INVESTING IN SOUTH AFRICA **JUNE 2005**

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WWB

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Webber Wentzel Bowens

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SECTION 1: SOUTH AFRICA – AN OVERVIEW

AREA AND POPULATION

South Africa is situated on the southern tip of the African continent, with the Atlantic Ocean to the West and the Indian Ocean to the East, and shares common borders with Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe. The total area of the country is approximately 1,233,201 square kilometres (472,156 square miles).

South Africa is divided into nine provinces: the Eastern Cape, Mpumalanga, KwaZulu-Natal, Northern Cape, Limpopo, Northwest Province, the Free State and Gauteng (comprising the Pretoria/Witwatersrand/Vereeniging area which was formerly referred to as the PWV) and the Western Cape Province.

According to www.statssa.gov.za, as at the night of October 9 to 10, 2001, South Africa's population totalled approximately 44,8 million.

There are 11 official languages: Afrikaans, English, Ndebele, Sepedi, Sesotho, Setswana, Swazi, tshiVenda, isiXhosa, xiTsonga and isiZulu. In October 1996, the South African population, by home language, comprised 9,2 million Zulu speakers, 7,2 million Xhosa speakers, and 5.8 million Afrikaans speakers, while Sotho, English and Setswana were estimated as having between 3-4 million speakers each. English is widely used as the language of commerce.

CONSTITUTIONAL FRAMEWORK

Elections

On 27 April 1994 South Africa held its first democratic national election, culminating in the appointment as President of South Africa of Mr Nelson Mandela, leader of the African National Congress (**"the ANC"**) and a former leader of the anti-apartheid movement in South Africa.

The final Constitution

The Constitution came into force on 4 February 1997 after it was passed by the Constitutional Assembly and certified by the Constitutional Court as consistent with the 34 constitutional principles contained in schedule 4 of the Interim Constitution.

The Constitution, inter alia, provides for the following: a common citizenship for all South Africans; the creation of a sovereign and democratic constitutional state; a Parliament consisting of a National Assembly and a National Council of Provinces (representing the provinces at the national legislative level); nine provinces with defined legislative and executive powers (rather than the 4 provinces and various homelands and self-governing territories of pre-constitutional South Africa); an independent judiciary, which includes a Constitutional Court, a Supreme Court of Appeal and the High Courts; and a number of state institutions supporting constitutional democracy (including the Public Protector, Human Rights Commission and Auditor-General).

Most significantly, the Constitution includes a Bill of Rights which enshrines the fundamental rights enjoyed by all persons and groups. These fundamental rights cover equality, privacy, property, freedom of expression and freedom of association as well as a number of socio-economic rights, for example, the rights to housing and education. Unlike the Interim Constitution, which bound only the State, the final Constitution, to a certain extent, applies "horizontally", binding private persons as well as the State.

Cabinet

Until 30 April 1999, the Cabinet consisted of as many parties represented in Parliament as received a defined minimum of the national vote, and this cabinet sought to operate by consensus rather than by voting (**"the Government of National Unity"**). The Government of National Unity was formed in 1994 by the naming to the Cabinet of representatives of the three largest parties, the ANC, the National Party and the Inkatha Freedom Party. Since 30 April 1999 the Cabinet has been appointed by the President from the members of the National Assembly.

Provincial and local government

The Constitution makes provision for provincial and local government in addition to government at the national level. Nine provinces are established in terms of the Constitution, and each province has its own provincial legislature of between 30 and 80 members and its own chief executive, the Premier. The Premier exercises the executive authority of the province together with the other members of the provincial Executive Council, which is constituted in a manner similar to the Cabinet in the national government.

The provinces exercise limited power on a national level, principally through their representatives in the National Council of Provinces and also through their power to block parliamentary action affecting the constitutional position and status of the provinces.

Although the Constitution allocates certain powers exclusively to the provinces, the National Government is granted the power to override the authority of the provinces in certain circumstances. Consequently, the demarcation of authority between the provincial governments and the national government is not precisely defined by the Constitution and can be expected to develop over time, with guidance from the Constitutional Court as to the extent of the provinces' legislative competence.

LEGAL SYSTEM

The South African legal system is based upon Roman-Dutch law, subject to the Constitution. Judicial authority is vested in the courts, which are established by or pursuant to the Constitution. The Constitutional Court has jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. It is the court of first instance on any matter concerning the constitutionality of an Act of Parliament. Decisions of the Constitutional Court are binding upon all persons and upon all legislative, executive and judicial organs of state. The majority of the judges of the Constitutional Court (excluding the President of the Court) are appointed by the President in consultation with the Cabinet and on the recommendations of the Judicial Service Commission, an independent body. Matters not falling within the jurisdiction of the Constitutional Court fall within the jurisdiction of the High Court, which has various provincial and local divisions, or the Supreme Court of Appeal, which has appellate jurisdiction from the High Court. The Supreme Court of Appeal or the High Court may make an order concerning the constitutional validity of an Act of Parliament, provincial Act or conduct of the President, subject to confirmation of the order by the Constitutional Court. Judgements of the Supreme Court of Appeal are binding on all courts of a lower order and judgements of the provincial and local divisions are binding on the lower courts within their respective areas of jurisdiction.

THE ECONOMY

South Africa has the most developed economy in the southern African region (consisting of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe, in addition to South Africa), with a gross domestic product (**"GDP"**) equal to four times that of its immediate neighbours combined. Over one quarter of the trade of countries (other than South Africa) in the southern African region is conducted with South Africa.

In the 1960's the South African economy enjoyed a strong average real growth rate of 5.5%, led principally by exports of metals and minerals. Although the country experienced periods of excellent growth in the 1970s during the gold booms of 1973-74 and 1979-81, the economy grew at a lower average real rate of 3.2% during the 1970s. In the 1980s, major Western export markets were disrupted by oil shocks and measures to counteract inflation. Economic sanctions against South Africa also began to affect the country's economy. These adverse economic influences, together with political uncertainty and social unrest, resulted in an average real growth rate of less than 2.2% per annum throughout the decade.

From the first half of 1989, the South African economy experienced a prolonged recession, with average annual real GDP growth of negative 1.3% during the period 1989-92. A modest recovery began in 1993, faltered somewhat in the first quarter of 1994 due to lower agricultural output and the effects of political uncertainty, continuing violence and labour unrest, but then regained some momentum in the second quarter of 1994 with 4.1% growth, concomitantly with decreased political uncertainty following the successful conduct of the country's first fully democratic elections in April 1994. GDP growth during 1995-96 was steady but more modest, resulting in an average growth of 2,8% for the recovery period from 1993 to the beginning of 1997. During 1998 and 1999, growth rate was steady at just under 3%. The economy grew by 3,4% in 2000 and about 2,2% in 2001. The SA Chamber of Business' (**"Sacob's"**) Business Confidence Index increased by 5.7 index points from April to May 2002, figures released by the major business organisation on 4 June 2002 showed.

In 2003 the GDP increased by 2,8 percent, this was followed by an increase of 3,7 percent in 2004. The main contributors to the increase in economic activity in 2004 were wholesale trade, retail trade, hotels and restaurants, finance, real estate and business services, transport, storage and communication, and manufacturing industries.

2004 was an excellent year for the Rand, towards the end of 2004 it rallied to a six-year best of R5,665 against the greenback.

The major strengths of the South African economy are its strong physical and economic infrastructure, its abundant natural resources (particularly gold, the platinum group metals, and a wide variety of other minerals as well as coal and uranium oxide), and its growing manufacturing sector and considerable tourism potential. The continued development of its abundant natural resources, including effective management of reserves, successful exploration efforts and the efficient production of these natural resources, are important factors in determining South Africa's future growth prospects.

South Africa's growth potential is expected to be enhanced by the opening and restructuring of the South African economy, including tariff reform and reductions that have already begun, and the expected privatisation or restructuring of state assets. In addition, the rejoining by South Africa of many international organisations and the granting of a generalised system of preferences status to South Africa by the United States, together with the implementation of a comprehensive trade agreement with the European Union, are expected to open trade and investment opportunities for South Africa. In April 1997 South Africa became a party to the Lomé Convention, a company-operation agreement between the European Union and 70 African, Caribbean and Pacific countries. Accession to the convention means that southern African countries have access to tenders for European Union contracts in member countries. The Lomé Convention has now been replaced by the Cotonou Agreement – see below under "Investment Incentives".

One of the most significant deals in 2004 as far as trade relations are concerned was the breakthrough in global trade talks at the World Trade Organisation, which saw developed countries promising to cut back debilitating farmer subsidies.

TRADE ARRANGEMENTS

South Africa has been a member of the Southern Africa Customs Union (**"SACU"**) since December 1969. In addition to South Africa, the SACU at present encompasses Botswana, Lesotho, Namibia and Swaziland (**"the BLNS countries"**). The SACU is intended to promote trade among the SACU countries, and goods flow freely among these countries unimpeded by internal tariffs or quantitative restraints. There is a common tariff on goods imported from outside the SACU. In the light of dissatisfaction with certain aspects of the SACU Agreement and changes in circumstances in the SACU countries, a far reaching re-examination of the SACU Agreement began in late 1994, and the year 2002 saw the successful conclusion of the review of SACU's trade policies by the WTO.

South Africa, Namibia, Lesotho and Swaziland make up the Common Monetary Area (**"CMA"**). The CMA allows for the unrestricted transfer of funds within the monetary area, a common capital market and substantially uniform exchange control regulations with respect to the rest of the world. The Multilateral Monetary Agreement provides for a uniform exchange control border around the four participating countries. The generally similar exchange control regulations of South Africa, Namibia, Lesotho and

Swaziland enable the area to share its scarce resources, namely domestic savings and foreign exchange.

On 29 August 1994, South Africa became a member of the Southern African Development Community (**"the SADC"**). In doing so, South Africa formally indicated its support for Southern African regional company-operation. A SADC Protocol on Trade is currently being negotiated. The SADC Protocol on Trade will be an agreement establishing a free trade area in the SADC region. It is envisaged that such a free trade area will be established 8 years from the implementation date of the SADC Protocol on Trade: during the 8-year period, tariff rates will be reduced, with the effect that 85% of trade within SADC will be at zero duty after the 8-year period.

Upon its re-admission to full membership of the United Nations, South Africa became a member of the United Nations Economic Commission for Africa, and, since October 1998, has been on the presidency of the United Nations Conference on Trade and Development (**"UNCTAD"**). UNCTAD is a capacity building organisation that assists developing countries by, among other things, advising on economic issues and issues regarding developing the third world, as well as by assessing risks involved for third world countries in global trading.

In May 1997, South Africa became a member of Indian Ocean Rim Association for Regional Co-Operation (**"IOR-ARC"**). South Africa was one of the first 14 countries to be signatory to the Charter of the IOR-ARC and is a full participant of the IOR-ARC. Amongst other things, the IOR-ARC is involved in a project regarding the management and upgrading of South African ports with a view to taking over certain of the sea traffic of the Suez Canal. The project involves a study of the infrastructure of South African ports in order to determine their capacity in this regard.

South Africa became a member of the African Development Bank (**"ADB"**) in December 1995 and has a shareholding in the ADB. South Africa qualifies for non-concessionary funding from the ADB in the form of slightly preferential agreements, payment periods and interest rates. Although South Africa does not qualify for the more generous concessionary funding from the ADB or the African Development Fund, it contributes to the African Development Fund which affords such funding to qualifying member countries, in an effort to assist those countries.

For details of South Africa's trade relationships see the section below headed "Investment Incentives".

SECTION 2: COMPETITION LAW

Regulation of business

Business operations in South Africa are largely regulated by statute. Nevertheless, measured by modern international standards, South Africa's business and industrial community is not over-regulated.

