DOING BUSINESS
IN SOUTH AFRICA

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ATTORNEYS

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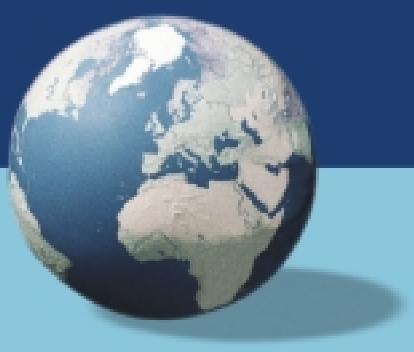

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JOHANNESBURG (SANDTON)
82 Maude Street Sandton 2196
P O Box 784903 Sandton 2146 South Africa
T +27 11 685 8500 **F** +27 11 883 4000

DURBAN
4th Floor The Marine 22 Gardiner Street Durban 4001
P O Box 2010 Durban 4000 South Africa
T +27 31 367 8800 **F** +27 31 301 3346

CAPE TOWN
8th Floor Southern Life Centre 8 Riebeek Street Cape Town 8001
Private Bag X10 Roggebaai 8012 South Africa
T +27 21 405 1200 **F** +27 21 418 6900

www.deneysreitz.co.za

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INTRODUCTION

This brochure illustrates important features of doing business in South Africa. The legal system within which business operates is closely based on overseas, particularly English, models. The concepts and rules will be familiar to overseas investors and trading partners.

Underlying the formal legislative system is a flexible common law system governing fields such as contract. The common law is fair and logical and will hold no surprises for anyone doing business in South Africa.

Since achieving democratic government in 1993 the Republic of South Africa has had the benefit of a modern Constitution which includes a Bill of Rights which is the cornerstone of democracy. The Bill of Rights enshrines the rights of all people and affirms democratic values of human dignity, equality and freedom. Fundamental rights are thus totally protected. The Bill of Rights governs the actions of government as well as private relationships.

Our country has highly sophisticated mining, commercial, financial and industrial sectors which compete with the best throughout the world and attract considerable interest by overseas investors. These sectors operate against a background of political and economic stability that encourage investment.

South Africa has developed equitable labour and employment laws. While in comparison with some other economies the cost of labour is high, investors can operate in South Africa free of any potential criticism regarding the exploitation of labour.

South Africa has become the favoured staging post for investment in Africa south of the Sahara and provides opportunities for trading with Africa, second to none. Southern Africa as a whole, rich as it is in minerals and natural resources, is becoming a strong economic unit to the benefit of everyone involved in this region, including overseas investors.

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BUSINESS ENTITIES

1 INTRODUCTION

There are a number of forms in which persons may elect to carry on business or to invest in South Africa. The most important are:

- individually as a sole proprietor;
- jointly with others in partnership;
- through a close corporation where only natural persons may be involved;
- through a private or public company;
- by the registration of a juristic person incorporated outside South Africa as an "external company" in South Africa.

Investments and enterprises can also be carried on through a business trust. This involves the passing of ownership in assets to trustees who then hold those assets, as a separate estate distinct from their own personal estates, for the benefit of the beneficiaries. Trusts are often used to attain a form of limited liability without the formalities of incorporating a close corporation or company, and are also used for the purposes of protecting assets by separating the assets from those of the beneficiaries. Trusts can play an important role in estate planning for individuals.

2 SOUTH AFRICAN PARTICIPATION

There is no requirement that an individual or any one or more members or shareholders of a close corporation or a company should be citizens of or resident in South Africa. There is also no requirement that any of the directors of companies should be citizens of or resident in South Africa.

The non-resident status of individuals, shareholders or directors does, however, have a number of consequences. For example:

- certain investments held by non-residents are required to be endorsed as "non-resident" in terms of the exchange control regulations;
- there are limits on the local borrowing powers of non-residents which in the case of juristic persons apply where ownership or control of 75% or more of the equity or votes is in the hands of non-residents (see 17 below);
- the so-called "thin capitalisation rules" may be applied to limit the amount of interest charged in respect of financial assistance, such as a loan, granted by non-residents to connected or related companies (as defined) in South Africa, specifically where a debt:equity ratio of 3:1 is not observed (see 6.5 below);
- the anti-transfer pricing provisions contained in the Income Tax Act may be applied in relation to goods or services acquired or supplied under an international agreement (which is defined), concluded between connected persons (see 6.5 below);
- the nationality of non-South African directors must be disclosed on all documents where directors' names are required to be listed, for example on letterheads.

In addition, other requirements must be met, for example:

- traders are required to register as vendors in terms of the Value-Added Tax (VAT) Act, 1991 where their income exceeds a specified amount. Where a trader is not a South African resident, a person resident in South Africa must be nominated as the representative of that person for VAT purposes;
- close corporations, companies and external companies must:
  - appoint an accounting officer or auditor resident in South Africa;
  - appoint a representative resident in South Africa to receive service of documents and to act as the Public Officer for liaison purposes with the South African Revenue Service;
  - have a registered address in South Africa.

3 BUSINESS ENTITIES

3.1 INDIVIDUAL / SOLE PROPRIETOR

There are no additional formalities required where a person commences business as a sole proprietor. The business is not a separate legal person and all transactions are regarded as having been concluded by the person concerned. Accordingly, the sole proprietor does not enjoy limited liability.

3.2 PARTNERSHIPS AND JOINT VENTURES

In general a partnership may be formed between at least 2 and no more than 20 persons. This number may be increased with the permission of the relevant Minister. There are no formalities required to form a partnership and a partnership will exist if the following requirements are met:

- two or more persons agree to act jointly to pursue a venture;
- they each make a contribution (whether in money or otherwise);
- the purpose of their venture is to make a profit; and
- they divide that profit between them.

Although no formalities are required, it is usual, if not essential, that a written agreement be concluded.

A distinction is often drawn between the term "partnership" and the term "joint venture". Although joint venture agreements may contain a statement that they are not to be construed as a partnership, joint ventures generally meet all the requirements of a partnership and will, where appropriate, be treated as a form of partnership.

The term "joint venture" is usually used where the parties concerned intend to pursue a single venture only, for example, in the mining industry joint ventures are often formed for the purpose of prospecting for mineral deposits. If a viable deposit is found the exploitation of the minerals is thereafter carried out by a company in which the joint venture members become shareholders.

Partnerships do not generally offer limited liability and during the existence of the partnership the partners are normally jointly and severally liable for the debts and losses of the partnership. If a partnership is sequestrated, the individual estates of the partners are automatically and simultaneously sequestrated. However, should a partner give an undertaking to discharge the partnership debts and provide security for such discharge, the partner's private estate will not be sequestrated. Joint and several liability means that any one of the partners may be compelled to pay the whole of the debt. If a partner has paid more than its share of the debts, it has a right of recourse against the other partner(s) for the excess.

3.3 CLOSE CORPORATIONS

This form of business entity was introduced in 1984. It is intended to serve smaller businesses, extending limited liability and certain other advantages of corporate identity without requiring compliance with all the formalities of the Companies Act, 1973.

A close corporation exists as a separate legal entity from its members and has an unlimited lifespan.

Normally only natural persons can be members of a close corporation and membership is restricted to ten members.

Legislation recognises the personal nature of the relationship between members of a close corporation. Thus the courts have extensive powers to regulate the relationship of the members should there be a dispute, including where appropriate, the power to order one member to sell its interest in the close corporation on terms fixed by the court. The limited liability of members may be lost if certain of the provisions of the Close Corporations Act, 1984 are contravened.

Members in a close corporation commonly regulate their relationship by way of an association agreement. The association agreement may vary some, but not all, of the provisions of the Close Corporations Act, 1984. A close corporation does not have any directors and there is, therefore, no practical separation between ownership and management.

It is possible to convert a close corporation into a company and vice versa.

3.4 COMPANIES

All companies are regulated in terms of the Companies Act, 1973 as amended. The Act is modelled very closely on English law, although there are several important differences.

As in the case of close corporations, a company exists as a separate legal entity from its shareholders/members and has an unlimited lifespan. But, unlike close corporations, both natural and juristic persons may become members. Furthermore, since companies must have directors, there is a separation between ownership and management.

SHARE CAPITAL

Generally speaking, all companies have a share capital consisting of shares either having a par value or having no par value. Different classes of shares may be created. Each different class of share must have rights that differ from the other classes in one or more respects, which would normally include voting rights. All issued share capital must be fully paid-up. A company may buy back its own shares within certain limits, but normally it is not permitted to give financial assistance directly or indirectly for the purchase of its shares.

There are no minimum share capital requirements in South Africa. Companies may thus be formed with a nominal share capital. However, on incorporation, the directors of the company must lodge a statement that the capital of the company is adequate for its purposes or must state how the company proposes to procure sufficient funds to carry out its business. Stamp duty at varying rates is payable on the creation of share capital, the issue of shares and transfers of shares. Currently the rates are 0.5% calculated on the nominal value of new share capital created, 0.25% on the full subscription price (including share premium) on the issue of new shares, and 0.25% on the price paid (or market value in certain circumstances) on the transfer of shares.

INCORPORATION

A company is incorporated by lodging its Memorandum and Articles of Association and various supporting documents and company forms with the Registrar of Companies. A company may trade only when the Registrar has issued it with a certificate to commence business. Once all the documents have been lodged there is only a minimal delay in the company being incorporated and a certificate to commence business being issued.

