National Environmental Management Act makes provision for personal liability on the part of directors.

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CONSTITUTIONAL LAW

Const Law

The Constitution is the supreme law of South Africa. Any law or conduct which is inconsistent with it is "invalid" and the obligations imposed by it must be fulfilled.

The Constitution applies to, and binds, the legislature, the executive, the judiciary and all other organs of state and the Constitutional Court is empowered to invalidate legislation which is in conflict with the rights embodied in the Bill of Rights.

The Constitution delineates the powers of parliament, the president and national executive, the courts, state institutions and all the provincial legislatures in the country. Various independent state institutions such as the Public Protector, the Human Rights Commission and the Commission on Gender Equality (which are subject only to the Constitution and the laws established under it) strengthen constitutional democracy in South Africa.

1 Bill of Rights

The Bill of Rights entrenched in the Constitution is the cornerstone of democracy in South Africa. It is modelled largely on the Canadian and German systems. The Constitution applies to actions between the state and individuals (vertical application) and to actions between individuals (horizontal application). Depending on the nature of the right and of the duty imposed by it, both natural and juristic persons are subject to the Bill of Rights.

The rights enshrined in the Bill of Rights include the right of universal adult suffrage; political participation; equality; privacy; freedom of expression; freedom of association; freedom of religion; freedom of assembly; access to information; and administrative justice.

In the economic sphere, the Bill of Rights guarantees a right to acquire and hold rights in property and prohibits deprivation of property otherwise than in accordance with a law of general application. Expropriation must be for a public purpose and is subject to just and equitable compensation.

The state, as well as individuals and private bodies, are constitutionally prohibited from unfairly discriminating on grounds such as race, sex, gender, disability, sexual orientation and social origin. The state must conform to international standards in the treatment of foreign nationals in respect of fundamental rights. South African courts have previously upheld the application of the Bill of Rights to aliens, including foreign companies.

The labour relations clause guarantees the right to fair labour practices. Employees have the right to form and join trade unions and employers have the right to form themselves into employer organisations. The Constitution enshrines the rights of employers and employees to bargain collectively and of employees to strike.

The rights in the Constitution may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.

The legislature of each province may frame its own provincial constitution. This must comply with the values of the national Constitution and may not confer on the province any powers or functions that fall outside the areas of provincial competence.

2 Legislation – Recent Developments

The constitutional provisions relating to equality, access to information and administrative justice each envisaged the enactment of legislation to give effect to these fundamental rights.

2.1 The Promotion of Equality and Prevention of Discrimination Act

The purpose of the Promotion of Equality and Prevention of Discrimination Act, 2000 as stated in its Preamble, is "the eradication of social and economic inequalities, especially those that are systemic in nature, and which brought pain and suffering to the great majority of our people".

To achieve this, the Act prohibits unfair discrimination, provides remedies to victims of unfair discrimination, and promotes the achievement of substantive equality. It is binding on the state and all persons.

In addition to the general prohibition on unfair discrimination, the Act gives specific protection to black people, women and disabled people. It also prohibits harassment, hate speech and the dissemination of information which would have the effect of unfairly discriminating against anyone.

To achieve substantive equality, the Act requires the state to develop action plans, enact further necessary legislation and to raise awareness and provide training around equality issues. Persons contracting directly or indirectly with the state are also obliged to promote equality. In addition, the Act sets out practices which may be unfair and which the state must address.

Finally, the Act envisages the establishment of Equality Courts with wide ranging powers of enforcement. While ordinarily a contravention of the Act does not create a criminal offence, it may nonetheless be referred for prosecution.

2.2 The Promotion of Access to Information Act

The Promotion of Access to Information Act, 2000 gives effect to the constitutional right of access to information held by the state or by another person and which is required for the exercise and protection of any rights. This Act is aimed at fostering a culture of transparency and accountability in public and private bodies.

The right of access to information is not absolute and is subject to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective and efficient governance.

A public body may also refuse access to information if the disclosure could cause prejudice to the defence, security or international relations of South Africa; if it could materially jeopardise the economic interests and financial welfare of South Africa; or if it would disclose information on the internal workings of the public body.

2.3 The Promotion of Administrative Justice Act

The third new law relates to administrative justice. The Constitution entrenches the right to administrative action that is lawful, reasonable and procedurally fair. In addition, everyone has the right to written reasons where his or her rights have been adversely affected by administrative action.

The Promotion of Administrative Justice Act, 2000 sets out the elements of procedurally fair administrative action. Such elements include adequate notice of the proposed action and a hearing, as well as notification of one's right of review or internal appeal and of the right to request reasons for any administrative action that materially and adversely affects one's rights.