Competition law and policy

Competition law in South Africa is currently governed by the Competition Act, No. 89 of 1998, as amended, (**"the Competition Act"**), which came into force on 1 September 1999. Subject to a few exceptions, the Competition Act applies to all economic activity within, or having an effect within, South Africa. In addition, where another regulatory authority has jurisdiction over a particular industry, or sector of an industry, and this conduct is also governed by the provisions of the Competition Act, the Competition Act grants the South African competition authorities concurrent jurisdiction in respect of such conduct.

The Competition Act is designed to promote and maintain competition within South Africa with the aim of:

- promoting the efficiency, adaptability and development of the economy;
- providing consumers with competitive prices and product choices;
- promoting employment and advancing the social and economic welfare of South Africans;
- expanding opportunities for South African participation in world markets and recognising the role of foreign competition in South Africa;
- ensuring that small and medium sized enterprises have an equitable opportunity to participate in the South African economy; and
- promoting a greater spread of ownership and, in particular, increasing the ownership stakes of historically disadvantaged persons.

The provisions of the Competition Act are enforced by three separate agencies: the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

The Competition Commission acts as the primary interface with the public and has the power to: investigate and evaluate alleged contraventions of the Competition Act; approve or prohibit small or "intermediate mergers" (as defined below); and refer its recommendations to the Competition Tribunal in relation to "large mergers" (again, as defined below).

The Commission's powers are backed by the possibility of imprisonment and the imposition of heavy fines for conduct which is found to contravene the Competition Act.

Restrictive horizontal practices

A horizontal relationship is defined in the Competition Act as a relationship between competitors.

Section 4(1)(a) of the Competition Act prohibits agreements, concerted practices or decisions between firms in a horizontal relationship which substantially prevent or lessen competition "unless a party to the agreement … can prove that any technological, efficiency, or other pro-competitive gain resulting from it outweighs that effect". A key feature of this section is the placing of the onus on the party to the agreement to prove, on a balance of probabilities, that a "technological, efficiency or pro-competitive gain" results from the agreement and that it outweighs the anti-competitive effect.

Section 4(1)(b) contains an outright prohibition on any agreement, concerted practice or decision that involves any of the following restrictive horizontal practices:

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

Restrictive vertical practices

The Competition Act defines a vertical relationship as one between a firm and its suppliers, its customers, or both.

In terms of section 5(1) of the Competition Act "an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless the party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect." Once again, a key feature of the section is the placing of the onus on the party to the agreement to prove, on a balance of probabilities, that a technological, efficiency or pro-competitive gain results from the agreement and that it outweighs the anti-competitive effect.

All exclusive distribution, purchasing, licensing, franchising or know-how agreements, as well as all long-term exclusive supply agreements, must be capable of being justified in terms of section 5(1) (if such agreements foreclose market access by other firms), and unless they are justified, the relevant anti-competitive provisions may be struck down by an order of the Competition Tribunal to this effect.

Section 5(2) contains an outright prohibition on the practice of minimum resale price maintenance. However, section 5(3) provides that a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided the supplier or producer makes it clear to the reseller that the recommendation is not binding and if the product has its price stated on it, the words "recommended price" appear next to the stated price.

Abuse of a dominant position

The Competition Act prohibits the abuse, by a firm, of its dominant position within a market. Section 7 of the Competition Act provides that a firm with a market share of over 45% is automatically dominant, while a firm with a market share of between 35% and 45% is presumed to be dominant, unless that firm can prove that it does not have market power. Firms having less than 35% of a market are dominant only if they are proved to have market power.

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

Section 8 of the Competition Act prohibits a dominant firm from abusing this dominance. It is prohibited for a dominant firm to:

- charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act, other than the ones listed below, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- engage in any of the following exclusionary acts:
  - requiring or inducing a supplier or customer to not deal with a competitor;
  - refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
  - selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
  - selling goods or services below their marginal or average variable cost; or
  - buying up a scarce supply of intermediate goods or resources required by a competitor.

If a dominant firm engages in any of the exclusionary acts listed above, it will need to prove that this conduct will result in technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of such conduct, failing which, the dominant firm may be subject to the imposition of an administrative fine.

If a dominant firm commits an exclusionary act which is not specifically listed above, the competition authorities will have to prove that the act has anti-competitive effects which outweigh any possible technological, efficiency or other pro-competitive gains. In addition, the dominant firm may only be subject to the imposition of an administrative fine if it has previously been found guilty of engaging in conduct which is substantially similar to the conduct which is the subject of investigation and prosecution by the competition authorities.

Price discrimination

Price discrimination by a dominant firm is prohibited by section 9 of the Competition Act. An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination if:

- it is likely to have the effect of substantially preventing or lessening competition;
- it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
- it involves discriminating between those purchasers in terms of the price charged for the goods or services, any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services, the provision of services in respect of the goods or services or payment for services provided in respect of the goods or services.

Price discrimination will not be regarded as prohibited price discrimination if the dominant firm establishes that the discrimination:

- makes only reasonable allowance for differences in cost, or likely cost, of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
- is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- is in response to changing conditions affecting the market for the goods or services concerned, including: the actual or imminent deterioration of perishable goods; the obsolescence of goods; a sale pursuant to a liquidation or sequestration procedure; or a sale in good faith where the business is discontinuing its supply of the product or service concerned.

Exemptions

In terms of section 10 of the Competition Act, a firm may apply to the Competition Commission for an exemption in relation to “an agreement or practice, or category of either agreements or practices” (section 10(1)) which would, failing the granting of the exemption, contravene the provisions of the Competition Act. The Competition Commission has been granted the discretion to determine the duration of such an exemption.

An exemption can be obtained on the grounds that the agreement or practice contributes to any of the following objectives: the maintenance and promotion of exports; the promotion of the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; the prevention of a decline in an industry; or the economic stability of an industry designated by the Minister.

The Competition Act also makes provision for the Competition Commission to grant an order of “negative clearance” if, on the application of a firm, it finds that the agreement or practice does not contravene the Competition Act and accordingly that an exemption is not required (section 10(2)(a)).

In addition, the Competition Commission may revoke an exemption if the exemption is later found to have been granted on the basis of false or incorrect information, if a condition to the exemption has not been fulfilled, or if the reason for the exemption no longer exists (section 10(5)).

Mergers

application of the Competition Act

Mergers between firms are regulated in terms of Chapter 3 of the Competition Act.

A merger is defined as the acquisition or establishment by one or more firms either directly or indirectly of direct or indirect control over the whole or part of the business of another firm, whether that control is achieved as a result of:

- the purchase or lease of the shares, interest, or assets of the other firm in question; or
- an amalgamation or other combination with the other firm in question.

A “firm” is, in turn, defined as including a person, partnership or trust.

The Competition Act distinguishes between “small”, “intermediate” and “large mergers”, according to the level of the combined annual turnover or assets of the merging parties.

A “small merger” is defined in the Regulations to the Competition Act as one where the merging entities have a combined annual turnover or combined assets (whichever is the greater) in, into or from the Republic of less than R200 million and/or where the target firm’s annual turnover or assets (whichever is the greater) in, into or from the Republic is less than R30 million.

Parties to a small merger are not required to notify the Competition Commission of the merger and may implement the small merger without the Commission’s approval. The Commission may, however, within six months after the date on which the merger was implemented, require the parties to a small merger to notify the Commission thereof, if, in the Commission’s opinion, the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.

An “intermediate merger” is defined in the Regulations to the Competition Act as one where the merging entities have a combined annual turnover or combined assets (whichever is the greater) in, into or from the Republic equal to or exceeding R200 million and where the target firm’s annual turnover or assets (whichever is the greater) in, into or from the Republic is equal to or exceeds R30 million.

A large merger is defined in the Regulations as one where the merging entities have a combined annual turnover or combined assets (whichever is the greater) in, into or from the Republic equal to or exceeding R3,5 billion and where the target firm’s annual turnover or assets (whichever is the greater) in, into or from the Republic is equal to or exceeds R100 million.

Except as described above, the Competition Act will not apply if a particular transaction does not meet the relevant threshold for an intermediate or large merger.

procedure

The parties to an intermediate or large merger may not implement such a merger until it has been approved by the Competition Commission, Competition Tribunal or the Competition Appeal Court, as applicable. In addition, the parties must provide a copy of their notification to the competition authorities to any registered trade union which represents a substantial number of the merging firms’ employees, or to the employees concerned or representatives of such employees if there are no registered trade unions.

The Competition Commission must, after considering whether or not an intermediate merger is likely to substantially prevent or lessen competition, either: approve the merger by issuing a clearance certificate; approve the merger subject to conditions; or prohibit the implementation of the merger.

In relation to large mergers, the Competition Commission will make a recommendation which is then referred to the Competition Tribunal. The Competition Tribunal is required to make a ruling on large mergers.

If the Competition Commission approves an intermediate merger subject to conditions or prohibits an intermediate merger, any party to the proposed merger may request the Competition Tribunal to consider the conditions or prohibitions. Any decision by the Competition Tribunal in relation to a merger is subject to an appeal, by any party to the merger, to the Competition Appeal Court.

evaluation

In considering the desirability of a merger, the Competition Commission or Competition Tribunal must firstly determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the strength of competition in the market and whether the firms after the merger will behave competitively or co-operatively. In making such an assessment, the Competition Commission or Competition Tribunal must take into account any factor that is relevant to competition in that market, including:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- whether the merger will result in the removal of an effective competitor.

If it appears that the merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must then determine whether the merger is likely to result in any technological, efficiency or other pro-competitive gains which will be greater than, and off-set, the effects of any prevention or lessening of competition that may result from the merger.

In addition, the Competition Commission or Competition Tribunal must consider whether the merger can be justified on public interest grounds (whether the merger raises anti-competitive concerns or not) by assessing the effect the merger will have on:

- a particular industrial sector or region;
- employment;
- the ability of small businesses or firms, controlled or owned by historically disadvantaged persons, to become competitive; and
- the ability of national industries to compete in international markets.

Remedies and enforcement provisions

administrative fines

Section 59 of the Competition Act provides that the Competition Tribunal may impose administrative fines of up to 10% of an offending firm's annual turnover in South Africa, as well as its exports from South Africa in the preceding financial year. The commission of certain prohibited practices will automatically attract an administrative fine (for example, conduct which is expressly prohibited under the Competition Act), while the commission of other prohibited practices will only attract a fine if the relevant conduct is substantially a repeat by the firm of conduct previously found to be in contravention of the Competition Act. The penal jurisdiction of the Competition Tribunal is subject to appeal to the Competition Appeal Court.

criminal offences

The Competition Act criminalises certain conduct, for example, where a person knowingly provides false information to the Competition Commission.

The Competition Act makes no provision for periodic penalty payments for non-compliance with a Competition Tribunal or Competition Appeal Court decision, but criminalises such conduct under section 73(1), with provision for penalties of up to ten years imprisonment or a fine of R500 000, or both.

civil claim for damages

A novel feature of the Competition Act is that a party may not institute a civil action for damages until the Competition Tribunal has found that there has been a prohibited practice (section 65(6)). The civil court is effectively only left with deciding the quantum of damages to be awarded, as the Competition Act provides that only the Competition Tribunal may deal with the merits of a complaint.

interim relief

The Tribunal may grant interim relief in respect of an alleged practice, where it is reasonable and just to do so, having regard to the following factors:

- the evidence relating to the alleged prohibited practice;
- the need to prevent serious or irreparable damage to the applicant;
- the balance of convenience favours the granting of an order;
- whether the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings.

divestiture

Perhaps the most controversial feature of the Competition Act is the provision (in section 60) for the divestiture of a firm's assets and, it would seem, any shareholder's shares in a firm, not simply in the case of an unlawful merger but in the event of a repeated abuse of dominance.

Apart from the automatic right of appeal to the Competition Appeal Court (section 60(3)), the Competition Act provides no checks and balances before the Competition Tribunal may order divestiture.

interdicts

The Competition Tribunal may make an appropriate order interdicting (i.e. preventing) any prohibited practice.

order to transact

The Competition Tribunal may order a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice.

declaring an agreement to be void

The Competition Tribunal may declare the whole or any part of an agreement to be void.

access to an essential facility

The Competition Tribunal may order access to an essential facility on terms reasonably required.