A company's main business must accord with that which is described as its main business in its Memorandum of Association.

Companies may either be private companies (designated by the words "(Pty) Ltd" or "(Proprietary) Limited" after the name) or public companies (designated by the word "Ltd" or "Limited" after the name).

PRIVATE COMPANIES

A private company may be established by one or more persons provided that it does not have more than 50 shareholders.

Although a private company is obliged to prepare audited financial statements on an annual basis, these financial statements do not have to be lodged with the Registrar of Companies and do not therefore become public documents.

The right to transfer the shares of a private company must be restricted by its Memorandum and Articles of Association.

Shareholders commonly regulate their relationship by way of a shareholders' agreement. Save where any provision is contrary to the Companies Act, the shareholders may agree that as between themselves certain of the provisions of the Memorandum or Articles will not be binding on them. Usually they will agree to procure changes to the Memorandum and Articles to give effect to their agreement.

PUBLIC COMPANIES

A public company requires a minimum of 7 shareholders.

Public companies are required to lodge audited financial statements with the Registrar of Companies each year and to make such statements available for inspection by members of the public at the registered office of the company.

Only a public company may, but is not obliged to, offer its shares or debentures to the public and only a public company may be listed in terms of the Stock Exchanges Control Act. In order to obtain a listing the company must comply with the listings requirements of the Johannesburg stock exchange known as JSE Securities Exchange South Africa. A public offer will require a detailed prospectus which must contain all the information required by the Companies Act, 1973, except where minimum subscriptions exceed a prescribed amount, or the offer is a private placement.

A new electronic clearing and settlement system for equity securities listed on the Johannesburg Stock Exchange, namely Share Transactions Totally Electronic (STRATE) has been introduced. This involves the dematerialisation of scrip - i.e. the change over from a paper share certificate to an electronic record of ownership.

3.5 EXTERNAL COMPANIES

South African law recognises the corporate identity of juristic persons incorporated outside the Republic of South Africa. However, where any company or other association of persons incorporated outside the Republic of South Africa establishes a "place of business" in the Republic of South Africa, it is obliged to register as an external company. "Place of business" is defined as any place where the company transacts or holds itself out as transacting business. An external company must register within 21 days of establishing its place of business.

Registration involves the lodging of a notarially certified copy of the Memorandum and Articles of Association of the company. If that document is not in one of the official languages of the Republic of South Africa it must be accompanied by a sworn translation into one of the official languages.

In addition, the external company must: give notice of its registered and postal office in South Africa and its financial year-end; appoint an auditor who practises in South Africa; give full details of all directors; and nominate a person resident in South Africa to accept service of documents on behalf of the company.

An external company must file a copy of its annual financial statements with the Registrar of Companies in respect of its South African branch, as well as a certified copy of the foreign financial statements of the company. Exemptions may be granted under certain circumstances.

The external company will be subject to tax on its South African branch profits at a higher rate than South African companies but will be exempt from the Secondary Tax on Companies (see 9 below). The result is that the effective tax rate should be lower for the branch than would be the case for a local company.

LISTINGS ON THE JSE SECURITIES EXCHANGE SOUTH AFRICA ("the JSE")

4.1 LISTINGS REQUIREMENTS

Listings requirements for the JSE are aligned with international best practice. Inter alia they aim to improve company reporting practices through the adoption of various Statements of GAAP, and are designed to boost international confidence in the South African equities market. These requirements have been modified in various respects, and rewritten as "the 2003 Listings Requirements" which became effective on 1 September 2003. A synopsis of the major changes is contained in 4.19 below.

This resumé highlights various of the listings requirements but is not intended to be exhaustive.

4.2 CONDITIONS FOR LISTING

Whilst the JSE Committee may, in its discretion, grant a listing to an applicant that does not fulfil its requirements, or refuse a listing to an applicant that does meet its requirements, the following are the more important conditions that will apply to all applications for listing –

4.2.1 the applicant must be duly incorporated or otherwise validly established under the law of its country of incorporation;

4.2.2 the directors and senior management must collectively have appropriate expertise for the management of the applicant's business;

4.2.3 where in connection with the listing of a subsidiary company its holding company is to make an offer of securities in the subsidiary company or procure the issue by the subsidiary company of securities, such that will result in the difference in value of the holding company's investment in the subsidiary before and after the issue of the securities exceeding 5%, or will result in a change in control of the subsidiary, then those securities to be issued that are not retained by the holding company must be renounced by it in favour of its shareholders by way of a renounceable offer, or such changed circumstances must be approved by its shareholders;

4.2.4 the financial statements to be produced in connection with the listing must conform to South African Statements of GAAP or International Accounting Standards as the case may be, and the listing particulars or any circular concerning a refinancing or reconstruction of the issuer or its group must include a working capital statement in relation to the sufficiency of working capital for the ensuing 12 months after the date of issue of the relevant documentation, except in the case of a banking, insurance or financial services business where the issuer's solvency and capital adequacy are suitably regulated by another regulatory body;

4.2.5 the securities to be issued must be fully paid up and freely transferable unless otherwise required by Statute;

4.2.6 no listing will be granted to a company with low or high voting instruments, but the Committee may grant a listing of additional shares where a company currently has listed high or low voting instruments; and

4.2.7 convertible securities may not be listed unless there are sufficient unissued securities available in the applicant's authorised capital into which the convertible securities can convert.

4.3 PUBLIC SHAREHOLDERS

In determining the shareholder spread requirements for a listed company, certain shareholders such as directors, their associates, the trustees of an employee share incentive scheme or pension fund, and certain other holders will not be regarded as being included in the public.

4.4 CRITERIA FOR MAIN BOARD, VENTURE CAPITAL AND DEVELOPMENT CAPITAL MARKET LISTINGS

(Note that the JSE proposes to close the Venture Capital and Development Capital Markets as at 30 July 2004, as a result of which companies listed on those markets which have been unable to transfer to the Main Board or which have not successfully applied for a listing on the Alt^{x} (see 4.4.4 below), may be suspended and ultimately delisted.)

The listings criteria are:

4.4.1 Main Board

4.4.1.1 a subscribed capital of at least R25 million;

4.4.1.2 not less than 25 million equity shares in issue;

4.4.1.3 a satisfactory audited profit history for the preceding three financial years, the last of which was at least R8 million before tax;

4.4.1.4 20% of each class of equity shares to be held by the public; and

4.4.1.5 the minimum number of public shareholders (excluding employees and their associates) to be 500 for equity shares, 50 for preference shares and 25 for debentures.

4.4.2 Venture Capital Market

4.4.2.1 a subscribed capital of at least R500 000;

4.4.2.2 no less than 1 million equity shares in issue;

4.4.2.3 a profit history is not necessary but the applicant's forward projections should indicate credible returns on capital which on a time weighted basis are above average;

4.4.2.4 a minimum of 10% of each class of equity share to be held by the public;

4.4.2.5 the number of public shareholders (excluding employees and their associates) to be at least 75 for equity shares, 25 for preference shares and 10 for debentures; and

4.4.2.6 at the beginning of the prospectus or pre-listing statement there must be a warning of the speculative nature of the investment in such a company.

4.4.3 Development Capital Market

4.4.3.1 a subscribed capital of at least R1 million;

4.4.3.2 not less than 1 million equity shares in issue;

4.4.3.3 a satisfactory profit history for the preceding two financial years the latest of which must have reported an audited profit level of at least R500 000 before tax;

4.4.3.4 a minimum of 10% of each class of equity share shall be held by the public;

4.4.3.5 the number of public shareholders to be at least 75 for equity shares, 25 for preference shares and 10 for debentures; and

4.4.3.6 the minimum initial issue price of equity shares to be not less than 50 cents per security.

4.4.4 Alternative Exchange

With effect from 1 October 2003 a new market was created known as the Alternative Exchange ("Alt^{x}").

The listings criteria for this market are as follows –

4.4.4.1 Alt^{x} is a market for small to medium companies that are in a growth phase. Applicants that meet the criteria for listing on the Main Board or any other sector of the List will not ordinarily be granted a listing on Alt^{x} and the JSE reserves the right to request such applicants to route their applications to those other sectors of the List. When issuers with a listing on Alt^{x} reach the stage that they comply with the criteria for a Main Board listing, the JSE may transfer their listing to the Main Board;

4.4.4.2 Applicants must meet the requirements of the general conditions for Listing;

4.4.4.3 A subscribed capital of at least R2 million (including reserves but excluding minority interests and revaluations of assets and intangible assets not supported by a valuation by an independent professional expert);

4.4.4.4 The public must hold a minimum of 10% of each class of equity securities and the number of public shareholders must be at least 100;

4.4.4.5 Applicants to ensure that a Designated Adviser ('DA') is appointed and maintained in office at all times;

4.4.4.6 The directors must have completed the Alt^{x} directors' induction programme or must make arrangements to the satisfaction of the JSE to complete it;

4.4.4.7 The applicant must appoint an executive financial director and the DA must be satisfied that the financial director has the appropriate expertise and experience to fulfil his/her role;

4.4.4.8 The applicant must product a profit forecast for the remainder of the financial year during which it will list and for one full financial year thereafter;

4.4.4.9 The applicant's auditors or attorneys must hold in trust 50% of the shareholding of each director and the DA from the date of listing, and a certificate to that effect must be lodged with the JSE by the applicant's auditors or attorneys. These securities must be held in trust until the publication of the audited results for the financial years referred to in the preceding paragraph, after which 50% may be released and the balance one year thereafter; and

4.4.4.10 At least 25% of the directors must be non-executive.

Note that shares held beneficially, whether directly or indirectly by the DA will not be regarded as being held by the public.