The Act sets out the procedure to be followed in requesting such reasons, as well as the circumstances under which administrative action may be reviewed by the High Court.

3 Constitutional Court

The Constitutional Court consists of 11 Judges appointed from the ranks of High Court judges, senior practitioners (both advocates and attorneys) and academics. The Judges are appointed by the President at the recommendation of the Judicial Service Commission for a non-renewable term of 12 years but must retire at the age of 70 years.

In all constitutional matters, the Constitutional Court is the highest court of the country. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. The Court has both original and appellate jurisdiction and is charged with the duty of overseeing, interpreting and implementing the rights guaranteed in the Constitution. It may declare any law or conduct that is inconsistent with the Constitution invalid. The High Courts may make an order concerning the constitutional validity of an Act of Parliament, provincial legislation and administrative conduct of the government, but an order invalidating the legislation of Parliament must be confirmed by the Constitutional Court.

4 Generally

In promoting the development of South African constitutional law and in interpreting the Constitution, the courts are obliged to consider international law and are empowered to have regard to foreign law.

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IMMIGRATION

No foreign person may enter South Africa on a temporary or permanent basis without the requisite permit. In general, the most important factor taken into account in the issuing of permits for temporary or permanent residence is whether or not the applicant is of a good character. Both temporary and permanent residence permits carry prescribed fees for the processing of the applications. Visas will generally be need to be applied for by persons wishing to come for short visits to South Africa (less than 3 months), unless the person holds a passport issued by a country which has been visa-exempted by South Africa. On entry into South Africa, the visa is then deemed to be a visitor's permit (see below).

1 Temporary Residence

The Immigration Act, 2002 provides for the issuing of various categories of temporary residence permits. The different categories of permits are briefly summarised below.

1.1 Visitor's Permit.
This permit may be issued to any foreign national who holds a visa or is a citizen of certain prescribed states, for up to 3 months at a time, unless the foreign national is engaged in academic sabbaticals, voluntary or charitable activities or research, in which case it will issued for up to 3 years. The holder of a visitor's permit may not conduct work in South Africa.

1.2 Diplomatic Permit.
This permit may be issued to an ambassador, a minister of a foreign state, career diplomat or consular officer of a foreign government recognised by the South African government, or a representative of an international organisation approved by the Minister of Foreign Affairs.

1.3 Study Permit.
This permit may be issued to a foreign national intending to study in South Africa for longer than 3 months. While a study permit does not entitle the holder to conduct work in South Africa, the holder may undertake part-time or vacation work if he or she is attending a higher education institution.

1.4 Treaty Permit.
This permit may be issued to a foreign national conducting activities in South Africa in terms of an international agreement, to which South Africa is a party.

1.5 Business Permit.
This permit may be issued to a foreign national intending to establish or invest in a business in South Africa in which he or she may be employed, and to the members of such foreign national's immediate family. This permit will only be issued if, among other things, the foreign national invests a prescribed minimum capital contribution in the business. The holder of a business permit may conduct work in South Africa.

1.6 Crew Permit.
This permit may be issued to a foreign national who is a member of the crew of a ship. The holder of a crew permit may not conduct work in South Africa.

1.7 Medical Treatment Permit.
This permit may be issued to a foreign national intending to receive medical treatment in South Africa for longer than 3 months. A designated official of the institution where the foreign national intends to receive treatment is to certify that it has received guarantees and that the treatment costs of the foreign national will be paid.

1.8 Relative's Permit.
This permit may be issued to a foreign national who is a member of the immediate family of a citizen or permanent resident of South Africa, provided that such citizen or permanent resident provides the prescribed assurance that he or she has the means available to support such foreign national for the requested duration of the permit, either personally, or through the contribution of such foreign national. The holder of a relative's permit may not conduct work in South Africa.

1.9 Work Permit.
There are several sub-categories of work permits which may be issued by the Department of Home Affairs.

- A quota work permit may be issued to a foreign national who falls within a category determined annually by the Minister of Home Affairs (in consultation with the Ministers of Labour and Trade and Industry) by notice in the Government Gazette, as long as the number of work permits issued for such category does not exceed the quota determined in the notice.
- A general work permit may be issued to a foreign national not falling within a quota category, provided the prospective employer of the foreign national satisfies the Department of Home Affairs that despite diligent search, the employer has not been able to employ a person in South Africa with qualifications equivalent to those of the foreign national. The employer would also need to produce certification from a chartered accountant that the terms and conditions under which it intends to employ the foreign national, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents of South Africa.
- An exceptional skills work permit may be issued to an individual having exceptional skills or qualifications, as determined in the discretion of the Department of Home Affairs, or by regulation.
- An intra-company transfer work permit may be issued to a foreign national who is employed abroad by a business operating in South Africa in a branch, subsidiary or affiliate entity and who by reason of his or her employment is required to conduct work in South Africa for a period not exceeding 2 years.