SECTION 3: CAPITAL MARKETS AND MONEY LAUNDERING

SECURITIES SERVICES

The securities services industry in South Africa was recently overhauled with the enactment of the Securities Services Act 36 of 2004 (**"the SS Act"**). The SS Act, which came into operation on 1 February 2005, repeals the Custody and Administration of Securities Act 85 of 1992, the Stock Exchanges Control Act 55 of 1985 (**"SECA"**), the Financial Markets Control Act 55 of 1989 (**"FMCA"**) and the Insider Trading Act 135 of 1998, and consolidates their provisions into a single Act. The SS Act also contains a significant number of new provisions, some of which relate to previously unregulated matters.

The objects of the SS Act are to increase confidence in the South African financial markets, promote the protection of regulated persons and clients, reduce systemic risk and promote the international competitiveness of securities services in South Africa.

The SS Act regulates "securities services", being services provided in respect of the buying and selling of securities, the custody and administration of securities, the management of securities by an authorised user (member of an exchange), and the clearing and settlement of transactions in listed securities. The SS Act also regulates market abuse consisting of insider trading and market manipulation.

The term "securities" is widely defined in the SS Act to include, inter alia, shares, stocks and depository receipts in public companies and other equivalent equities, notes, derivatives instruments, bonds, debentures, participatory interests in a collective investment scheme and instruments based on an index, but specifically excludes money market instruments (except as regards the custody and administration of securities).

In terms of the SS Act, no person may operate as an exchange, central securities depository or clearing house unless it is licenced in terms of the SS Act. Furthermore, no person may act as an authorised user or a participant unless authorised by an exchange in terms of the exchange rules or accepted as a participant in terms of the rules of a central securities depository.

Exchanges

There are currently two exchanges in South Africa. The JSE Securities Exchange South Africa (**"the JSE"**) is an equity and derivatives exchange, while the Bond Exchange of South Africa (**"BESA"**) lists loan stock (bonds). The JSE and BESA were previously licenced under the repealed SECA and FMCA. In terms of the transitional provisions of the SS Act, however, both the JSE and BESA are deemed to be licenced exchanges under the SS Act with effect from 1 February 2005.

The JSE recently launched a new interest rate exchange, Yield-X, which commenced trading on 28 February 2005. Yield-X will trade a broad spectrum of interest rate products, with a focus on derivatives (although a limited number of spot bonds will be secondary listed on the exchange to support the value of the corresponding derivatives), and aims to open up the interest rate market to new players and new products, encouraging liquidity and market diversification. Yield-X has been well supported by the market and has attracted 24 trading and clearing members to date, with more applications being processed. At the heart of Yield-X is an anonymous central order book, allowing for trading via a single platform with automated trade matching and guaranteed settlement. The JSE, through clearing-house Safcom, guarantees all trades and offers a cradle to grave audit trail. Yield-X is hoping to be in a position to list corporate bonds by the end of 2005.

The JSE and BESA have published separate sets of rules in terms of the repealed SECA and FMCA. In terms of the transitional provisions of the SS Act, the rules of the JSE and BESA continue in force despite the repeal of SECA and FMCA, so far as they are not inconsistent with the SS Act, provided that the JSE and BESA must amend or replace their rules by 1 August 2005 so as to comply with the requirements of the SS Act. An exchange rule is

binding on an exchange, an authorised user, an issuer and their officers and employees, and on clients.

The SS Act provides for the demutualisation of the exchanges and the amalgamation of two or more exchanges, a step which has become necessary in the light of international trends. The SS Act introduces a limitation of control of, and shareholding in, an exchange that is a company or close corporation. In this regard, the approval of the Registrar of Securities Services will be required in order to acquire shares in an exchange if the aggregate nominal value of those shares will amount to more than 15% of the total nominal value of all the issued shares of that exchange. The purpose of this provision is apparently to prevent so-called “disreputable people” from controlling an exchange and thereby introducing systemic risks into the securities markets.

The JSE has already been restructured in order to allow for the change from a structure owned by member stockbroking firms to a demutualised exchange constituted like a company. The restructuring, which was implemented in 2000, introduced a board of directors (representative of a broad interest base) and an advisory committee structure and changed the Constitution of the JSE to more closely resemble the memorandum and articles of association of a company.

Consistent with the intention to separate membership from ownership of the JSE, ownership of JSE rights does not immediately entitle rights holders to trade. Members are divided into owners of the JSE (termed “rights holders”) and authorised users of the JSE. A JSE right represents a rights holder’s proportionate share in the ownership of the JSE and entitles the rights holder to vote at any meeting of rights holders of the JSE and to share in the profits and surplus assets on the winding-up of the JSE. No single holder may own more than 10% of issued JSE rights. In order to trade, a person is required to hold such whole number of JSE rights as is equal to at least the prescribed minimum Rand value and to comply with the membership requirements set out in the JSE rules.

Trading in securities

The SS Act restricts the buying and selling of listed and unlisted securities. The term “unlisted securities” includes securities listed on a foreign exchange.

In this regard, except in certain prescribed circumstances, a person may not carry on the business of buying or selling listed securities (ie securities listed on a South African exchange) unless that person is an authorised user of the relevant exchange, effects such buying or selling through an authorised user or is a financial institution transacting as principal with another financial institution also transacting as principal.

The Registrar of Securities Services may prohibit a person from carrying on the business of buying or selling unlisted securities if that person carries on such business in a manner which defeats one or more of the objects of the SS Act, impose conditions for the carrying on of such business and/or prescribe conditions in terms of which specified types of unlisted securities may be bought or sold. A person who buys unlisted securities from or sells unlisted securities to a person who contravenes or fails to comply with such a prohibition or condition may cancel the transaction.

Listing on the JSE

Companies can seek a Main Board Listing or a listing on the Venture Capital Market (**“VCM”**) or the Development Capital Market (**“DCM”**). Small to medium companies that are in a growth phase can also seek a listing on the Alternative Exchange (**“AltX”**).

An applicant seeking a listing on the Main Board must have a subscribed capital (including reserves but excluding minority interests) of at least R25 million. It must have not less than 25 million equity shares in issue and a satisfactory audited profit history for the preceding three financial years, the last of which reported an audited profit of at least R8 million before taxation. 20% of each class of equity securities must be held by the public and the number of public shareholders must be at least 500 for equity securities, 50 for preference shares and 25 for debentures.

An applicant seeking a listing on VCM must have a subscribed capital (including reserves but excluding minority interests) of at least R500 000. It must have not less than 1 million equity shares in issue and a minimum of 10% of each class of equity share must be held by the public. The number of public shareholders must be at least 75 for equity securities, 25 for preference shares and 10 for debentures.

An applicant seeking a listing on DCM must have a subscribed capital (including reserves but excluding minority interests) of at least R1 million. It must have not less than 1 million equity shares in issue and a satisfactory profit history for the preceding two financial years or, in exceptional circumstances, a lesser period, the latest of which reported an audited profit level of at least R500 000 before taxation. A minimum of 10% of each class of equity share must be held by the public and the number of public shareholders must be at least 75 for equity securities, 25 for preference shares and 10 for debentures.

Additional and alternative requirements relating to conditions for listing apply to mineral companies, property companies, pyramid companies, investment entities, dual listings and listings by external companies and specialist securities.

When applying for a listing on the VCM, DCM and Main Board, it is mandatory for a company to appoint a sponsor. The responsibilities of a sponsor appointed by an issuer are twofold, namely to assist the issuer with an application for listing which requires the production of listings particulars and to give advice on a continuing basis regarding the application of the listings requirements.

During October 2003, the JSE and the Department of Trade and Industry, acting in partnership, launched AltX as a market for small to medium companies that are in a growth phase. AltX is intended to give a range of smaller companies the opportunity to issue new shares, raise capital, widen their investor base and have their shares traded in a regulated market, and will initially target junior mining companies and back economic empowerment companies. Companies that list on AltX are considered to be the future large companies that will eventually migrate to the Main Board. Applicants require no profit history to list but must have share capital of at least R2 million (including reserves but excluding minority interests). 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.

AltX has reduced listing fees, but is supported by the full range of JSE services, including the trading of shares on the same system as the Main Board, market surveillance to eliminate irregularities and settlement of AltX securities through STRATE. AltX has listing requirements appropriate for small and medium companies, placing an emphasis on initial and ongoing disclosure of company information. There is also a focus on the enhancement of the skills of directors of AltX companies, with a compulsory four-day directors' induction programme. The JSE has signed an agreement with Société Général to reduce the cost of post-trade administration services for AltX investors.

The government encourages overseas controlled companies to seek a listing on the JSE and so provide the public with an opportunity of obtaining a stake in the equity of companies trading in South Africa. An overseas company seeking a listing on the JSE must comply with all relevant listings requirements applicable to all listed companies generally, with certain modifications depending on whether the company is seeking a primary or secondary listing on the JSE.

Listing on BESA

Although primarily a government bond market, BESA also provides a forum for the listing of Rand denominated debt securities issued by local government, public enterprises and corporations. As at 21 December 2004, BESA had granted a listing to 377 debt securities, issued by 61 borrowers, with a total nominal value of approximately R572 billion. Settlement of spot bond trades takes place on a T+3 basis, or T+2 for repo trades, through an electronic nett settlement system.

The listing requirements of BESA reflect the rules and procedures governing new applications for listings and the ongoing obligations of issuers, and are aimed at providing investor confidence via an orderly, secure, efficient and transparent financial market. BESA is one of the most liquid markets in the world and has adopted international best practices for listings, namely the International Organisation of Securities Commissions

"International Disclosure Standards for Cross-border Offerings and Initial Listings by Foreign Issuers".

The Listing Disclosure Requirements of BESA provide for the minimum disclosures which investors and their professional advisors would reasonably require for the purpose of making an informed assessment of the nature and state of an issuer's business - specifically the current financial statements and forecasted earnings. This information must be either included in the Placing Document or be provided separately. The Placing Document consists of the terms and conditions of the issue, including the rights of the investor, the obligations of the issuer, the terms of any underwriting or guarantee, the mechanics of payment and settlement and any credit enhancements, trust deeds or credit ratings.

All foreign entities seeking a listing on BESA require Exchange Control approval from the South African Reserve Bank as a critical part of the listings process. To date, this has meant that foreign entities have been unable to list their debt securities on BESA as such listings do not fall within the existing National Treasury policy.

Alliances concluded by the JSE

The JSE offers technical and other kinds of assistance to stock exchanges in the Southern African Development Community (SADC) and other stock exchanges in Africa. The JSE has signed memoranda of understanding with stock exchanges in Namibia, Kenya, Ghana, Egypt, Nigeria and Mauritius.

As part of its global vision, the JSE has also entered into a strategic alliance with the London Stock Exchange (**"LSE"**). On 2 April 2001, the JSE entered into a deal with the LSE consisting of a Business Agreement and a Technology Agreement. The deal comprises the provision of core technology services by the LSE to the JSE and aims to achieve easier access to each other's markets for both member firms and issuers.

The Business Agreement provides for each exchange to assist in the marketing of the other exchange's data, together with arrangements to facilitate cross-membership and the dual trading of securities on both exchanges. Each exchange will leverage the existing client relationships of the other to increase revenue from the sale of share price information and to promote trade on each other's market.

The Technology Agreement comprises the provision of core technology services by the LSE to the JSE through the trading system Sequential Equity Trading System (Sets) and the information dissemination service (LMIL). The Technology Agreement was implemented during May 2002.

The deal has provided the JSE with world class technology at a competitive price. This should increase revenue potential from data distribution, while enabling the JSE to retain its major listed companies and control over the operation of its market. In particular, the JSE will be in a position to provide its member firms with a leading edge trading platform capable of significantly growing its markets over the next few years. The Namibian Exchange has accepted an offer by the JSE to join it in utilising the technology of the LSE to unlock the potential of the SADC.