Generally, the Listings Requirements applicable to the other categories of markets will apply to Alt^{x}, with certain minor modifications.

4.5 METHODS AND PROCEDURES FOR BRINGING SECURITIES TO LISTING

4.5.1 Where the equity securities are not already listed

New applicants may bring equity securities to listing by way of one of the following methods, namely, an introduction, a placing, an offer for sale, an offer for subscription, an issue with participating or conversion rights, or a renounceable offer.

4.5.2 Where the equity securities are already listed

Applicants whose equity securities are already listed may bring securities (whether or not of a class already listed) to listing by any of the following methods, namely, an offer for sale, an offer for subscription, an issue with participating or conversion rights, a renounceable offer, a rights offer, a claw-back offer, a capitalisation offer, an issue for cash, an acquisition or merger issue (or vendor consideration issue), a vendor consideration placing, an exercise of options to subscribe for securities (including options in terms of executive and staff share schemes), a conversion of securities of one class into securities of another class, or such other method as may be approved by the Committee either generally or in any particular case.

The JSE listings requirements specify detailed requirements for each of the above methods including the nature and form of the documentation to be submitted to the Committee for approval, and the documentation to be published or circulated as the case may be. Furthermore, detailed timetables are specified in relation to each method.

4.6 REPURCHASE OF SECURITIES AND REDUCTIONS OF SHARE CAPITAL

4.6.1 Any acquisition by a company of its own shares, or a purchase by a subsidiary of shares in its holding company, all in accordance with the Companies Act, 1973, must conform to the JSE requirements for listed companies. These requirements differ depending upon whether the acquisition takes the form of a specific authority to repurchase securities, or a general authority to repurchase securities. Detailed requirements are also contained in the Companies Act for these transactions.

4.6.2 Reductions of capital must conform to the relevant provisions of the Companies Act and in addition must comply with the listings requirements of the JSE. Such requirements include the obtaining of the approval of the company's shareholders in general meeting, and authorisation by shareholders to proceed with the reduction in terms of an ordinary resolution. In terms of the JSE requirements the circular in relation to any reduction of share capital must contain the information specified in those requirements.

4.7 EXCHANGE CONTROL APPROVALS

The JSE Committee will not approve an issue of securities until such time as it has received copies of the requisite authority from the exchange control department of the South African Reserve Bank giving a ruling regarding the use of funds to be introduced through normal banking channels from abroad, or from a non-resident account or from an emigrant's blocked account relating to such issue.

4.8 PRE-LISTING STATEMENTS

Detailed requirements are contained in the JSE listings requirements as to the contents of Pre-Listing Statements. Such must contain a responsibility statement, must be formally approved by the Committee before publication, and must not omit relevant information unless approved by the Committee.

4.9 LISTINGS PARTICULARS

The listings requirements prescribe detailed items of information that may be required to be included in Pre-Listing Statements and Circulars relating to rights offers, capitalisation issues and certain merger or acquisition transactions. These include detailed information as to the applicant and its capital, directors, managers and advisors, the securities for which the application is being made, the group activities, financial information, general information and statements concerning documents and consents to be available for inspection and also information in relation to the vendors.

4.10 ACQUISITIONS AND DISPOSALS OF ASSETS BY A LISTED COMPANY

4.10.1 The listings requirements differ in relation to which of the four prescribed categories the acquisition or disposal may fall.

4.10.2 Each category is measured by way of a percentage ratio calculated with reference to various ratios such as 'consideration to market capitalisation', 'dilution', and whether the transaction is to be settled partly in cash and partly in shares.

4.10.3 Category 1 comprises a transaction where any percentage ratio is 30% or more; category 2 comprises a transaction where any percentage ratio is 20% or more but each is less than 30%; category 3 comprises transactions where any percentage ratio is 10% or more but each is less than 20%; and category 4 refers to a transaction where either of the percentage ratios are less than 10%, but more than 5%.

4.10.4 Furthermore, a reverse take-over, involving an acquisition by a listed company of a business, an unlisted company or assets that would result in a fundamental change in the business or in a *de jure* change in board or voting control of the listed company would generally constitute a transaction falling to be governed by the requirements of the JSE.

4.10.5 Various requirements are specified depending upon whether the transaction falls into one of the four categories mentioned above, or is a reverse take-over. In general terms, a category 1 transaction will have stringent requirements as to disclosure, shareholder approval and the like, whilst a category 4 transaction will generally require no more than a disclosure thereof by the company in its next interim report, annual financial statements or other documents circulated to shareholders.

4.11 TRANSACTIONS WITH RELATED PARTIES

Various requirements are stipulated in regard to transactions between a listed company (or any of its subsidiaries) and a related party. A 'related party' includes a material shareholder, a director of the company, any subsidiary or holding company, an advisor, a person who was a principal executive officer of the company, and the like.

4.12 MINERAL COMPANIES

Specific requirements are contained in the JSE listings requirements in relation to the listing of exploration companies and mining companies, with specific requirements in regard to pre-listing statements, listing particulars, prospectuses and circulars. Specific requirements are also included in relation to announcements and circulars regarding such matters.

4.13 PROPERTY COMPANIES

Property companies and listed companies that carry out certain property related transactions are subject to the additional disclosure requirements, principally relating to valuations. Property dealing companies may be subject to different treatment depending on the circumstances of each case.

4.14 SPECIAL TYPES OF ISSUERS

Specific requirements are contained in the JSE listings requirements in relation to pyramid companies, redevelopment entities, industrial 'Development Stage' companies, the procedures for listing on the Development Stage 'sector' of the main board, and for Warrants. In general, the listing of pyramid companies will not be approved save in exceptional circumstances where the pyramid results from an unbundling or partial unbundling transaction. Where the listing of a pyramid company is the result of a partial unbundling, such pyramid company will be given six months from the date of the unbundling to introduce alternative assets. Failure to meet this requirement may result in the termination of the listing of such pyramid company.

4.15 LISTING OF INVESTMENT ENTITIES

In evaluating a listing of an investment entity, (i.e. one whose principal activity is the investment in securities) the Committee will have regard to the following fundamental principles:

4.15.1 those responsible for managing the investments must have adequate experience;

4.15.2 there must be an adequate spread of risk;

4.15.3 the investment entity must be a passive investor and neither it nor its management company nor any director or manager of the investment entity or its management company should control, or seek to control, or be actively involved in the management of the companies, or other entities in which it invests; and

4.15.4 the applicant must not, to a significant extent, speculate in securities.

4.16 DOCUMENTATION TO BE SUBMITTED TO THE COMMITTEE

4.16.1 Generally speaking, most documentation required for any transaction relating to a listed company, or a company to be listed, must be submitted to the Listings Division through the medium of a sponsor. Detailed requirements are set out as to approval procedures, timetables for submission of documentation for approvals, and the like.

4.16.2 Furthermore, the listings requirements specify in detail the various listing fees, annual listing fees and documentation fees that will be applied in regard to the various activities and documentation to be submitted.

4.17 DUAL LISTINGS AND LISTINGS BY OVERSEAS COMPANIES

The listings requirements contain specific reference to requirements to be satisfied with respect to overseas companies already listed or seeking a listing on the JSE. Certain of the requirements apply to all overseas companies, while other requirements depend on whether the overseas company is seeking or already has a primary or secondary listing on the JSE. Furthermore, an overseas company should take account of the other requirements dealing with mineral companies, property companies, special types of issuer, e.g. pyramid companies, redevelopment entities, warrants and investment entities.

4.18 STAFF SHARE SCHEMES

The listings requirements refer to certain rules in regard to the formulation of Staff Share Incentive Schemes such as the percentage of issued capital to be available for such Schemes, the aggregate number of securities that may be utilised for the Scheme, the category of persons to whom or for the benefit of whom securities may be purchased or issued under the Scheme, the amount if any payable on application or acceptance, the basis for determining the purchase subscription or option price, and the voting, dividend, transfer and other rights including those arising on a winding up of the company, which would attach to the securities and any options, if appropriate. Various requirements are also included in relation to the identity of the trustees of a Share Scheme, applications for listing of new securities to be issued for the purpose of the Scheme and disclosures in the listed company's annual financial statements in regard to the number of securities utilised for the purposes of the Scheme at the beginning of the accounting period, and subsequent changes in such numbers.

4.19 SIGNIFICANT ASPECTS OF LISTINGS REQUIREMENTS

- the Listings Requirements apply to and require compliance by directors in their individual capacities;
- the JSE is able to suspend or terminate a listing when it deems it to be in the public interest to do so;
- listed companies are required to have a permanent sponsor at all times;
- continuing obligations include disclosure of details concerning trading statements;
- listed companies are required to publish abridged annual financial statements on SENS on the date of issue of their annual financial statements;
- the publication of voluntary preliminary annual financial statements on SENS requires a review by the auditors;
- certain corporate governance requirements of King II have been incorporated and made mandatory (see 5 below); however, contrary to popular belief the JSE does not enforce compliance with the remainder of King II's governance principles, but does require annual disclosure of the extent of compliance with the principles;
- guidance has been issued concerning fair and reasonable statements;
- guidance has been issued concerning the use of treasury shares;
- directors of listed companies and of major subsidiaries will require clearance prior to trading in their listed company's securities;
- closed periods and their effects have been defined;
- reference is included to the GAAP Monitoring Panel and to censures and penalties for non-compliance with Statements of GAAP (and IFRS with effect from financial years commencing during 2005); and
- the threshold for related party transactions is 0.25%.