1.10 Retired Person Permit.
This permit may be issued for a period exceeding 3 months to a foreign national who intends to retire in South Africa, provided the foreign national provides proof that he or she has the right to a pension or annuity which will give the foreign national a prescribed minimum payment for the rest of his or her life, or has a minimum prescribed net worth. The holder of such a permit may also be permitted to conduct work in South Africa.

1.11 Corporate Permit.
This permit may be issued to a corporate applicant to employ foreign nationals who are required to perform work for the corporate applicant. The Department of Home Affairs, in consultation with the Departments of Labour and Trade and Industry, will determine the maximum number of foreign nationals to be employed in terms of a corporate work permit. Notwithstanding the existence of this category of permit, a corporate applicant would still be entitled to employ a foreign national on a general work permit, as described above.

1.12 Exchange Permit.
This permit may be issued to a foreign national participating in a programme of cultural, economic or social exchange organised or administered by an organ of state in South African or a public higher education institution in conjunction with an organ of a foreign state. This permit may also be issued to a foreign national who is under 25 years of age and who has received an offer to conduct work for no longer than 1 year.

In most cases, applications for temporary residence permits may only be made while the foreign national is outside South Africa, and the foreign national will not be allowed to enter the country until a valid temporary residence permit has been issued to him or her. A cash deposit or bank guarantee may be required to ensure that the period of stay stated in the permit, or the purpose for which or conditions under which the permit is issued, are observed or complied with. Once the permit has been granted, it is possible, if properly motivated, to apply for an extension of certain permits before their expiry date, from within South Africa.

When any temporary residence permit is issued to a foreign national, an appropriate permit may also be issued to the spouse, life partner, dependant, child, person in the employ and a member of the household of the foreign national, if the spouse, life partner, child, or employee intends accompanying the foreign national and residing with the foreign national in South Africa.

A foreign national employed in South Africa and transferred for a temporary period to work in South Africa will be subject to the same legal provisions as a local employee and will be treated on the same basis. His or her South African income will be subject to income tax and other deductions on the same basis as any local employee. Persons on short-term employment contracts will generally have temporary residence status and can make favourable arrangements through their banks with the South African exchange control authorities to remit their income overseas.

2 Permanent Residence

A person who wishes to permanently reside in South Africa may apply for a permanent residence permit in the following categories:

2.1 Direct Residence.
A permanent residence permit may be issued to:

- a person who has been a holder of a work permit for at least 5 years and has received an offer of permanent employment in South Africa;
- the spouse of a citizen or resident;
- the child of a citizen;
- the child of a citizen or resident under the age of 21, provided that this permit will lapse if the foreign national does not submit an application for its confirmation within 2 years of his or her having turned 21 years of age.

2.2 Residence on other grounds.
A permanent residence permit may be issued to a foreign national who:

- has received an offer for permanent employment in South Africa;
- has demonstrated extraordinary skills or qualifications;
- intends to establish a business in South Africa and invest in it the prescribed financial contribution to be part of the intended book value of the business;
- is a refugee as defined in the Refugees Act, 1998;
- intends to retire in South Africa, provided that a chartered accountant certifies that such foreign national has the right to a pension or retirement annuity equivalent to a prescribed amount, or a minimum prescribed net worth;
- is a relative of a citizen or resident within the first step of kinship.

The holder of a permanent residence permit will have all the rights, privileges, duties and obligations of a South African citizen, except for those rights, privileges, duties and obligations which a law or the South African Constitution explicitly ascribes to citizenship, for example, voting rights.

Dispute Resolution

1 The Courts

South Africa has a three-tier system of courts, namely, Magistrate Courts or lower courts (having jurisdiction in local districts), High Courts (having jurisdiction in the provinces - there is a High Court in all major cities) and the Supreme Court of Appeal, which sits in Bloemfontein. The Constitutional Court has both original and appellate jurisdiction on constitutional matters. Fuller details of the legal system and profession have been given in Chapter II (Investment Principles and General Considerations).

The Magistrates Courts have jurisdiction in civil disputes of up to R100 000. Any amount over that figure falls within the jurisdiction of the High Court, although to save costs parties may agree to submit disputes to the Magistrates Court. Magistrates are appointed by the Department of Justice and Judges are appointed from the ranks of senior advocates (barristers), attorneys (solicitors) and academics.

The Small Claims Court has a maximum jurisdiction of R3 000 and was created to enable the man in the street to have inexpensive access to the courts. No legal representation is permitted and no corporate entity may institute proceedings in this court.