The JSE is also in the process of overhauling its indices. It has entered into an agreement with global index provider FTSE to supply internationally recognised index products for the international and domestic markets. FTSE commenced calculating certain FTSE/JSE Africa Indices using free float methodology from 2 February 2002 and additional indices from 13 May 2002. With effect from 24 June 2002, FTSE officially started calculating the FTSE/JSE Africa Index Series, which incorporates new ground rules, the FTSE Global Classification System and the calculation of Total Return values. The Socially Responsible Investment Index was implemented by the JSE and FTSE at the end of 2002.

STRATE Limited

The process of the dematerialisation of securities in the South African equities market was started in March 2001 and completed in 2003, replacing manual settlement of share transactions with electronic settlement. Only dematerialised shares are good for settlement on the JSE. In respect of loan stock listed on BESA, the dematerialisation process is also almost complete with 70% of scrip dematerialised to date.

The SS Act generally enables the conversion of all types of certificated securities to uncertificated securities, as well as the issuing of uncertificated securities. Uncertificated securities may be deposited into a central securities depository licenced under the SS Act. At present, the only licenced central securities depository in South Africa is Share Transactions Totally Electronic Limited (**"STRATE"**), which acquired the other two central securities depositories, UNEXcor (the Universal Exchange Corporation) and CD LTD (The Central Depository), with effect from 1 August 2003.

STRATE effects electronic settlement of equities, bonds and money market instruments and is by far the biggest central securities depository in Africa and one of the largest in the Southern Hemisphere. STRATE was originally registered as a central securities depository under the Custody and Administration of Securities Act 85 of 1992 (**"the CAS Act"**), but in terms of the transitional provisions of the SS Act is deemed to be licenced under the SS Act with effect from 1 February 2005.

STRATE is regulated by the Financial Services Board (**"the FSB"**) and exercises its powers and carries out its functions under the oversight of the Executive Officer of the FSB. As a public company incorporated in terms of the Companies Act 61 of 1973, STRATE is also regulated by the Registrar of Companies.

The rules and procedures of STRATE have been determined by STRATE and were initially published in the Government Gazette under the auspices of the repealed CAS Act. In terms of section 116 of the SS Act, the rules of STRATE continue in force despite the repeal of the CAS Act, so far as they are not inconsistent with the SS Act, provided that STRATE must amend or replace its rules by 1 August 2005 so as to comply with the requirements of the SS Act. STRATE is required to supervise compliance by its participants with the SS Act and the STRATE rules.

Any person who wishes to deposit securities in STRATE must first open an uncertificated securities account with a central securities depository participant (**"CSD participant"**) who has been accepted by STRATE. The following institutions have been accepted as CSD participants to date: ABSA Bank Limited, Firstrand Bank Limited, Nedcor Bank Limited, Computershare, Société Général (Johannesburg) and The Standard Bank of South Africa Limited.

Under the STRATE system, there are essentially two types of clients: controlled and non-controlled. A controlled client is one who elects to keep his shares and cash in the custody of his broker and, therefore, indirectly the broker's chosen CSD participant. As CSD participants are the only market players who liase directly with STRATE, all brokers must have accounts with CSD participants. A non-controlled client is one who appoints his own CSD participant to act on his behalf.

Any deposit, withdrawal, transfer, pledge or cession of securities in STRATE is effected by the CSD participants by means of entries in the uncertificated securities accounts. In the event of rights being exercised against a central securities depository in respect of deposited securities, such rights must be exercised through a CSD participant, in its own name and on behalf of the relevant clients.

Automated securities lending and borrowing for CSD participants, the settlement authority and STRATE became operational on 6 August 2001. From 12 November 2001, all new warrant issues have been issued electronically and settled by STRATE. Existing warrants continue to be settled manually but new warrants enjoy the benefits of electronic settlement. STRATE-eligible warrants are purely electronic instruments and no certificates will be issued for them. STRATE wishes to settle all securities in the future.

In addition to the dematerialisation of scrip, STRATE's objectives include the establishment of contractual, rolling electronic settlement for on-market trades. STRATE was launched with settlement occurring on T+5 but plans to move to T+3 or shorter.

Market abuse

South Africa has had one or other form of insider trading legislation for the past 30 years, although it is probably fair to say that it has been ineffectual until the promulgation of the Insider Trading Act 135 of 1998 that came into effect on 17 January 1999.

With effect from 1 February 2005, the Insider Trading Act

was repealed and its provisions incorporated into the SS Act with some refinements. What used to be the Insider Trading Directorate is now the Directorate of Market Abuse and its reach has been extended to include manipulative, improper, false or deceptive practices of trading. The criminal penalty for committing market abuse practices has been increased substantially to a fine not exceeding R50 million and/or imprisonment for a period not exceeding 10 years.

The market abuse provisions of the SS Act are limited to those securities that are dealt in on a regulated market (whether domestic or foreign), but will apply even if the actual dealing takes place over the counter. Provision has been made for both criminal and civil actions to be brought against any person who contravenes the market abuse provisions.

The SS Act creates five insider trader offences which may be committed by an insider who knows that he or she has inside information and who cannot prove any of the prescribed defences on a balance of probabilities. These are as follows:

- dealing in the relevant securities for his or her own account;
- dealing in the relevant securities for any other person;
- disclosing inside information to another person;
- encouraging or causing another person to deal in the relevant securities; and
- discouraging or stopping another person from dealing in the relevant securities.

The Directorate of Market Abuse is given a derivative civil action against persons who contravene the insider trading provisions. In order for civil liability to attach to a person with inside information who dealt for his or her own account (**"the main defendant"**), it is required that the main defendant made a profit or would have made a profit if the securities had been sold at any stage, or avoided a loss. Those with inside information who disclose it, encourage or discourage another to or from dealing, or deal for another, are jointly and severally liable for the same amount as the main defendant (save for the amount of the penalty). Each defendant will also be directly liable to the Directorate of Market Abuse for a separate penalty equal to three times the amount of the profit made or the loss avoided, together with all commission or consideration for disclosing, encouraging, discouraging or dealing.

In addition to the insider trading offences outlines above, the SS Act prohibits trading practices which, inter alia:

- will have the effect of creating a false or deceptive appearance of active public trading in connection with, or an artificial price for, securities;
- will unduly or improperly influence the market price of securities;
- will have the purpose of creating or inducing a false or deceptive appearance of demand for or supply of securities;
- will maintain a level of artificial prices;
- will effect or assist in effecting a market corner;
- are aimed at defrauding any person; or
- are deceptive or are likely to have that effect.

The SS Act also prohibits the making of false, misleading or deceptive statements, promises and forecasts.

Allowance is made in the SS Act for the introduction of price stabilising mechanisms, regulated by the rules or listing requirements of an exchange. The purpose of such mechanisms is to promote an orderly secondary market following a new issue of shares, but only for a limited period of 30 days. Price stabilisation does not constitute a manipulative practice or insider trading.

The SS Act introduces the establishment of an Enforcement Committee with the power to impose an administrative penalty on a person who contravenes or fails to comply with the provisions of the SS Act, or (in the case of insider trading) to require such a person to pay compensation. It is expected that this will allow the FSB to act more effectively and expeditiously.

MONEY LAUNDERING

Money laundering in South Africa is combated in part by the Prevention of Organised Crime Act, 1998 (**"POCA"**), which provides for offences relating to the proceeds of unlawful activities, i.e. any property or any service advantage, benefit or reward derived, received or retained, directly or indirectly, as a result of any unlawful activity carried on by any person.

POCA was introduced to combat organised crime, money laundering and criminal gang activities. POCA repeals the Proceeds of Crime Act, 1996 but reincorporates most of its provisions in amended form.

POCA creates the following offences in respect of money laundering:

- racketeering;
- money laundering;
- assisting another to benefit from proceeds of unlawful activities; and
- the acquisition, possession or use of proceeds of unlawful activities.

A person can only commit one of the above offences where such person “knows or ought reasonably to have known” that the property is or forms part of the proceeds of unlawful activity. Unless this state of mind is present on the part of the accused, he or she cannot be successfully prosecuted under POCA.

Any person convicted of one of the above offences will be liable to a fine not exceeding R100 million or to imprisonment for a period not exceeding 30 years.

The Financial Intelligence Centre Act

The object of the Financial Intelligence Centre Act, 2001 (**“FICA”**) is to complement POCA by introducing mechanisms and measures aimed at combating money-laundering activities. FICA sets up an anti-money laundering regulatory regime that encourages voluntary compliance and self-regulation by institutions that may be exploited for money-laundering purposes.

FICA establishes a body, known as the Financial Intelligence Centre (**“the Centre”**), that will collect, retain, compile and analyse all information disclosed to it in terms of FICA and will conduct investigations into money laundering offences. The Centre is an independent statutory body accountable to the Minister of Finance. The functions of the Centre are to:

- collect, process, analyse and interpret information obtained by it;
- inform, advise and co-operate with investigating authorities;
- supervise compliance with FICA; and
- give guidance to institutions to combat money-laundering activities.

FICA places a reporting obligation on persons who carry on a business, are in charge of or manage a business undertaking or who are employed by a business undertaking, to report suspicious transactions to the Centre. A person who forms a suspicion about a transaction may continue with that transaction, provided he or she ensures that all records relating to the transaction are kept and all reasonable steps are taken to discharge the disclosure obligation. Obviously, however, a person who knows the transaction is tainted may not and should not continue with the transaction. Failure to report a suspicious transaction is an offence and carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million.

FICA places onerous identification, record-keeping and reporting burdens upon the so-called “accountable institutions” which are listed in schedule 1 of FICA. These accountable institutions have been determined by the legislature as being the most likely institutions to come into contact with money laundering activities and include, inter alia, banks, authorised users of the exchanges, investment managers, investment advisors, attorneys, accountants and estate agents. The institutions are required to formulate and implement internal administrative systems to ensure that they know their customers, report suspicious transactions to the Centre and keep records of their customers. They are also required to train their employees to recognise and deal with suspected money-laundering transactions.

Enforcement of the provisions of FICA is backed by penal and administrative sanctions. The administrative sanctions apply only to accountable institutions and provide for non-judicial procedures that may be utilised by the Centre provided certain conditions are met.

SECTION 4: INVESTMENT VEHICLES

Introduction

There are a variety of investment vehicles available to investors interested in setting up an active business in South Africa. The decision as to which is appropriate will depend on numerous factors, including the need for limited liability and tax transparency.

Limited liability companies

A limited liability company will generally be the most suitable investment vehicle, since it allows great flexibility and can be used for joint ventures. Two types of limited liability companies are possible in South Africa: public companies and private companies. Both are created in terms of and are governed by the provisions of the Companies Act, 1973, and the following characteristics and requirements apply to each:

- separate legal personality;
- limited liability;
- an auditor must be appointed;
- company tax is levied at a flat rate of 30% and Secondary Tax on Companies (**"STC"**) is levied on 12,5% of the difference between dividends declared and dividends received or accrued;
- profits remitted by way of dividends to an offshore parent company are not subject to withholding tax;
- there is no requirement that there be any local shareholders or directors.

In addition, a public company has the following characteristics:

- a minimum of 7 shareholders;
- typically no restriction on the transfer of shares;
- the company must file its annual financial statements and interim reports with the Registrar of Companies, where they will be available for inspection by the general public during the Registrar's office hours;
- public companies may raise capital from the general public and are capable of being listed on the JSE Securities Exchange South Africa;
- a minimum of 2 directors is required; directors need not hold qualification shares and need not be residents or nationals of South Africa. There are no requirements for a local shareholder;
- the quorum at general meetings is 3 members with voting rights;
- public companies are identified by the word "Limited" after the name of the company.