CORPORATE GOVERNANCE

5.1 INTRODUCTION

The King Committee on corporate governance issued its report in March 2002 (King II). King II advocates principles of openness, integrity and accountability. It identifies seven primary characteristics of good governance namely discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. King II is not a statute, it is a set of guidelines. Listed companies are required to disclose in their annual reports the degree to which they have complied with the provisions of King II. Private companies are encouraged but not obliged to comply with the provisions of King II. King II promotes the concept of triple bottom-line accounting which incorporates the economic, environmental and social aspects of the company's activities.

5.2 CODE OF CORPORATE PRACTICES AND CONDUCT

King II sets out a code of corporate practices and conduct which deals with:

5.2.1 The board of directors;

5.2.2 Risk management;

5.2.3 Internal audit;

5.2.4 Integrated sustainability reporting;

5.2.5 Auditing and accounting;

5.2.6 Relationship with stakeholders;

5.2.7 Communication.

5.3 GUIDELINES FOR LISTED COMPANIES

The following guidelines, for listed companies, are set out in King II:

5.3.1 The board must:

- 5.3.1.1 develop and adopt a charter which confirms the board's responsibilities for various activities within the company;
- 5.3.1.2 develop a corporate code of conduct which addresses conflicts of interest relating to directors and management;
- 5.3.1.3 agree a procedure whereby directors may, if necessary, take independent professional advice at the company's expense;
- 5.3.1.4 agree a procedure whereby non-executive directors have access to management without attendance of the executive directors;
- 5.3.1.5 identify and evaluate actual and potential risk areas and oversee formal reviews of the activities associated with the risk management and internal control processes.

5.3.2 The board should define levels of materiality, reserving specific powers to itself and delegating other matters, with the necessary authority to management.

5.3.3 Board meetings should be held not less than once per quarter.

5.3.4 The board should formulate and implement a code of ethics which sets out the ethical principles necessary to guide decision-making by employees and other stakeholders.

5.3.5 Directors have individual and collective responsibility for the company's safety, health and environmental performance and compliance.

5.3.6 The board should review, define and prioritise its tasks and subject itself to annual self evaluation.

5.3.7 As a minimum each company should have an audit committee and a remuneration committee.

5.3.8 Each item of special business included in the notice of the annual general meeting sent to shareholders must be accompanied by a full explanation of the effects of any proposed resolution.

5.3.9 All directors should be present at the shareholders meetings, particularly the chairperson of each board committee.

5.4 ANNUAL REPORT REQUIREMENTS

Listed companies are required to deal with the following items in their annual reports:

5.4.1 A brief CV of each director standing for election or re-election;

5.4.2 The charter adopted by the board;

5.4.3 The directors must be categorised into executive, non-executive and independent directors;

5.4.4 The names of members of the remuneration committee;

5.4.5 Director's remuneration on an individual basis;

5.4.6 Details of fixed term service contracts for executives which exceed three years;

5.4.7 The remuneration philosophy on executive and director remuneration should be disclosed;

5.4.8 The board is responsible for ensuring that a systematic, documented assessment of the process and outcome surrounding key risks is undertaken and reported on;

5.4.9 Should the board decide not to establish an internal audit function full reasons for that decision must be disclosed;

5.4.10 The company should report on the nature and extent of its social, transformation, ethical, safety, health and environmental management polices and practices;

5.4.11 Disclosure should be made of adherence to the company's code of ethics;

5.4.12 The audit committee should draw up a recommendation dealing with the appointment of the external auditors;

5.4.13 The board must minute the facts and assumptions used in the assessment of the going concern status of the company;

5.4.14 Where non-financial aspects of reporting have been subject to external validation this fact must be stated and the details provided;

5.4.15 The formal terms of reference of the audit committee must be stated.

6. INCOME TAX

6.1 PRINCIPLES

Residents are taxed on the residence basis, while non-residents are taxed on the source basis. The effect on non-residents is that any income accruing from a South African source is taxable in the Republic. Residents are taxed on their worldwide income, with relief in respect of foreign taxes paid on income from foreign sources, up to the amount of the equivalent South African tax payable on such income. A natural person may qualify as a resident in one of two ways:

- by being "ordinarily resident" in the Republic. In terms of South African case law, a person is ordinarily resident in the country to which that person "would naturally and as a matter of course return from his wanderings". It is the place that may most aptly be described as the person's real home;
- by qualifying under the "physical presence" test. A person who is not ordinarily resident will be deemed to be a resident if he or she is physically present in South Africa for more than 91 days in each of the current and preceding three years and for a period or periods exceeding 549 days in aggregate during the preceding three years.

A company, trust or similar entity is deemed to be a resident if it is incorporated, established, formed or has its place of effective management in South Africa.

The residence status of a person under any double tax treaty will, however, take precedence over this definition.

Where a resident holds an effective interest of at least 10% in an offshore company, and alone or together with other residents holds more than 50% of participation rights or votes in that company then it is a "controlled foreign company" ("CFC") in relation to that resident. The income of a CFC is imputed to the controlling holders in proportion to their holdings, subject to certain exclusions and tax credits where applicable.

Related to this provision, foreign dividends are exempt from tax in South Africa where they are received by resident shareholders holding in excess of 25% of the equity share capital of the company declaring the dividend. Dividends received by residents holding less than 25% of such capital will be taxable in South Africa subject to a tax credit for foreign withholding taxes payable by the recipient shareholder..

Resident shareholders holding from 10% to 25% of the participation rights or votes in the foreign company may elect on an annual basis that their attributable share of that company's net income be treated as taxable income in South Africa (as if they held more than 50% of such rights or votes). In this event they will get the benefit of a tax credit for the foreign taxes paid by such company with respect to their pro rata share of that income.

Trusts are not covered by the CFC rules, but provisions exist to achieve substantially the same effect where trusts are used for offshore activities and capital or income is vested in a beneficiary resident in South Africa, or in a non-resident beneficiary in consequence of any donation, settlement or other disposition made by a resident of South Africa.

6.2 CAPITAL GAINS TAX

Since 1 October 2001 a capital gains tax (CGT) has applied in South Africa. Subject to a number of exemptions, limitations and rollover provisions, the tax is imposed by including, in taxable income on disposal, gains over the value of the asset on 1 October 2001 or the actual cost in respect of assets acquired after that date:

- in the case of natural persons, 25% of any gain on disposal. The effective rate of tax for such persons is thus 10% at the maximum marginal rate of 40%;
- for other taxable entities, 50% of any gain on disposal. The effective rate of tax for companies is thus 15% and for trusts 20%.

Capital losses may only be set off against capital gains, so that if in any year the losses exceed the gains, the difference is carried forward until there are gains against which to set them off. The gain or loss in each case is the difference between the base cost and the proceeds.

Base cost is the value at 1 October 2001 where the asset was held at that date, or the cost of acquisition where it was acquired after that date. Where the status of a person or an asset changes (see the list of deemed disposals below), the base cost after the change is the market value on the date of the change. In all cases, other expenses of a capital nature incurred after acquisition are added to the base cost.

Proceeds are the amounts accrued on disposal. Provisions are in place to prevent the manipulation of the proceeds of disposals between connected persons. Such disposals are deemed to have taken place at market value.

Disposal for CGT purposes means more than mere sale. Disposals include:

- in broad terms, any act or occurrence that affects the value of the patrimony of a person;
- death;
- becoming or ceasing to be a resident;
- converting a capital asset into trading stock and vice versa;
- converting a capital asset into a personal-use asset (which is exempt from CGT) and vice versa;
- capitalisation of loans, waivers of claims on loan account, and variations of the rights attaching to shares in certain circumstances.

The first R1 million of the gain on the disposal of the primary residence of a natural person is exempt, as is the first R10 000 of gains each year. In the year of death, the first R50 000 is exempt.

There are special provisions relating to gains on foreign currencies. In essence they have the effect of taking into account foreign exchange gains and losses for individuals, but not for companies. The latter are subject to normal tax on the results of their foreign exchange gains and losses.

The CGT legislation is very complex and a document such as this cannot do justice to it. A more detailed description is available on our website or from members of our tax division.

6.3 TAX RATES

Companies and close corporations are taxed at a flat rate of 30% on income. There is also a Secondary Tax of 12.5% on declared dividends (see 9 below), resulting in an effective rate of 37.78%.

External companies are taxed on branch profits at a flat rate of 35% on income. The Secondary Tax on Companies does not apply to external companies (see 9 below).

Small business corporations (defined below) are taxed at 15% on the first R150 000 of taxable income, and at 30% thereafter.

Individuals pay tax based on a sliding scale with a maximum marginal rate currently of 40%. Trusts are taxed at a rate of 40% on all taxable income.