2 Alternate Dispute Resolution

Alternate forms of dispute resolution have become increasingly popular. Arbitration is governed by the Arbitration Act, 1965. Professional bodies specialising in mediation services and alternate dispute resolution have been formed and are used extensively, particularly in labour related matters. All building and engineering contracts can and generally should contain clauses providing for mediation or arbitration.

Parties are free to agree on a governing law and to the jurisdiction of international arbitration forums such as the ICC and LCIA.

3 Enforcement of Foreign Judgments

Certain procedures must be followed to procure the enforcement of foreign judgments, including foreign arbitral awards. Under the Protection of Businesses Act, 1978, the consent of the Minister of Trade and Industry is required for the recognition and enforcement by South African courts of a judgement or arbitration award rendered by a court or arbitral tribunal outside South Africa in respect of some acts or transactions. Such enforcement is also subject to compliance with the requirements of South African law for the enforcement of foreign judgements. As a general principle however, a foreign judgment may be enforced in South Africa. The procedure normally followed is to institute provisional sentence proceedings based on the foreign judgment as a liquid document.

84 GENERAL INFORMATION ON LIVING IN SOUTH AFRICA

1 Property

Fully serviced houses and apartments are available for sale or rental in South Africa, ranging in size and value to suit individual needs. Availability and cost vary from province to province, with property in Cape Town generally being the most costly. The property market in South Africa is booming, particularly in the coastal areas, mainly as a result of the drop in interest rates and the strengthening of the Rand.

2 Health Care

The South African public health care system is currently in transformation, and some state hospitals are under-funded and under-staffed. The Department of Health is in the process of improving primary health care throughout South Africa particularly in the rural areas and free immunisation is available to children for turberculosis, hepatitis B, measles, tetanus and other illnesses. Private medical care on a par with international standards is available throughout the country.

3 Education

South Africa has many excellent private and state schools, providing kindergarten to matriculation-level education. There are co-educational and single-sex institutions, boarding and day schools, and those that provide tuition in foreign languages, or for children with special needs. Public school education is largely funded by the government.

All schools offer sporting activities in both summer and winter, ranging from tennis, cricket, swimming and athletics to netball, soccer, hockey and rugby. Regional and national sporting and academic events are held throughout the school year.

A range of tertiary education options is available, including a number of excellent universities teaching to international standards, as well as technical training courses offered by colleges and technical institutions. The South African academic year is from January to December for both schools and tertiary institutions.

4 Transport

In general, public transport is neither extensive nor reliable, and most corporate employees rely on their own vehicles to get around in South Africa.

South Africa's transport infrastructure is well developed and there is an extensive and excellent road network available which links all major cities. South Africans drive on the left hand side of the road. The speed limit in urban areas is usually 60km per hour, and on freeways 120km per hour unless otherwise indicated. Wearing seat belts is compulsory and driving under the influence of alcohol is a serious offence. Driving while holding a cellular phone is also an offence and one can be subject to a spot fine.

The railway system is also well developed and is used mainly for freight transport and a limited amount of passenger transportation, although the construction of a sophisticated passenger "Gautrain Rapid Rail" which will create a direct line between Johannesburg International Airport, Johannesburg and Pretoria, is in the pipeline. Construction is scheduled to start in May 2004, and should be completed in about the middle of 2007.

Air transport in South Africa is good with international airports in all major cities, as well as airports in most towns. South Africa has major ports centred in Durban, Cape Town, East London and Port Elizabeth.

5 Social Activities, Sports Clubs and Entertainment

Many South Africans take an interest in sport and outdoor activities, well suited to the country's attractive climate. Membership of a health club is popular and these offer a wide range of facilities from indoor swimming pools and squash courts to weight training equipment and aerobic and other classes. There are also many sports clubs and world-class golf courses.

South Africa has numerous craft markets, theatres and cinemas and there is a wealth of diverse restaurants and eating establishments. A popular relaxation activity is a "weekend getaway" to an area of the beautiful countryside, and this might take in spectacular coastal scenery, wine lands, desert areas, mountain ranges and typical African grasslands. Activities range from game viewing and fishing to climbing, hiking, mountain biking, canoeing and river rafting. The accommodation available ranges from camping and caravan sites to luxury lodgings.

6 General

South African society is characterized by marked imbalances, which has, and will, continue to have an influence on standards of living. These include unemployment, inadequate state health care and social security benefits, high levels of HIV infection, a critical backlog of low-cost housing, and a severe shortage of schools and teachers in disadvantaged communities. The South African government allocates funding and takes steps to eradicate these imbalances.

These factors notwithstanding, the beauty of the landscape, the climate and the diversity and hospitality of the people make any stay in South Africa an enjoyable experience.