A **private company** has the following additional characteristics:

- the articles of association of the company must restrict the right to transfer the shares of the company, must limit the number of members to 50 and must prohibit any offer to the public for the subscription of any shares or debentures of the company;
- copies of audited financial statements need not be lodged with the Registrar of Companies, nor need members be provided with half yearly interim reports and provisional annual financial statements;
- private companies must have a minimum of one member and at least one director; directors are not required to hold qualification shares;
- a quorum at meetings of shareholders where there is more than 1 shareholder is 2 members with voting rights;
- voting rights in a private company may be unequal;
- private companies are identified by the words "(Proprietary) Limited" after the name of the company;
- there are no requirements to have a local director or shareholder.

Section 53(b) companies

The Companies Act, 1973, allows any private company to provide in its memorandum of association that the directors together with the company are jointly and severally liable for all debts and liabilities of the company incurred during their term of office. This liability of the directors is limited to the company's contractual debts and liabilities, this liability does therefore not include delictual or statutory liability.

Certain professional persons, such as attorneys and accountants, who are statutorily prevented from enjoying limited liability may incorporate a section 53(b) company to regulate their affairs with the benefit of corporate existence and perpetual succession.

These companies are identified by the word "Incorporated" or "Inc." after the name of the company.

Branches

A foreign company not wishing to incorporate a subsidiary in South Africa may instead set up a branch office.

The key requirements and characteristics of a branch are the following:

- the foreign company must register as an "external company" within 21 days of establishing a place of business in South Africa. A notarially certified copy of the memorandum and articles of the parent company (translated into English, if not in English) must be filed with the Registrar of Companies to effect registration;
- external companies must comply with the Companies Act, 1973, by appointing a South African auditor and by submitting statutory returns and filing annual financial statements;
- there is no need to appoint a local board of directors but simply one person residing in South Africa to accept service of any process and notices;
- accounting records similar to those prescribed for local companies must be kept in respect of the local operations and in addition, unless exemption is obtained, a copy of the complete financial statements of the operations of the entire company must be lodged with the Registrar of Companies;
- conversion into a local company is possible in certain circumstances;
- branches are taxable entities, but are taxed at a higher rate than domestic companies, namely, 35%. However branch profits can be remitted to the head office free of withholding taxes and STC;
- the parent company's assets will be at risk if branch debts are not paid, since a branch has no separate legal personality.

Close corporations

The Close Corporations Act, 1984 introduced a simpler and less expensive form of corporate body than the limited liability company, which still provides for separate legal personality, perpetual succession and limited liability, but it is unlikely to be of interest to the majority of foreign investors.

The key characteristics of a close corporation are:

- only individuals (not companies or trusts) may be members of close corporations provided an initial contribution is made by the member and the number of members may not exceed ten, such members must be actively involved in the conduct and affairs of the close corporation;
- members have "interests" expressed as a percentage (not shares) and they may not sell their interests without the consent of the other members;
- a memorandum or articles is not required, but an association agreement may be entered into to regulate the members' relationship, a founding statement or amended founding statement signed by or on behalf of every prospective member must, however be lodged with the Registrar;
- a close corporation is not required to appoint an auditor, only an "accounting officer" who may be an employee or member provided he is so qualified and all the members agree to his appointment in writing;
- close corporations are taxed in the same manner as companies, however, distributions of net profit are exempt from normal income tax in the hands of the members and dividends received by shareholders of a limited company are also exempt.

Partnerships

Because of their flexibility, partnerships are frequently used to create a joint venture between two corporate

entities. They may be constituted by contract or by implication from the conduct of the partners. They are not regulated by statute.

Every partner in a general partnership is liable jointly and severally for all the debts and obligations of the partnership, whilst in a limited partnership, the liability of certain partners is limited to their contribution. Limited partners may not participate in the management of the partnership or hold themselves out to the public as partners.

A partnership is not a legal entity distinct from the persons comprising the partnership (including for tax purposes). The partnership must keep proper books and records and submit a copy of the partnership balance sheet and income statements in support of each individual partner's annual tax return.

The Companies Act, 1973, prohibits any unincorporated company, association or partnership for gain from consisting of more than 20 people, except for certain professional partnerships (including attorneys and accountants).

Business or trading trusts

In South African law, a trust has the following characteristics:

- property is held or administered by trustee(s) for the benefit, at least partially, of other persons;
- no separate legal personality (except for taxation purposes); trust property vests in the trustee;
- trust property is segregated from the private assets of the trustee and this trustee is required to hold trust property separately. The trust creditors and the beneficiaries may sue the trustee (in respect of his conduct as trustee) only in his capacity as such and may only execute against the trust property. A beneficiary may sue a trustee in his personal capacity only if the trustee has been guilty of a personal default such as a breach of trust;
- a business carried on by trustees therefore enjoys a form of limited liability, independently of the provisions of the Companies Act;
- the Trust Property Control Act, 1988 governs the operation of trusts;
- trustees are required to lodge the trust deed and any amendments to it with the Master of the High Court and to obtain written authorisation from the Master before they are permitted to act in the capacity of trustee. The grant of such authorisation is contingent on the furnishing of security or being exempted from doing so;
- a court has a discretion to vary the provisions of a trust or even to order the termination of the trust so as to protect the achievement of the founder's objects, the interests of beneficiaries or the public interest;
- a trustee is required to act with the standard of care, diligence and skill reasonably expected of a person who manages the affairs of another and a trustee cannot indemnify himself against liability arising out of a failure to act in this manner;
- the Master may call upon a trustee to account for his administration and disposal of trust property;
- rules applicable to trusts are largely determined by the contents of the trust deed;
- there is no provision for formal maintenance of capital, solvency or liquidity requirements;
- income vesting in or awarded to beneficiaries within a tax year is not taxed in the hands of the trustee but is taxed only in the hands of the beneficiary at his or her applicable rate.

Compared to a company, the advantages of using a trust to operate a business include the following:

- in effect, a trust has limited liability, in that neither the trustees nor the beneficiaries would be liable for obligations incurred by the trustees on behalf of the trust despite not being subject to the Companies Act;
- the conduit principle applies if income is distributed by a trust, i.e. this income is considered to be the income of the recipients, and it retains its character and other general features;
- the more than 450 detailed sections and numerous schedules and forms of the Companies Act, 1973, do not apply. For example, a trust is not obliged to prepare financial statements and does not need to be audited; it does not have to make annual returns; there is no

limitation on the qualification of persons who may act as trustees; there is no restriction on the use of trust capital to finance the acquisition of interests in the trust; the provisions dealing with winding-up do not apply; there are no restrictions on the way in which decisions can be taken or in respect of the enlargement of the trust capital or as to what may be provided in the trust deed of amendments of the trust deed;

- although a trust deed has to be lodged with the Master of the High Court, greater secrecy as to the interests and operations of the trust is possible.

Compared to a partnership, the advantages of a trading trust include:

- perpetual succession; on the departure, death or insolvency of a partner, the partnership terminates;
- the management of a partnership is more cumbersome, since all the partners are entitled to participate;
- general partnerships offer no limited liability;
- membership of a business partnership is limited to twenty persons; there is no limitation on the number of trust beneficiaries.

Joint Ventures

introduction

A joint venture has been defined by US courts as “an association of two or more natural or legal persons combining property and expertise to carry out a single business enterprise and having a joint proprietary interest, a joint right of control, and a sharing of profits and losses”. The definition is also appropriate to South African joint ventures.

Joint ventures may be conducted through any of the vehicles discussed above and be constituted between any two such vehicles. The structure is inherently flexible and offers the foreign investor many advantages which setting up business alone in South Africa cannot do.

International joint ventures represent a significant proportion of international operations in South Africa, particularly amongst the larger enterprises. The economic sectors of activities in which joint ventures are most common are research and development, national resource exploration and exploitation, engineering and construction, production/manufacturing, buying and selling and services.

forms of joint venture

Typically, one of three forms is adopted:

- a company whose share capital is held by the joint venturers;
- an unincorporated association which has the legal status of a partnership;
- an unincorporated association which does not fall to be treated as a partnership (eg by means of a contract between the parties).

The choice of joint venture vehicle will depend upon a variety of different factors, including legal implications, commercial objectives, tax aspects, market usage and professional or political pressure. Some of the factors discussed above in relation to the different corporate structures are relevant. The choice will usually be between incorporating a company (offering limited liability) or creating a partnership or unincorporated association (which do not offer limited liability).

benefits of joint ventures

- facilitates globalisation of companies by providing suitable means to cross ethnic, business and cultural boundaries - capitalises on local party’s knowledge and skill in local market;
- reduces risk;
- harmonises skills of partners;
- inherently flexible mechanism;
- can be a convenient means to divest, if this becomes necessary;
- may create competitive advantages in market;
- specific advantages include:
  - acquiring a means of distribution;
  - penetrating a specific geographic market;
  - acquiring a skilled marketing executive;
  - entering a new business field;
  - achieving vertical integration of existing products;

- acquiring a manufacturing base or raw material source;
- expanding existing product lines;
- learning newly developing market needs;
- improving the effectiveness of existing marketing efforts;
- avoiding cyclical or seasonal instability;
- acquiring consumer franchises.

factors to consider

- respective interests in joint venture (there are no restrictions in South Africa on the extent of the ownership by a foreigner in a joint venture enterprise);
- funding techniques;
- compatibility with partner; partner's strengths and weaknesses; long-term prospects for successful working relationship; cultural differences;
- possibility of limiting liability of participants to the assets they contribute to the common activity;
- division of management and control in relation to percentage interest of the parties in the joint venture; management style; need to move key foreign personnel;
- protection for intellectual property; whether joint venture entity is to own the property rights or to obtain licence for use; consequences of termination of joint venture on intellectual property; development of intellectual property; need for patent protection; warranties as to quality and ownership of intellectual property;
- tax considerations; tax position of each of the parties, especially if different jurisdictions apply to each and if one regime taxes with reference to residence and the other to source of income (South Africa has a "residence" tax system); possibility of sourcing major expenditure from a jurisdiction providing the most favourable tax situation; best means to utilise losses and shelter profits; tax consequences of acquiring intellectual property or of payment of royalties therefor;
- mechanisms for dispute resolution; preference for arbitration to preserve amicability requirements of the joint venture relationship;
- industrial relations and labour considerations.

Minority equity participation

introduction

Participating in an enterprise as a minority shareholder offers the investor the opportunity to enjoy a share in the profits without active participation in and control of a business. The lack of control, however, represents a potential risk to the minority shareholder.

the Companies Act, 1973

The Act offers some protection to minorities, through the establishment of the Securities Regulation Panel (discussed below) and other provisions such as the grant of a right to any member, believing any act or omission by the company to be "unfairly prejudicial, unjust or inequitable" to him or some part of the members of the company, to apply to court for relief. The court, on good cause shown, has wide powers to make an order in these circumstances.

the Securities Regulation Panel

The Securities Regulation Panel (**"SRP"**) is established by the Companies Act, 1973 and its functions are to regulate "affected transactions" (defined below) and to supervise certain dealings in securities.

An "affected transaction" is one which (a) taking into account any securities held before such transaction, has or will have the effect of (i) vesting control of any company in any person, or persons acting in concert, in whom control did not vest prior to such transaction; or (ii) any person, or persons acting in concert, acquiring all the securities, or all the securities of a particular class, of any company; or which (b) involves the acquisition by any person, or persons acting in concert, in whom control of any company vests of further securities of that company in excess of the limits (currently 5%) prescribed in the rules.

"Control" is defined as being 35% or more of the voting rights of a company.

The Securities Regulation Code on Take-Overs and Mergers (**"the Code"**) came into effect on 1 February 1991. It is based largely on the City Code on Take-Overs and Mergers issued by the London Panel on Take-Overs and Mergers and its underlying principle is to ensure fair and equal treatment of all holders of relevant securities in relation to affected transactions. It affords greater protection to minority shareholders than previously.

The Code applies to transactions in which the offeree (i.e. target) company is a public company (listed or not), a statutory corporation resident in South Africa, or a private company, whose shareholders' interests (valued at the offer price) together with the loan capital exceed R5 000 000, and which has more than ten shareholders.