6.4 CAPITAL ALLOWANCES

Expenditure is in general deductible if it is not of a capital nature and has been incurred in the production of income, and then only to the extent that it is laid out or expended for the purposes of trade. Limited allowances in respect of capital expenditure are granted. These include:

- Wear and tear - An annual write-off of part of the cost or value of a capital asset. The amount of the allowance is at the discretion of the South African Revenue Service (the SARS) and the period of the write-off depends on the type of asset. The wear and tear allowance is not granted on structures of a permanent nature (such as buildings) or any assets which are written off in terms of the special depreciation allowance provisions of the Income Tax Act referred to below.
- Industrial buildings - An annual allowance expressed as a percentage of the cost of buildings or improvements (excluding the land) is granted in respect of buildings used wholly or mainly in a process of manufacture or a similar process. The percentage of the allowance varies according to the date of commencement of the erection of, or improvements to, the buildings. The rate applicable to erection/improvements commenced between 2 July 1996 and 30 September 1999, and buildings brought into use before 31 March 2000, is 10% per annum. The current rate for buildings brought into use after that date is 5% per annum.
- Hotels - An allowance of 5% per annum of the cost of that portion of the buildings or improvements used for the purposes of the taxpayer's trade as a hotelkeeper is granted if erection or improvement was commenced on or after 4 June 1988 (if the erection or improvement commenced before 4 June 1988 the allowance is 2% per annum). Improvements to an existing hotel building which do not extend the exterior framework of the building are subject to an allowance of 20% per annum. An annual allowance of 20% is also granted on new or used hotel equipment brought into use for the first time on or after 17 March 1993.
- Aircraft - An allowance is granted of 20% per annum of the cost of aircraft acquired on or after 1 April 1995 for the purpose of any trade.
- Ships - An allowance is granted of 20% per annum of the cost of ships acquired on or after 1 April 1995 for the purpose of any trade.

- Intellectual property - In respect of such property acquired before 29 October 1999, the cost may, in the discretion of the SARS, be written off over the lesser of the estimated life of the property or 25 years. In respect of expenditure incurred after that date but before any year of assessment commencing on or after 1 January 2004:
  - expenditure on patents, trademarks, copyrights and similar property may be written off over 20 years;
  - expenditure on designs and similar property may be written off over 10 years;
  - expenditure on the acquisition of trademarks may not be written off at all.

  In respect of years of assessment commencing on or after 1 January 2004, the cost of acquiring any of the categories listed above may be written off as indicated.

  The cost of research and development conducted in South Africa that results or may result in an identifiable intangible asset may be written off as follows:
  - buildings, machinery, plant and other capital assets: 40% in the year of first use and 20% per annum thereafter;
  - other expenditure: in the year in which it is incurred.
- Leasehold improvements - The cost of leasehold improvements effected by the lessee may be written off over the period of the lease, provided the lessor is taxable on the value of the improvements, and provided the improvements are carried out in terms of an obligation under the lease.
- Plant and machinery - There is a special depreciation allowance expressed as a percentage of the cost of plant and machinery in the year it is brought into use for the first time by the taxpayer for the purpose of trade (other than mining or farming) and in succeeding years, and used directly in a process of manufacture or similar process. The allowance is presently 40% in the year in which it is first brought into use and 20% per annum for the next three years.
- Small business corporations - The cost of the plant and machinery brought into use by a small business corporation (an SBC) may be written off in full in the year of first use. An SBC is a company or close corporation all of whose members are natural persons with no other investments in companies (other than in listed shares or collective investment schemes). The gross income of the SBC may not exceed R5 million, not more than 20% of which may consist of investment income. The SBC may not be an employment company.
- Strategic industrial projects - Where a company carries on a strategic industrial project (an SIP), it may write off 100% of the cost of industrial assets, up to a limit of R600 million, in the year of first use where the SIP has "preferred status", and 50%, up to a limit of R300 million, where the SIP has "non-preferred status". The value of the investment in assets must exceed R50 million over not more than four years. Ministerial approval is required, and applications are dealt with on a case by case basis.

In the year of disposal or scrapping of any asset used for the purposes of trade, an adjustment is allowed to the extent that the tax value exceeds the proceeds. Any recoupment of allowances on disposal is limited to the initial cost of the asset. It should be noted that foreign losses incurred by a resident may not be set off against the domestic profits of the taxpayer. There are provisions to prevent the abuse of allowances by means of disposals between connected persons (this is a widely defined expression in the Income Tax Act).

6.5 TRANSFER PRICING AND THIN CAPITALISATION RULES

- Transfer pricing - The anti-transfer pricing provisions contained in the Income Tax Act may be applied where goods or services are supplied or acquired in terms of an international agreement concluded between connected persons (essentially group companies). If the price of the goods or services is other than it would be between persons transacting with each other at arm's length, the SARS may adjust the consideration in the determination of the taxable income of either the acquirer or the supplier.
- Thin Capitalisation - The thin capitalisation rules may be applied by the SARS where financial assistance, such as a loan, advance or debt, or the provision of any security, is granted by a non-resident investor to a resident investee who is either a connected person, or a corporate entity in which the investor has a direct or indirect interest entitling it to participate in not less than 25% of the dividends, profits, capital or votes. The thin capitalisation rules, when applied, disallow the deductibility of interest paid by the South African resident to the foreign lender, to the extent that such interest is considered to be excessive by the SARS. In broad terms, the rules will not be applied if-
  - the debt:equity ratio falls within a safe haven ratio of 3:1. In other words, where the financial assistance granted by the non-resident investor does not exceed three times the fixed capital (being essentially share capital, share premium and accumulated profits) of the resident investee; and

- the interest rate does not exceed the weighted average of prime plus 2% for South African Rand denominated loans, or the relevant weighted average interbank rate plus 2% for loans denominated in other currencies.

These rules do not apply to financial assistance granted by a "parent" company to its branch operating as an external company in South Africa.

7. WITHHOLDING TAXES

At present only royalties are subject to a withholding tax.

A withholding tax of 12% is deductible from gross royalties payable to non-residents.

South Africa has entered into a number of double taxation treaties with foreign countries (see 11 below). These agreements often vary the provisions concerning the withholding tax on royalties and may be an important consideration relative to the offshore shareholding and funding structure of a South African company.

8. PASSIVE INVESTMENT INCOME

- Dividends - Dividends received by a taxpayer are excluded from the taxable income of the taxpayer. But foreign dividends received by residents are taxable in South Africa unless the recipient (or the recipient's group of companies) holds in excess of 25% of the total equity share capital of the company declaring the dividend, or the foreign profits giving rise to the dividend have already been taxed in South Africa, or the dividend is declared by a company enjoying a dual listing both in South Africa and its country of domicile and in excess of 10% of the share capital of that company is held by residents of South Africa.
- Interest - Interest payable to non-residents is exempt from normal tax in South Africa provided that:
  - interest payable to persons (other than companies) ordinarily resident outside South Africa will only be exempt if payable to a natural person who is physically absent from South Africa for at least 183 days during the tax year;
  - interest payable to a company managed and controlled outside South Africa will only be exempt if the interest is not effectively connected with the business carried on by such company in South Africa;

In the case of all passive investment income, relief is available in respect of foreign taxes paid on the income.

Interest from certain prescribed investments accruing to a non-resident who does not carry on business here is exempt from the normal tax in South Africa. These investments comprise stock and securities issued by the Government and certain parastatals.

9. SECONDARY TAX ON COMPANIES (STC)

Secondary Tax on Companies (STC) applies to companies and close corporations, but not to the local branches of foreign companies.

The net amount of a dividend declared by a company (and a close corporation) is subject to STC at a rate of 12.5%. The net amount is the amount by which dividends declared during a dividend cycle exceed dividends accrued to the company during the relevant cycle. The dividend cycle commences on the day after the declaration of the previous dividend and ends on the date on which the next dividend accrues to the shareholders. Dividends passing through a group structure will be exempt from STC when declared by a wholly owned subsidiary, but will suffer STC when subsequently declared out by the parent company.

Companies that earn profits both from within and outside South Africa are liable to STC on the pro rata portion of dividends declared which relates to profits earned from a source within South Africa. Dividends received are not taken into account in the determination of the ratio.

STC is payable by the company declaring the dividend, and not by the recipient.

Currently some countries grant tax relief in respect of the STC imposed in South Africa.

Special provisions apply to gold mining companies and long-term insurers.

10. VALUE ADDED TAX (VAT)

Value Added Tax (VAT) must be charged and paid over by all suppliers of goods and services (other than very limited exempt goods and services).

The current rate is 14%.

All suppliers of goods and services having an annual turnover currently exceeding R300 000 are obliged to register as VAT vendors and to charge output VAT. Other vendors may elect to register as VAT vendors provided their annual turnover exceeds R20 000. If they do not register, they are prohibited from:

- charging VAT on goods or services they supply;
- claiming an input tax (rebate of VAT paid) on goods and services which they acquire.

11. DOUBLE TAXATION AGREEMENTS

South Africa has concluded bilateral agreements for the avoidance of double taxation with more than 50 countries and is continually increasing this number. Most of the agreements are comprehensive, while there are several limited Sea and Air Transport bilateral agreements in force.

12. ESTATE DUTY

Estate duty of 20% is imposed on the net value of deceased estates, after an abatement of R1.5 million. This applies to the worldwide assets of residents, subject to certain exemptions, and to the South African assets of non-residents.

13. DONATIONS TAX

A tax of 20% is imposed on donations made by residents, subject in the case of natural persons to an annual exemption of R30 000. Persons other than natural persons may make casual donations of not more than R10 000 per annum without incurring the tax.

Public companies are exempt from donations tax, as are donations in the public interest to recognised public benefit organisations (see 14 below), institutions for the advancement of science or art, political parties and spheres of government.

14. PUBLIC BENEFIT ORGANISATIONS

Organisations carrying out one or more "public benefit" activities may apply for exemption from normal tax. There are eleven categories of such activities:

14.1 welfare and humanitarian;

14.2 health care;

14.3 land and housing;

14.4 education and development;

14.5 religion, belief or philosophy;

14.6 cultural;

14.7 conservation, environment and animal welfare;

14.8 research and consumer rights;

14.9 sport;

14.10 the provision of funds, assets or other resources to a PBO or institution, board or body conducting one or more public benefit activities; or

14.11 the provision of support services to one or more of the entities referred to in 14.10, or a bid to host or the hosting of an international event approved by the Minister.

Taxpayers who make donations to exempted PBOs engaged in any of categories 14.1, 14.2, 14.3, 14.4 or 14.7 above may deduct the value of such donations from their income, subject to certain limitations.

15. ASSESSED LOSSES AND SECONDARY TRADES

Whereas assessed losses from one trade may generally be set off against income from other trades conducted by the same taxpayer, certain limitations apply to natural persons whose taxable income exceeds the level at which the maximum marginal rate is payable. Losses from any denominated secondary trade carried on by such a person may in certain circumstances be ring-fenced and only set off against subsequent profits from the same trade.

EXCHANGE CONTROL

16. INTRODUCTION

Exchange control regulations, which restrict the free flow of capital in and out of the country, exist in South Africa. These regulations, which until the recent past were rather strict, have been significantly relaxed. The expressed goal of the South African government is the ultimate equal treatment of residents and non-residents in relation to inflows and outflows of capital and the abolition of exchange control measures.

17. TRANSFERS OF CAPITAL

17.1 NON-RESIDENTS

Non-residents are no longer subject to exchange control and currently may freely transfer capital into and out of South Africa. Investments into South Africa must however be reported to the authorities and share certificates evidencing such investment must carry a "non-resident" endorsement. It should be noted that non-residents who wish to invest in South Africa by means of loan capital need to obtain prior approval from the South African Reserve Bank, particularly with reference to intended repayment dates, and interest rates. It should also be noted that the Reserve Bank will not agree to interest in excess of prime being charged by non-resident shareholders on loans to their South African subsidiaries, but loans from non-residents other than shareholders may be allowed to carry interest at prime +2%.

South African subsidiaries and branches of foreign companies are considered to be South African residents and are, therefore, subject to exchange control.

17.2 RESIDENTS OF SOUTH AFRICA

South African companies may as a general rule, but subject to possible exchange control requirements, freely remit the following to non-residents:

- Repayment of capital investments made by non-residents.
- Dividends and branch profits, provided that such transfers are made out of trading profits and are financed from available cash resources without resorting to excessive local borrowing. Certain audit certifications are required.
- Interest payments, provided that the rate is reasonable in regard to the nature of the loan, current interest rates and past practices, and conforms to the requirements of the thin capitalisation rules if applicable (see 6.5 and 17.1 above).
- Payment of royalties or similar fees for the use of know-how, patents, designs, trademarks, copyright or similar property, subject to the prior approval of the exchange control, and also in certain instances of the Department of Trade and Industry. Generally speaking, such royalties will be limited to an amount of between 2% and 6% of turnover.
- Payments for goods imported into South Africa.
- Directors' fees.
- Other fees in respect of services rendered by non-residents, subject to reasonableness.

The following may also be of interest:

- Exchange control limits on new outward foreign direct investments by South African corporates are abolished. Application to the South African Reserve Bank's Exchange Control Department is still required for monitoring purposes and for approval in terms of existing foreign direct investment criteria, including demonstrated benefit to South Africa. The South African Reserve Bank reserves the right to stagger capital outflows relating to very large foreign investments so as to manage any potential impact on the foreign exchange market.
- South African companies will be allowed to raise foreign funding on the strength of their local balance sheets. But where such loans are guaranteed by South African companies in terms of approvals granted by exchange control, then, currently, no foreign lender may take steps to enforce such guarantee prior to the expiry of a period of two years after the date of the loan.
- As announced in the 2004 Budget, foreign companies, governments and institutions may list on South Africa's Bond and Securities Exchanges. This aims to promote foreign investment into South Africa and to support the positioning of South Africa as a regional financial centre better able to cater for the capital raising needs of the continent. To further support these aims, South African private individuals will now be able to invest, without restriction, in inward listed instruments on South African Exchanges.
- South African companies will be allowed to retain export proceeds for a maximum of 180 days from the date of shipment or the date of rendering the relevant service.

18. RESTRICTIONS ON LOCAL BORROWINGS

The exchange control regulations provide that when 75% or more of the voting stock, capital, assets or earnings of a local company are directly or indirectly vested in, or controlled by, a non-resident, a local loan may not be made or granted to the company without the prior approval of exchange control. The South African exchange control authorities allow local borrowings calculated as a percentage of the company's total effective capital in terms of the following formula:

$$300\% + \left[\frac{\%\ \text{South African interest}}{\%\ \text{Non-resident interest}} \times 100\% \right]$$

The above ratio does not apply to emigrants, the acquisition of residential properties by non-residents or affected persons, and any other financial transactions, such as portfolio investments by non-residents, securities lending, hedging and repurchase agreements. In all these instances, the figure of 100% must be substituted for the figure of 300% in the above formula.

"Total effective capital" includes share capital, shareholder loans from abroad, unappropriated capital or revenue profits, and, in certain instances, the hard core of shareholders' trade credit.

A relaxation of these provisions may be granted in exceptional circumstances.

The restrictions on local borrowings apply both to a South African company and to an external company.

19. MONEY LAUNDERING

Although not part of the exchange control system as such, money laundering activities are now controlled by the Financial Intelligence Centre Act of 2001, the Prevention of Organised Crime Act of 1998, and the regulations published under these Acts.

This legislation, in keeping with worldwide trends, aims at curbing the use of the proceeds of crime and money laundering.

Rigorous compliance obligations are imposed on "accountable institutions" in terms of this legislation. An accountable institution includes attorneys such as Deneys Reitz. Accountable institutions are obliged to follow 'know your client' procedures, namely to:

- identify and verify new and existing clients;
- keep records of identities of clients and all transactions entered into with clients;
- report certain transactions to the authorities;
- train employees; and
- appoint a compliance officer.

Please bear in mind, therefore, that in asking you, our clients, for all the required information we are doing no more than carrying out our legal duties.

LAW OF CONTRACT

20. BASIC PRINCIPLES

The South African law of contract is in many respects similar to the English common law of contract. There is no requirement that each party should give a consideration in order to form a binding contract.

The basis of the contract in South African law is offer and acceptance. Save in a few prescribed circumstances (eg the purchase of land) it is not necessary for a contract to be in writing. However, it is always advisable, and indeed is the common practice, to ensure that business contracts are reduced to writing either by way of a formal contract or by an exchange of letters.

The terms of a contract may be tested against the provisions of the Bill of Rights. Provisions which significantly infringe certain basic human rights (eg equality) may be void.

Consumer legislation may prescribe or limit the provisions that may be in a contract.

INFORMATION TECHNOLOGY AND COMMUNICATIONS LAW

21. APPLICABLE LEGISLATION

South Africa is a country with a vast and well entrenched information technology infrastructure that matches the best in the rest of the world. The law regulates this field primarily through the Electronic Communications and Transactions Act, 2000.

The Act takes the position that the electronic information environment is a national resource and the law is aimed at the most efficient utilisation of that resource in the public interest. The Act deals comprehensively with the full spectrum of electronic law issues such as consumer protection, data protection, privacy, cyber crime and administration of the "dot za" domain name.

Telecommunications and broadcasting are well established areas of South African law and are regulated by the Telecommunications Act, 1999, and the Independent Broadcasting Act, 1993 respectively. The Independent Communications Authority of South Africa ("ICASA") is the body empowered to regulate those industries. ICASA has shown itself to be both independent and willing to assert its powers.

The monopoly of Telkom, the current fixed line monopoly operator, is due to come to an end and an IPO of its shares took place in 2003. One more fixed line operator will initially be licensed to compete with Telkom. The mobile phone arena already has three players, the newest of which entered the market in late 2001. This area continues to show strong growth with high levels of cellphone usage prevalent throughout the country across all income groups.

22. INTRODUCTION

The South African economic system is predominantly based upon the principles of a free market economy. However, as in most developed economies, competition in South Africa is controlled. Competition is regulated both by the common law and the Competition Act, 1998 (the "Act") which came into operation on 1 September 1999. This legislation aims to control anti-competitive behaviour and applies not only to economic activity in South Africa, but also to all economic activity having an effect in South Africa.

23. MERGER CONTROL

In terms of the Act, a party to a merger which is in excess of certain turnover/asset thresholds is required to notify the South African competition authorities of the merger. A "merger" is defined widely so as to include any acquisition or establishment of control over the whole or part of the business of another firm whether through the purchase or lease of shares, an interest or assets, amalgamation or by other means. Mergers are classified as either small, intermediate or large depending on the turnover/asset values of the parties to the transaction. A small merger is one that falls below the thresholds for an intermediate merger. An intermediate merger is one where the "combined figure" is R200 million or more and the assets or turnover of the target firm are R30 million or more. A large merger is one where the turnover or assets of the target firm are R100 million or more and the "combined figure" is R3.5 billion or more. The "combined figure" is the combined assets or turnover in South Africa of the acquiring firm and the target firm, or the assets of the one and the turnover of the other, in whichever combination reaches the highest figure.