Although the Code applies to both listed and unlisted companies incorporated or registered in South Africa or having their head office or central place of business here, in practice the acquisitions most affected are those involving companies with numerous minority shareholders who do not participate directly in take-over negotiations.

The Code acknowledges that it is impractical to devise rules in sufficient detail to cover all possible circumstances. The spirit of the Code is therefore embodied in specified "General Principles" and the SRP seeks to interpret, enforce or relax the rules in accordance with these principles.

The principles include the following:

- all holders of the same class of securities of an offeree company must be treated similarly by an offeror;
- during the course of an offer neither the offeror, nor the offeree company, nor any of their respective advisers may furnish information to some holders which is not made available to all holders of such securities, except with the consent of the SRP;
- if an offeror makes an offer he must be able to proceed and implement the offer;
- holders of relevant securities must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information may be withheld from them;
- all parties to an offer must take all reasonable steps to prevent the creation of a false market in the securities of an offeror or the offeree company. Parties involved in offers must take care that statements are not made which may mislead holders of relevant securities or the market;
- rights of control are to be exercised in good faith and the oppression of a minority is unacceptable;
- after a bona fide offer has been communicated to the board of the offeree company, or after it has reason to believe that an offer might be imminent, it may not take any action in relation to the affairs of the company, without the approval of the holders of the relevant securities in general meeting, which could effectively result in any offer being frustrated or in the holders of relevant securities being denied an opportunity to decide on its merits;
- an affected transaction normally gives rise to an obligation to make a general offer to all other holders of the relevant securities; where an acquisition is contemplated, the offeror must ensure that he is able to implement such an offer;
- directors of the offeree company must act in their capacity as directors in advising the holders of the relevant securities, the interests of the holders of the relevant securities as a whole must be considered;
- the underlying principle is that persons holding an equity interest in an offeree company through shares or other securities in that company (whether or not such shares carry voting rights) are entitled to dispose of their interest on terms comparable to the parties of an affected transaction.

The rules of the SRP are extensive, but some of the more important of them include:

- a mandatory offer must be made to all other shareholders for the same or comparable consideration as those afforded to the parties to the affected transaction when any person (or persons acting in concert) becomes the holder of 35% or more of the voting rights of a company; or, if a shareholder owning between 35% and 50% increases that shareholding by more than 5% in any year;
- the publication of cautionary announcements (in certain circumstances where an offer is being negotiated) and

of an announcement of a firm intention to make an offer (in certain other circumstances) is required;

- the offer must be put to the board of the offeree company and must remain open for a least 21 days after the posting of the offeror document. The ultimate offeror must be disclosed to the board and the board must obtain competent independent advice on the offer, which advice is to be made known to the holders of the relevant securities.

shareholders' agreements

In addition to statutory protections, a minority investor may protect his interests by ensuring that a shareholders' agreement is entered into which contains certain provisions. Amongst other things, it should provide that his consent (written or otherwise) is required before certain actions may be taken. This amounts to the grant of a veto power to the minority shareholder and typical (although not exhaustive) examples of areas in which insistence on the veto should be considered include:

- the approval of the annual budget, annual business plan, lease expenditure and capital expenditure budgets and any amendment of the annual business plan or the budgets;
- the conclusion of any contracts outside the ordinary course of business or outside the scope of the approved annual business plan or the budgets;
- any voluntary liquidation;
- any capital investment or expenditure, however financed, in excess of a specified sum of money or any disposal of any of the capital assets, the sale proceeds or book value of which is in excess of a specified sum of money, other than that approved in the annual budget;
- any sale, assignment, transfer or other disposition of any material intangible assets such as goodwill, logos, names, trademarks, copyright, patents or licences, or trademark, patent or licence agreements;
- any material change in the accounting policies as used for the audited financial statements;
- the issue or allotment of any shares, whether pursuant to a rights issue or reduction or cancellation of any paid up share capital of the holding company, the company or any subsidiary;
- the furnishing of any encumbrances over any assets or of any guarantees, suretyships, undertakings, indemnities or other forms of intercession for the obligations of third parties;
- the acquisition or incorporation of any direct or indirect subsidiaries;
- the acquisition of any shares or interest in any company, other legal entity, business, partnership or undertaking of whatever nature;
- the termination of any material contract;
- the granting of any share options or the conclusion of any profit-sharing arrangements;
- the incurring of any general banking facilities, whether or not utilised, or any liability or borrowing, whether interest-bearing or not, or the entering into of financial leases or suspensive sales;
- the incurring of any foreign exchange exposure otherwise than in the ordinary course of business;
- the institution of any legal proceedings of any nature other than in the ordinary course of business;
- the disposal of any business or shares or any asset not in the ordinary course of business;
- the appointment or removal of the auditors;
- the engagement or dismissal of any key employee;
- the removal of any director or the acceptance of the resignation of any director;
- the declaration of any dividends or any distributions in cash to the holders of equity share capital.

Insider trading

See the discussion on insider trading under Securities and Financial Markets.

SECTION 5: SOUTH AFRICAN TRADE RELATIONSHIPS

(source: www.southafrica.info, as at 19 April 2004)

introduction

South Africa participates in a number of preferential trade relationships, both regional and bilateral. It was a founding member of the General Agreement on Tariffs and Trade of 1947 and is an active member of the WTO. South Africa is committed to the principles of these organisations, and to increasing its global competitiveness.

It should be noted at the outset that, by definition, trade statistics and trade agreements are highly fluid and in a constant state of flux. Accordingly, it might be necessary to check the official government statistics/sources for the latest data.

establishing strong trading blocs

Due to the high level of competition for foreign direct investment among emerging markets, South Africa has placed great emphasis on forming strong economic trading blocs in order to gain access to key markets.

Thus, to mention but some examples, the South African government has actively pursued negotiations for an agreement on trade, development and co-operation with the European Union (**"EU"**) (see below), which agreement paves the way for developing secure markets in the EU for South African businesses. South Africa is also pursuing agreements for greater South-South co-operation. The move to establish trade relations with Mercusor by means of a free trade agreement with Brazil, and also with India, is at the top of the government's export-oriented trade agenda. Such agreements will facilitate greater trade with South America and the East. Lastly, South Africa's participation in the Southern African Development Community (**"SADC"**), which comprises 14 sub-Saharan African countries, allows access to a market of approximately 140 million, which is expected to grow at an annual rate of around 3%.

general trade agreements

Since 1994 South Africa has negotiated a host of general trade agreements, not least to normalise trade relations with international trading partners. General trade agreements do not make provision for market access in specific sectors, but essentially allow for "Most Favoured Nation Tariff Treatment", which is the global minimum standard for international trade relations established under the WTO.

free trade agreements

In addition to general trade agreements, South Africa has negotiated two free trade agreements, which allow for preferential access across sectors between signatory countries for specific products. The one agreement is with the SADC, and the other with the EU. Both are considered in some detail below. As was alluded to above, South Africa is also exploring free trade agreements with Mercusor, EFTA, India, China, Nigeria and possibly the USA.

preferential trade arrangements

Over and above these agreements, South Africa is the recipient of unilateral preferential trade arrangements. As result of these arrangements, other countries unilaterally provide access to their markets through lower tariffs and increased or removed quotas. Since such arrangements are not negotiated, and can be unilaterally amended by the providing country, they are not agreements in the strict sense.

The USA, for example, provide such market access opportunities to a number of African countries, including South Africa, through the African Growth and Opportunity Act (**"AGOA"**). Several other countries provide market access through a Generalised System of Preferences (**"GSP"**) mechanism. Thus the following countries accord South Africa GSP status: EU Countries; Norway; Switzerland; Hungary; Japan; Canada; USA and the Czech Republic.

While to consider all of South Africa's trade relationships with different countries or continents in detail would fall well beyond the scope of this booklet, it is nevertheless

worthwhile to consider its relationships with Africa and Europe in some detail. The Asia/India ocean rim, and the Americas trade relationships, on the other hand, will be only briefly mentioned.

SOUTH AFRICA AND AFRICA

(source: www.southafrica.info, as at 19 April 2004)

introduction

It has already been indicated that South Africa participates in a number of preferential trade relationships, both regional and bilateral. The most important must undoubtedly be the Southern African Customs Union of 1968, and SADC.

southern african customs union ("SACU")

SACU consists of Botswana, Lesotho, Namibia, Swaziland and South Africa. In a customs union, members remove all barriers to trade amongst themselves and adopt a common set of external tariffs. With but a few exceptions, free and unimpeded trade takes place amongst SACU members.

The year 2002 saw the successful conclusion of the review of SACU's trade policies by the WTO. The review, in line with the new SACU agreement concluded in 2002, reflects renewed commitment and more intensive co-operation among the five member states. The review enabled the five member states to work together and co-operate in producing detailed and comprehensive policy documents on SACU's trade practices and policies.

south african development community

In 1994, South Africa became a member of SADC. The 13 other members are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia, the Democratic Republic of Congo, the Seychelles and Zimbabwe.

The SADC agreement consists of general objectives rather than specific obligations, and the key policy objective is to strengthen trade and investment linkages between South Africa and other SADC countries.

In terms of the proposed SADC free trade agreement, South Africa has made a free trade offer to its fellow SADC members to address the trade imbalances in the region. As yet agreements resulting from this offer have only been ratified by South Africa and Mauritius and hence tariff barriers between these two countries have been lowered with effect from 31 September 2000. South Africa has offered to remove its tariffs faster than the other members and could begin reducing its tariffs as soon as other SADC countries ratify the agreements.

SOUTH AFRICA AND THE EUROPEAN UNION

(source: www.eusa.org.za, as at 19 April 2004)

The South Africa – EU relationship deserves mention in view of the fact that Europe is South Africa's biggest source of investment and accounts for almost half of South Africa's total foreign trade. The EU has a long standing relationship with South Africa, dating from years before the end of apartheid, when the EU provided funding for victims of the regime at that time. Prior to South Africa's first democratic elections in 1994, the EU was responsible for channelling approximately R90 million per annum into development efforts in South Africa. Upon South Africa attaining democracy, both the EU and South Africa have taken substantial steps towards the strengthening of relations between themselves, with the EU rapidly becoming South Africa's largest international aid partner, as well as its largest trading partner and the largest foreign investor. The steps taken have manifested themselves, amongst others, in:

- South Africa's (qualified) membership of the Lomé Convention and its successor, the Cotonou Agreement; and
- the conclusion of a comprehensive bilateral Trade, Development and Co-operation Agreement between South African and the European Union.

South Africa's Qualified Membership of the Lomé Convention and of the Cotonou Agreement

The Lomé Convention (**"Lomé"**) was a unique trade and development partnership between 15 EU members and 71 African, Caribbean and Pacific (**"ACP"**) countries. In November 1994, Mr Thabo Mbeki, South Africa's then Vice-President, addressed the Co-Presidents of the ACP/EU Council of Ministers on opening negotiations with a view to establishing the closest possible relationship between South Africa and Lomé.

In reply, the Community put forward an approach specially tailored to South Africa's unique circumstances. Rather than full accession, South Africa was offered qualified membership of Lomé. This approach was approved by the ACP/EU Council of Ministers in Luxembourg on 24 April 1997, and the agreement came into force in June 1998. South Africa enjoys all the benefits under Lomé other than non-reciprocal trade preferences and EDF financial resources.

The fourth Lomé Convention, signed on 15 December 1989, was concluded for a period of 10 years, with the provision that the Financial Protocol be renegotiated after 5 years. The revised Convention (2nd Protocol) was signed in Mauritius on 4 November 1995 and entered into force in mid-1998 after ratification by ACP and EU Member States. South Africa's obtaining of qualified membership of Lomé strengthened co-operation between the European Union and sub-Saharan Africa, a region in which South Africa is particularly influential.

On 23 June 2000, the EU and its member states signed a new partnership agreement (**"Cotonou"**) with the ACP group at Cotonou, Benin. This agreement replaces Lomé and is valid for a period of 20 years.