Both legs of the enquiry must be met. Thus if the turnover/assets of the target firm are R30 million or more, but the combined figure is not as much as R200 million, one would be dealing with a small merger, which would not be automatically notifiable. Similarly, if the combined figure is R200 million or more, but the turnover or assets of the target is less than R30 million, the merger is a small one. The same principles apply in determining whether a transaction is an intermediate merger or a large merger.

Notification of a merger is only compulsory where a transaction is an intermediate or large merger. Although parties are not obliged to notify the competition authorities of a small merger, the authorities may, for a period of six months after implementation, require parties to notify a small merger if it raises competition or public interest concerns, and the parties may not take any further steps towards implementing the merger until approval is granted. A filing fee of R85 500 (for an intermediate merger) and R285 000 (for a large merger) is payable to the competition authorities on notification. No filing fee is payable for notification of a small merger.

In considering whether a merger should be approved, the relevant competition authority must determine whether the merger is likely to substantially prevent or lessen competition in a market by taking into account factors such as barriers to entry, import competition, countervailing power and the like. If competition will be affected, the competition authority is entitled to prohibit the transaction. However it may nevertheless approve the merger if it is likely to result in any technological, efficiency or other pro-competitive gain or if it can be justified on certain specific public interest grounds. Alternatively it may approve the merger subject to certain conditions.

The public interest factors are more important in South Africa than in other jurisdictions and could conceivably be taken into account in prohibiting a merger.

24. PROHIBITED PRACTICES

The Act further contains general provisions prohibiting agreements between parties in a horizontal or vertical relationship which prevent or limit competition in a market, unless a party to such an agreement can show that technological, efficiency or other pro-competitive gains outweigh the negative impact on competition. Certain practices are prohibited outright, such as price fixing, market-sharing agreements, collusive tendering and minimum resale price maintenance.

In addition, the Act prohibits the abuse by a firm of its dominant position. A firm is considered dominant if it has a share of at least 45% in a given market. A firm having market share of less than 45% may still be deemed dominant if it has market power, which means that the firm must have the power to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, suppliers or an essential facility when it is economically feasible to do so. It may also not engage in exclusionary acts, such as requiring a supplier or customer not to deal with a competitor, tying sales or buying up scarce resources required by a competitor. The Act does however allow exclusionary acts if they can be justified on the basis of efficiency gains.

Parties engaging in restrictive practices or exclusionary conduct may in certain circumstances be granted an exemption by the Competition Commission, thus enabling them to continue with those activities. However it should be noted that the grounds for applying for an exemption are extremely limited.

25. ECONOMICS AND COMPETITION LAW

As is the case in other jurisdictions, economics plays a central role in the determination of competition law matters, whether one is dealing with mergers or prohibited practices.

26. ADMINISTRATIVE PENALTIES

Failure to notify a merger, or implementation of a merger without the prior approval of the competition authorities may result in the imposition of an administrative penalty.

Similarly, any party engaging in prohibited practices also exposes itself to administrative penalties.

These penalties can be substantial. Indeed, the authorities have the power to impose penalties of up to 10% of the offending party's turnover in, and exports from, South Africa.

Our authorities have hitherto been more involved in merger regulation, but they have clearly indicated an intention to pursue investigations into prohibited practices in the future. Indeed, a penalty of 5% of turnover was recently imposed on a firm found to have engaged in minimum resale price maintenance.

27. CORPORATE LENIENCY POLICY

Recently a Corporate Leniency Policy has been introduced, in line with developments elsewhere in the world, to encourage individuals to come forward with information regarding cartel operations. Various forms of immunity from penalties are available depending on the nature of the information provided.

28. CONCLUSION

Competition law has an important place in South Africa, and the competition authorities are encouraged to enforce the provisions of the Competition Act. It extends into numerous branches of commercial law and very few inter-business operations can take place without considering the competition law implications thereof.

ENVIRONMENTAL LAW

With the transition of South Africa to democracy, environmental law has undergone a major change in focus from command-and-control provisions with the limited aim of punishing environmental degradation, to a more holistic approach which goes beyond the issue of mere pollution control, and which has as its core the concept of integrated environmental management.

Environmental laws have hitherto been fragmented with different government departments being responsible for their administration and enforcement, but significant and ongoing steps are being taken to establish a more coherent, integrated approach towards environmental management and pollution control through legislation.

A justiciable environmental right has been enshrined in the Bill of Rights under South Africa's Constitution, in essence entitling the individual to an environment that is not harmful to human health or well-being and to have the environment protected for the benefit of present and future generations.

This has created a new form of legal standing for individuals and classes of individuals not previously recognised under South African law, and has given the public the tools for enforcement of environmental laws, for example, through class actions.

South Africa's constitutional structure is such that in certain instances both the central government and the provinces have concurrent power to make laws related to the environment, and in certain instances (eg. air pollution) this power is shared by local government as well.

29. ENVIRONMENTAL MANAGEMENT

Three major Acts presently account for the bulk of regulation of the management of the environment in South Africa. They are the Environmental Conservation Act, 1989 (the ECA), the National Environmental Management Act, 1998 (NEMA) and the National Water Act, 1998.

The ECA is overarching legislation within a general structure for the management of the environment, and it also contains principles and procedures for environmental management, measures for nature conservation, for pollution control and for waste management.

The main focus of NEMA is on environmental management, and upon its introduction the legislature effectively repealed those sections of the ECA which dealt mainly with the principles and procedures of environmental management which overlapped with NEMA. It is anticipated that in time the ECA will be phased out altogether although only at the stage when all of its existing content has been incorporated into new sectoral laws.

NEMA is perhaps the core environmental statute in the country. It aims to establish overarching guidelines and principles to facilitate environmental management and is also applied to manage pollution generally. It provides for prevention and remediation of pollution and establishes a general duty of care. In respect of both emergency and non-emergency incidents, a liability regime applies to owners of land, to persons in control of land, and to persons occupying or using the land, on or in which any activity or process is or was performed or any other situation exists which causes, has caused or may cause significant pollution or degradation of the environment. This underscores the need for specific warranties and indemnities in land sale agreements and disposals and acquisitions of businesses which carry on or which may have carried on polluting activities, as well as for due diligence exercises in appropriate cases, since the regime includes joint and several liability in certain instances. Life cycle responsibility (in terms of which a person never loses responsibility for the environmental consequences of its actions) is also established in terms of NEMA.

A number of amendments to NEMA have recently been made or are in the process of being made focusing primarily on improved enforcement provisions such as the appointment of environmental management inspectors with extensive powers, as well as measures which will lead to improved integration of the environmental legal framework. There are also important amendments proposed concerning Environmental Authorisations. Important new bills, namely, the National Environmental Management : Protected Areas Bill and the National Environmental Management : Biodiversity Bill are being processed by the parliamentary system and may be on the statute book by the end of 2004.

The Biodiversity Bill (together with the Protected Areas Bill) is intended to be the domestic implementation mechanism of several international conventions, including the Convention on Biological Diversity, the Ramsar Convention on Wetlands of International Importance and the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) and provides for the following:

- the establishment, powers and functions of the South African National Biodiversity Institute;
- biodiversity planning, monitoring and research;
- protection of threatened or protected ecosystems and species (achieved through a listing mechanism);
- regulation of bioprospecting of genetic material derived from indigenous biological resources and the equitable sharing of the benefits;
- co-ordination of biodiversity planning with other environmental planning;
- the Minister's power to set norms and standards for the management of biodiversity.

30. AIR POLLUTION

Common law principles and case law applicable to the civil wrong of nuisance still play an important part in the control of air pollution. In terms of statute law air pollution is currently controlled by the Atmospheric Pollution Prevention Act, 1965. Emitters of noxious and offensive gases and other pollutants may not carry on so-called "scheduled processes" (there are 72 defined by regulation) without first obtaining a licence from the Chief Air Pollution Control Officer. Other legislation deals with limited aspects of air pollution such as smoke control (the Health Act, 1997), dust control (Minerals Act, 1991 which is due to be replaced by the Mineral and Petroleum Resources Development Act, 2002) and motor-vehicle emissions (Road Traffic Act, 1989).

Air pollution legislation will undergo significant change once the so-called "Air Quality Bill" which has been published for comment, becomes law. Although there will still be an activity-specific authorisation process (of "listed activities"), which will replace the current registration certificate framework, the Air Quality Bill contemplates declaration by both the central government and provincial governments of air quality norms and standards, and provision is made for the declaration of priority areas and controlled emitters. Specific provision will also be made for international (transboundary) air pollution control and a central role is envisaged for local government in the licensing process for listed activities. The Air Quality Bill has been tabled before parliament but as a result of comment received from interested parties its passage has been halted and it is likely to undergo significant amendment before it is passed into law.

31. MANAGEMENT OF WATER RESOURCES

Further important legislation governing the environment is the National Water Act, 1998 in terms of which South Africa's water resources are regulated. The National Water Act has strong provisions governing the prevention and remediation of pollution, and it provides for a liability regime similar to that of the National Environmental Management Act.

The National Water Act addresses the shortcomings of past discriminatory laws and practices which prevented equal access to water and use of water resources by adopting the principle that water belongs to the State which holds it in trust for the nation. It empowers the Minister of Water Affairs to determine a "reserve" to meet the requirement of sustainable use of water and for protection of aquatic ecosystems. Maintenance of the reserve is a priority criterion governing the allocation of water.

There are four ways in which the right to use water may be obtained, namely unrestricted use for the purposes set out in the Act (minor uses), existing water use (continuation of an existing lawful use obtained under the previous Water Act, 1956), use under general authorisation and use authorised by licence.

There is a general procedure governing the licence application process and a compulsory procedure. The latter is intended to be used in areas which are, or are soon likely to be, under "water stress". All water uses must be registered.

In some circumstances permits must be obtained to discharge effluent into a water resource. Purification of effluent must comply with prescribed standards.

The Prevention and Combating of Pollution of the Sea by Oil Act, 1981 makes the owner of any ship, tanker or offshore installation liable for any loss or damage caused by pollution resulting from a discharge of oil and for related clean-up costs.

32. WASTE MANAGEMENT

An anomalous situation in terms of which two government departments managed waste in South Africa has recently been rectified with the Department of Environmental Affairs and Tourism (DEAT) now managing all aspects of waste. The ECA (referred to in 29 above) prohibits the establishment or operation of a waste dump without a permit from the DEAT.

New powers under a recent amendment to the ECA will empower the Minister to impose so-called "green taxes" on waste types or specified items such as tyres and specific hazardous pollutants.

A White Paper on Integrated Pollution and Waste Management for South Africa was published in March 2000 and is part of the process to develop a statutory waste minimisation regime. The further development of this legislation has been awaited for some time.

33. HAZARDOUS SUBSTANCES

The Department of Water Affairs and Forestry has published the Minimum Requirements for Waste Disposal by Landfill, Minimum Requirements for the Handling and Disposal of Hazardous Waste and Minimum Requirements for Monitoring at Waste Management Facilities (collectively referred to as the ***"minimum requirements"***) which must be used as administrative guideline documents.

34. TRANSBOUNDARY MOVEMENT OF WASTE

The disposal of waste by one country to another is controlled by international law under the guiding principle that the reduction or avoidance of waste will be defeated if waste producers are free to export their waste to other countries.

Transboundary movement of waste as it affects Africa is controlled by:

(i) the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, 1989; and

(ii) the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991.

South Africa is a signatory to the Basel Convention.

35. LAND USE AND ENVIRONMENTAL IMPACT ASSESSMENTS

The National Environmental Management Act provides for mandatory environmental impact assessments (EIAs) in respect of specified activities, and regulations framed under the Environmental Conservation Act require EIAs in respect of the undertaking of identified activities (including any proposed change in use of land from agricultural or undetermined use to any other land use). This is in keeping with the general objective of integrated environmental management that the actual and potential impact of proposed activities on the environment should be identified, predicted and evaluated along with the risks and consequences and alternatives and options for mitigation of activities. The intention is to minimise the negative impact of activities, maximise benefits and promote compliance with the principles of environmental management.

Environmental Management Programme Reports (EMPR's) which entail EIAs and programmes for rehabilitation of the environment in respect of mining operations, are legislated for in the Minerals Act, 1991 (due to be replaced by the Mineral and Petroleum Resources Development Act, 2002) which requires that any prospecting or mining operations must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.

A significant feature of the replacement Act (which has been promulgated but is not yet in force) is that the holder of a right under the Act is responsible for any environmental damage, pollution or ecological degradation as a result of its operation. The directors of a company or members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the firm which they represent (there is a strong likelihood that the constitutionality of this provision will be challenged).

36. ENVIRONMENTAL AUDITING AND ISO 14 000

Neither environmental auditing nor ISO standards are statutorily prescribed, but South Africa's increasing integration into the global economy exerts continual pressure on organisations to move towards accreditation in terms of internationally accepted standards. Accordingly, many concerns (particularly those with international affiliations) have secured accreditation of their environmental management systems in terms of ISO 14 001 *(environmental management systems - specification with guidance for use* as adopted by the South African Bureau of Standards in 1996). This Code of Practice is supported by several other codes such as the codes dealing with environmental auditing (14 010), environmental labelling (14 020), environmental performance evaluation (14 030), life-cycle assessment (14 040) as well as other general guidelines on principles, systems and supporting techniques developed by the South African Bureau of Standards.

LABOUR AND EMPLOYMENT LAW

37. INTRODUCTION

The legislation governing the relationship between employer and employee has undergone a process of major reform over the past number of years. The Government has attempted to obtain consensus with its social partners, Business and Labour, on the process of aligning South African employment legislation with International Labour Organisation recommendations and conventions. This process took place under the auspices of a statutory tripartite forum, the National Economic Development and Labour Council and has resulted in a number of key statutes being enacted. The impact of these statutes is briefly explained below.

38. LABOUR RELATIONS ACT

The purpose of the Labour Relations Act, 1995 (the LRA) is to advance economic development, social justice, labour peace and the democratisation of the workplace. The LRA provides a framework within which employees, trade unions, employers and employers' organisations can bargain collectively on wages, terms and conditions of employment and other matters of mutual interest. The LRA is specifically designed to promote orderly collective bargaining at industry level, particularly by means of bargaining councils that have the power to conclude and enforce collective agreements. The LRA also promotes employee participation in decision-making in the workplace through consultation and joint decision-making.

The LRA provides simple procedures for the resolution of most labour disputes, including unfair dismissal and unfair labour practice disputes. These can be resolved through statutory conciliation and arbitration by the Commission for Conciliation, Mediation and Arbitration (CCMA), or through independent alternative dispute resolution services accredited for this purpose. The Labour Court and the Labour Appeal Court are tasked with the adjudication and determination of labour disputes of a more serious nature. The Labour Court has the status of a provincial division of the High Court and appeals against Labour Court judgments are dealt with by the Labour Court.

Important amendments to the LRA were introduced during the first half of 2002. The amendments afford greater protection to employees in the event of the transfer of a business or the reduction of staff on the grounds of the operational requirements of the employer. Another important amendment aims to make it more difficult to circumvent legislation by means of artificial independent contractor arrangements.

39. BASIC CONDITIONS OF EMPLOYMENT

The Basic Conditions of Employment Act, 1997 (the BCEA) prescribes minimum standards of employment. Although the BCEA allows for a certain measure of variation of some of its provisions, important minimum standards may not be varied by agreement.

The BCEA sets the maximum ordinary working hours per week at 45 hours and determines payment for overtime work. Annual leave, family responsibility leave and maternity leave provisions are improved. The BCEA also places comprehensive administrative requirements on employers.

The BCEA creates a permanent commission with broad powers to set minimum standards tailored primarily for those industries where collective bargaining does not take place.

The BCEA gives the Department of Labour's inspectorate extensive powers of investigation and action with regard to breaches of minimum employment standards. The CCMA plays a major role in the determination of disputes and offences in respect of alleged breaches of employment standards.

40. EMPLOYMENT EQUITY ACT

The Employment Equity Act, 1998 was promulgated to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The further purpose of the Act is to implement affirmative action measures to redress the historical disadvantages in employment experienced by designated groups (defined as "black people, women and people with disabilities"), in order to ensure their equitable representation in all occupational categories and levels in the workforce.

41. HEALTH AND SAFETY

The Compensation for Occupational Injuries and Diseases Act, 1993 provides for compensation for injury, disease or death arising in the work environment. Compensation is paid out of public funds and no action lies against the employer which contributes to those funds.

The Mine Health and Safety Act, 1996 and Occupational Health and Safety Act, 1993 place duties on employers to ensure a safe working environment as far as is reasonably practicable. Failure to comply with the provisions of these Acts is a criminal offence.

42. HUMAN RESOURCES DEVELOPMENT

A need has been identified to develop the skills of South Africa's workforce, in order to enable the country to attract investment and to compete globally. The Skills Development Act, 1998 and Skills Development Levies Act, 1999 have been promulgated to achieve this purpose. Employers are required to pay an amount equal to a certain percentage of the value of their payrolls to the government. These funds are then applied by either the government or industry-based educational and training authorities to train workers. This is consistent with the goal of improving the productivity of the workforce for the sake of competitiveness. Businesses that undertake approved training can apply for refund of portion of the levy paid.

43. CONCLUSION

South Africa has a sophisticated legislative network that regulates employment matters. This has to be taken into account when doing business with South Africa. It is expected that the legislative framework will go a long way towards establishing a competent, stable and productive workforce.

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JOHANNESBURG (SANDTON)
82 Maude Street Sandton 2196
P O Box 784903 Sandton 2146 South Africa
T +27 11 685 8500 **F** +27 11 883 4000

DURBAN
4th Floor The Marine 22 Gardiner Street Durban 4001
P O Box 2010 Durban 4000 South Africa
T +27 31 367 8800 **F** +27 31 301 3346

CAPE TOWN
8th Floor Southern Life Centre 8 Riebeek Street Cape Town 8001
Private Bag X10 Roggebaai 8012 South Africa
T +27 21 405 1200 **F** +27 21 418 6900

DENEYS REITZ
ATTORNEYS

www.deneysreitz.co.za