Once again, South Africa's membership of Cotonou is a qualified membership, which provides South Africa with an important opportunity to establish and strengthen previously strained ties with its ACP colleagues and enables it, *inter alia*, to tender for projects within the ACP Group. As indicated, and despite of only having qualified membership, South Africa participates fully in the institutions of Cotonou, except in respect of decisions taken in relation to provisions that do not apply to South Africa (i.e. provisions on trade and on development finance co-operation).

The rationale behind the Republic's qualified membership (vis-à-vis full membership) is the result of an awareness that South Africa's membership had to be consistent with the interests of the Convention's existing members and the members of Cotonou. For that reason, also, while certain articles of the Convention are not applicable to the Republic, Protocol 3 to Cotonou provides that the provisions of the bilateral Trade, Development and Co-operation Agreement will take precedence over the provisions of Cotonou. Accordingly, South Africa and the EU's trade relationship is regulated by a bilateral agreement which lays the foundations for a free trade arrangement between the trading partners.

The Trade, Development and Co-operation Agreement

South Africa's trade relations and development co-operation with the EU are governed by the Trade, Development and Co-operation Agreement (**"TDCA"**), which was signed in Pretoria on 11 October 1999. While ratification of the TDCA is ongoing, its trade-related articles are being provisionally applied (since January 2000). Their main objective is to create a free-trade area between South Africa and the EU over an asymmetric transitional period of 12 years, meaning that the EU and South Africa will open their markets to each other at a different pace.

South Africa is the EU's largest trading partner in Sub-Saharan Africa. In 2002 it imported goods from the EU worth €12.4 billion and exported goods to the EU for €15.6 billion. Since the provisional application of the TDCA in January 2000, South African exports to the EU went up by 46%.

In addition to this quantitative evolution, the improvement of the composition of trade is also encouraging: while EU exports to South Africa comprise a larger share of capital goods, South Africa is gradually moving from mainly commodity-based products to a more diversified structure of exports including more manufactured products.

trade

By far the most ground-breaking element of the TDCA is the establishment of a free trade area between the EU and South Africa which will effectively see, at the end of a 10 year transition period, 95% of all EU imports from South Africa entering the market free of duty. This also applies to various categories of agricultural products. In line with the asymmetrical and differentiated nature of the TDCA, approximately 86% of all EU imports into South Africa, over a stipulated 12-year period, will arrive in the

South African market free of duty. The trade element of the TDCA accordingly establishes South Africa as one of Europe's preferred trading partners, providing South Africa with not only access to much sought after European markets, but also enabling it to participate more actively in the global economy.

economic co-operation

The economic co-operation leg of the TDCA strives to increase co-operation between the partners on a wide range of economic and industrial matters. These matters include the diversifying and strengthening of economic links; promoting of sustainable development in the South African economy; supporting patterns of regional economic co-operation; promoting economic co-operation between small and medium sized enterprises; and protecting and improving the environment.

other areas

The TDCA also regulates co-operation in the areas of telecommunications and information, energy, investment promotion, industry, mining, tourism, agriculture, fisheries, consumer policy and services. Given the contentious nature of the wine and spirits and fisheries areas, separate co-operation agreements are required. Co-operation, however, is not limited only to the above mentioned areas, but will include such matters as the environment, cultural contacts, information and media as well as social co-operation, human resource development, health, data protection and the fight against drugs and money laundering. Science and technology are, however, dealt with in a separate agreement.

Furthermore, the TDCA provides for the facilitation of political dialogue at ministerial and other levels between the contracting parties, and supports the process of regional economic integration currently under way on the sub-Saharan continent. It is widely held that the long term effects of the TDCA will provide positive benefits to, and stimulate growth within, the Southern African region.

future prospects

As provided for by the TDCA, South Africa is gradually opening up its markets to EU products. Following the last meeting of the Trade Co-operation Committee on 6 June 2002, the EU and South Africa are working to solve the technical issues that are pending in areas such as agricultural trade, rules of origin, anti-dumping, etc. A work-schedule was also agreed for areas where negotiations still need to take place (e.g. automobiles).

Other Agreements

Separate agreements on wines and spirits were signed on 28 January 2002 in addition to the TDCA. These agreements - which are also applied provisionally – provide, for example, for the reciprocal protection of wine and spirits names, and cover issues such as oenological practices and processes, and product specifications.

SOUTH AFRICA AND THE ASIA/INDIA OCEAN RIM; THE AMERICAS

(source: www.south africa.info, as at 15 April 2004)

Asia/India Ocean Rim

south, south-east asia

South Africa is a member of the Indian Ocean Rim Association for Regional Co-operation (**"IOR-ARC"**), a project-based regional economic grouping of 15 countries covering the eastern coastline of Africa, the Arabian peninsula, southern Asia and Singapore, Indonesia and Australia. South Africa has built its strongest ties in South-East Asia with Malaysia, Malaysia being the second largest investor on a cumulative basis in South Africa since 1994.

north-east asia

Japan is South Africa's largest Asian trading partner, as well as its fourth largest overall trading partner. Economic and trade relations between South Africa and the People's Republic of China have grown rapidly since the formal establishment of diplomatic relations.

australia

Australia is South Africa's third largest trading partner in Asia, after Japan and the Peoples Republic of China. Trade between the two countries is currently concentrated in the areas of mining and minerals, cars and motor-components, chemicals, services and tourism. Australia, the worlds 12th largest economy, is also a big investor in South Africa. The merger of Australia's BHP Billiton and

South Africa's Gencor in the 1990s created the largest mining company in the world.

north and south america

One of South Africa's key trading partners for both South African export promotion and inward investment mobilisation is the US. The traditional position which saw the US exporting value-added products to South Africa while South Africa exported raw materials to the US is changing. The introduction of the Africa Growth and Opportunity Act allows duty-free access of exports into the US which has given a major boost to the clothing manufacturing industry in South Africa.

Brazil is South Africa's largest trading partner in Latin America (with bilateral trade reaching R5,3 billion in 2001), and trade with Mexico has grown to R1,2 billion in 2001 and is continuing to grow.

South African products with high potential in the Chilean market are mineral or chemical fertilisers, sulphate, angles, shapes and sections of iron, flat-rolled products of stainless steel, insecticides, fruit, nuts and other edible parts of plants, acrylic alcohols, flat-rolled products of iron or non-alloy and parts suitable for use solely or principally with other engines and motors.

SECTION 6: FINANCIAL ASSISTANCE FOR INVESTMENT

THE SOUTH AFRICAN DEPARTMENT OF TRADE AND INDUSTRY AND THE GLOBAL ECONOMY

(source: www.southafrica.info, as at 15 April 2004)

introduction

The South African Department of Trade and Industry (**"DTI"**) offers a variety of services to those interested in establishing or conducting business in South Africa. These services include the provision of information on how to conduct a business in the country, what the requirements for the establishment of a business are, and what different forms a business can take.

Since the first democratic elections in South Africa in 1994, the DTI has concentrated on the reintegration of the country into the global economy after decades of isolation. This required new policies and the consolidation of existing ones. Following the general elections in 1999, the DTI moved from a period of learning to transformation, which involved the development of an organisational structure more suited to the economic needs of the country and the challenges of globalisation. The DTI thus seeks to attract higher levels of domestic and foreign investment; increase market access for South African products world-wide; and create a fair, efficient and competitive market place for domestic and foreign investors, business and consumers.

Some of the goals of the DTI include promoting Small, Medium and Micro Enterprises (**"SMMEs"**), increasing opportunities for Black Economic Empowerment (**"BEE"**), reducing inequality and poverty between regions in Southern Africa, strengthening the international competitiveness of South African business and developing the SADC region.

To this end, the DTI has established the Industrial Development and Investment Centre, which has as some of its objectives the identification and elimination of impediments to industrial growth; the promotion of South Africa as an investment destination; and the provision of a "one stop" information and assistance service to prospective investors in the industrial sector.

In addition, the DTI runs a number of incentive schemes aimed at achieving its stated goals, either through itself or through affiliated organisations. Some examples follow.

technology and human resources for industry programme

This programme, funded by the DTI and administered by the National Research Foundation, provides various schemes to encourage the competitiveness of the South African industry by supporting scientific research and technological development as well as encouraging collaboration between higher educational institutions and industry. Grants matching industry contributions to qualifying projects are financed by the DTI.

small medium enterprise development programme ("SMEDP")

Entities which qualify for this incentive are local and foreign companies, close corporations, co-operatives, sole proprietorships and partnerships investing not more than R100 million in land, buildings, plant and equipment, in new projects or in expanding existing ones. The programme provides cash incentives for small or medium sized businesses in South Africa, specifically relating to the manufacturing, tourism, business services, information and communication technology investments, high-value agricultural projects, agro-processing, recycling, biotechnology industries, agriculture and cultural industries. The aims of the incentive package are to create wealth and generate employment entrepreneurship as well as promoting empowerment. It also aims to ensure the long-term sustainability of such projects and utilise local raw materials.

The incentive package provides for an investment grant which is payable for the first two years on the acquisition of certain specified assets, calculated on a sliding scale. An additional investment grant is payable in the third year provided that human resource remuneration costs amount to 30% of the manufacturing costs.

All SMEDP incentives are tax exempt in terms of section 10(zH) of the Income Tax Act, 1962.

skills support programme

This programme is jointly administered by the DTI and the Department of Labour and relates to the awarding of training grants for the development and increase of skill levels of employees. 50% of training costs will be subsidised, with a ceiling of 30% of actual costs. Grants under this programme are also tax exempt in terms of section 10(zH) of the Income Tax Act.

emerging entrepreneur scheme

The scheme aims to increase access to finance for SMMEs through banking institutions. Independently owned SMMEs with assets of less than R2 million before financing can apply, provided they meet the banks' normal lending criteria. The maximum indemnity offered is 60-70% of the loan and the tire maximum facility is R75 000.

TRADE AND INVESTMENT SOUTH AFRICA

(source: www.southafrica.info, as at 15 April 2004)

The Trade and Investment South Africa agency (**"TISA"**) works under the umbrella of the DTI to provide a "one-stop shop" for investors and exporters at national level.

TISA is a service delivery agency which combines trade and investment promotion, which, in turn, enables the DTI to take advantage of the synergy between investment and export. Internationally, TISA's sales and marketing teams operate from around 50 diplomatic offices and provide core market intelligence as well as identifying opportunities and targeting key investors.

A three-pronged investment strategy has been adopted to provide high-level investment performance:

- the development of Industrial Development Zones (**"IDZs"**): duty-free processing zones around coastal or inland ports, for dedicated exporters;
- the development of special incentive packages: development of new and more effective incentives to match those being offered by competitor countries; and
- policy input for the creation of an investor-friendly environment: active engagement in the policy debate to improve the overall investment climate.

On the export side, TISA's strategy focuses on secondary or manufacturing industries and the development of SMMEs. TISA also co-ordinates provincial initiatives to match investors' requirements with opportunities available in the nine provinces. In particular, TISA focuses on promoting those sectors of the South African economy that show the greatest growth potential and marketability, namely chemicals (fine and speciality chemicals, polymers, and pharmaceuticals); minerals and metals (ferrous and non-ferrous metals); agro-processing (meat, fruit and vegetables); textiles (clothing and leather); automotive (materials, technology and research); and information and communication technology (electronics and information technology).

In terms of the services it delivers and the financial incentives it oversees, TISA, then, is a flexible, customer-led organisation, which carefully monitors its successes. An example of this would be the TISA-funded sector-specific Export Councils in partnership with the South African business sector, and the financial Export Marketing & Investment Assistance (**"EMIA"**) export incentive scheme (see below). In 2000 the sectors prioritised by TISA realised R4 billion in trade growth and R6,1 billion in fixed inward investment in the country's manufacturing sector.

TISA's sector specialists have a clear understanding of, and access to, the various industries, and can therefore provide sound investment advice. TISA's customer care centre can be contacted on 0861 843 384.

THE INDUSTRIAL DEVELOPMENT CORPORATION

(source: www.idc.co.za, as at 20 April 2004)

The Industrial Development Corporation (**"IDC"**) operates throughout South Africa and offers a range of financing services for small, medium and large-scale industries, so as to assist businesses in the establishment of manufacturing concerns in South Africa and the Southern African region. This state-owned financial institution follows normal company practice and pays income tax at corporate rates.

The IDC's stated mission is the assistance in financing

new and existing private sector enterprises so that industrial development in South Africa takes place according to sound business principles. It provides development capital to new undertakings in urban and rural areas, generally in the form of medium to long-term finance loans for the acquisition of fixed assets. In certain cases, however, the IDC may also take equity in industrial enterprises.

The IDC's focus is directed at:

- economic empowerment of emerging entrepreneurs;
- development growth and globalisation of the medium-size component of manufacturing;
- segmenting industries according to clusters of industries to improve their international competitiveness;
- encouraging investment into new branches of manufacturing;
- the attraction of development and generation of foreign exchange earnings;
- the establishment of internationally competitive large resource-based beneficiation projects to support special development initiatives;
- encouraging development amongst SADC countries;
- attracting foreign investors into the region; and
- leveraging of entrepreneurial development in tourism agro-industries and small mining activities owing to a potential for employment creation, rural development and the creation of foreign exchange.

The prime considerations of the IDC in respect of any application are the managerial/partnership presence of a South African and economic merit (in other words the ability of the undertaking to make acceptable profits within a reasonable period) although the impact of the development on job-creation and the generation of foreign exchange are also considered. The IDC's financial participation is usually by way of loan finance but other facilities such as leased buildings, suspensive sale and plant leases are also available, and the IDC could consider the provision of ordinary and preference share capital in certain cases. A range of competitive interest rates apply and security may be required, the form and nature of which will relate to the applicant's specific circumstances. The IDC expects a reasonable financial contribution from the shareholders or owners of the business and prefers for its exposure not to exceed that of the shareholders or owners. It also prefers not to participate in the management of any undertakings.

The IDC provides finance under special low interest rate schemes to promote specific industrial development objectives. The interest rates of these schemes are currently 15% per annum fixed or variable rates which are set bearing in mind the particular applicable scheme and the risk profile of the project. The repayment periods for these loans are tailored to the specific circumstances of each applicant but as a general guideline loans in respect of working capital are usually repayable over 4 years, plant and equipment 5 to 6 years, and land and buildings 9 to 10 years. The general financing facilities are available to assist smaller and medium-sized industries in the growth phase of development.

The IDC consists of two operational and client-orientated divisions, being the Sectors Division and the Project Division:

- The Sectors Division provides medium to large enterprises, as well as emerging entrepreneurs from the previously disadvantaged communities with medium-term finance for the establishment of new enterprises or the expansion of existing concerns.
- The Projects Division aims to impact on the regional economy by utilising its expertise in evaluating project ideas, participating and co-funding of project feasibility, as well as providing project finance for viable new and/or expansion projects.

Both divisions are organised into Strategic Business Units ("SBUs") to ensure an industry specific focus. The following are some of the most important SBUs in the Sectors Division:

agro-industries

This SBU is aimed at entrepreneurs in the agricultural, food, beverage and marine sectors who wish to expand and develop their businesses.

Medium-term finance takes the form of loans, suspensive sales, equity and quasi-equity in order to establish permanent infrastructure in the agricultural sector and aqua-culture; and establish new or expand existing undertakings in the food and beverages sector.

The minimum financing requirement is R1 million, with interest rates being competitive and risk related, and based on the prime bank overdraft rate. An economically viable business plan needs to be submitted by the applicant.

Contact the Agro-Industries SBU on +27 11 269 3590.

international finance

- **import credit facilities**

  Credit and guarantee facilities are available to industrialists/importers for financing the importation of capital goods and services, up to a maximum of 85% of the contract price. Credit periods range from 2 to 10 years, with repayments spread in a series of half-yearly instalments.

- **capital goods export**

  Credit facilities are provided by the IDC for capital goods and services exported from South Africa to enable South African exporters to offer competitive terms to foreign purchasers. These facilities are available at attractive interest rates in either Dollars or Rands and cover the pre-shipment period after the goods have been delivered and accepted by the buyer. The credit facilities are for 2- to 10- year periods with half-yearly repayment instalments.

- **short-term trade finance facilities**

  Pre- and post-shipment working capital can be provided to local industrialists under a revolving credit facility, limited to six months pre- and six months post-shipment.

Contact the International Finance Department on +27 11 269 3266.

entrepreneurial mining and jewellery

This unit concentrates on the development of small and medium-sized mining and benefication activities, as well as jewellery manufacturing. Medium-term finance in the forms of loans, suspensive sales, equity and quasi-equity involvement are available to establish or expand junior mining houses; allow historically disadvantaged people to acquire mining assets; undertake mining related activities such as contract mining; and establish or expand jewellery manufacturing activities.

Access criteria focus on a sound business plan and a minimum requirement of R1 million, with interest rates being competitive and risk related.

Contact the Entrepreneurial Mining SBU on +27 11 269 3572.

techno industries

In line with global business transformation, the IDC has established this unit to provide finance to technology intensive businesses in the IT, electronic, telecommunication and electrical industries. This reflects the IDC's willingness to undertake riskier investments in innovative technology, placing its emphasis on intellectual capital. The investment focus is on providing growth capital to early-stage companies with proven technology and an established client base. The finance products available take the form of:

- **equity involvement**

  A meaningful minority stake is temporarily acquired, to the minimum value of R8 million. The size obtained will depend on the amount of funding required, the company valuation and the specific risk profile.

- **quasi-equity**

  Debt funding with equity features for high risk ventures with profit potential.

- commercial debt

  Term facilities of 3 to 6 years for a minimum of R1 million at competitively priced rates with a negotiable grace period.

Contact the Techno-Industry SBU on +27 11 269 3364.

textiles

The focus of this SBU is on stimulating development and global competitiveness in the Southern African textile,

clothing, leather and footwear industries. The types of finance involved are building loans, plant and equipment finance, limited equity and quasi-equity participation in selected projects, trade finance and working capital. The loan size should not be less than R500 000, with repayment periods varying between 5 and 10 years, depending on the product used. In all cases a one-year moratorium on capital repayments is offered. The IDC may require security, depending on the nature of the loan and the parties' circumstances, and its exposure should not be greater than that of the shareholders, members or owners.

tourism

This business unit focuses on loans for development in the tourism industry, such as accommodation, expansions, furniture and equipment, renovations, and other capital intensive projects. Loans are structured on a 5 to 10 year basis to a minimum value of R1 million. Equity and quasi-equity structures are possible as well, with a minimum return on the investment of 10% after tax required by the IDC, with an exit mechanism effective after 7 years involvement. The main financing criteria are economic merit, a meaningful financial contribution from the parties (40%) and the provision of adequate security.

Contact the Tourism SBU on +27 11 269 3509.

wholesale and bridging finance

Bridging finance is aimed at entrepreneurs who have been awarded tenders by government, and/or have secured contracts for providing services/products to established blue chip companies. Only loan finance is provided, with small and medium-sized enterprises being given preference. The annual turnover of the enterprise must exceed R1 million. The loan required must be a short-term one (maximum of 18 months), the minimum financing requirement being R500 000. The applicant must demonstrate the capability to deliver in terms of the contract/tender and be prepared to cede the proceeds of the contract or provide alternative security.

Wholesale finance is offered to intermediaries looking for wholesale funding to lend on to individual entrepreneurs, for example franchisers, companies, and organisations. Loan finance is the only type of financial assistance offered, with the loans being intermediary focused (maximum loan period of 6 years). The applicant must be in a strong financial position with a good business development record and must have sufficient management information systems in place. The minimum loan requirement is R100 000 for on-lending to at least 10 projects (R1 million). The interest rates charged are risk related.

Contact the Wholesale and Bridging Finance SBU on +27 11 269 3677.

project finance

Project finance is aimed at large projects in the Metals, Petro- and Chemical, Manufacturing, Agriculture, Minerals and Mining and Energy Market Segments.

Long-term finance in the form of project finance (equity, quasi-equity) and debt finance (balance sheet, project finance, export and import) is offered, with interest rates being competitive and risk related and based on the prime bank overdraft rate.

Project proposals must be submitted and discussed, and there are requirements of mutual participation, risk sharing and funding of pre- and feasibility studies.

Contacts:

Oil, gas and related products: +27 11 269 3766

Food, beverages and agro-industries: +27 11 269 3593

Resources and beneficiation: +27 11 269 3572

support programme for industrial innovation ("SPII")

SPII is aimed at industrialists/entrepreneurs wanting to develop South African based products or processes that represent a significant technological advantage over existing products.

Applicants are assessed on the management's ability of product or process development; financial ability to successfully complete the proposed development and commercialisation thereof; and ability to manufacture and market products or implement a process.

Support is in the form of a grant of 50% of actual costs incurred in development activities. The Matching Scheme supports product/process development to a maximum of R1,5 million per project. The Partnership Scheme supports large-scale innovation and products/process development by providing a conditional grant with no upper limit, i.e. repayable in the form of a levy on sales if the project is successfully commercialised.

Contact Kindoc Advisory Services on +27 11 269 3073.

manufacturing sector

This unit deals with a diverse portfolio of industries. For example:

- *wood*, and its related industries such as forestry, logging, saw-milling, manufacturing of veneer sheets, plywood, laminated board, builders carpentry and joinery, wooden containers and other wood products;
- *paper*, manufacturing of pulp, paper, paperboard, corrugated board, containers, and any other articles manufactured from these products; and
- *other industries*, being largely natural resource based, such as gas (manufacturing), electricity (production and distribution), and steam and hot water (supply).

The types of finance available are commercial loans (with term facilities from 3 to 10 years), guarantees (structured to fit project cash flow), equity (high-risk ventures with substantial profit potential and developmental impact) and quasi-equity (IDC has a minority interest and does not seek control or management approval). Each project is considered on merit, with assistance being provided for both expansions and new developments. The minimum loan size is R1 million, with the further requirements of security and that the project is sustainable and profitable. The owner's contribution is generally 33% (of total assets) for going concerns, and 45% for start-ups, depending on the industry norms and individual risk profiles.

Contacts:

Chemicals, textiles and allied industries: +27 11 269 3131
Metal-based products: +27 11 269 3234
Wood, paper and other: +27 11 269 3573

sadc

In line with the Millennium Africa Recovery Plan, the South African Government views the IDC as a primary catalyst for sustainable development on the African continent. The IDC therefore seeks to act in accordance with this mandate through identifying sound investment opportunities, supporting development initiatives, assisting in the financing of exporting South African goods and by providing a consultancy service. Financial assistance is given to a wide range of projects, each assessed on their own merits, in a number of forms such as equity investments, loan financing and venture capital. Financing criteria focus on projects that are sustainable, have economic merit and a developmental effect in terms of job creation, export earnings and the expansion of the industrial base. The IDC's basic requirements are that the owners make a reasonable financial contribution, comply with environmental laws and have adequate security.

KHULA ENTERPRISE FINANCE LIMITED ("Khula")

Khula is a limited liability company (with the DTI being a major shareholder), which facilitates the provision of loan and equity capital to SMMEs by way of Retail Financial Intermediaries. Its offerings include credit guarantee schemes.

NTSIKA ENTERPRISE PROMOTION AGENCY ("Ntsika")

Ntsika is a government agency set up to render non-financial support services to SMMEs. Its programmes include counselling, advice and technical support, skills training, tender advice, access to technology and a mentorship programme. Local business service centres facilitate the rendering of these services.

NATIONAL EMPOWERMENT FUND ("NEF")

The business of the NEF is to promote savings and investments among historically disadvantaged people through its retail division, and to fund economic empowerment and black business through its investments division.

OTHER ORGANISATIONS

provincial administrations and development corporations

Within the nine provinces industrial investment opportunities co-ordinated by the relevant member of the Executive Council for Economic Affairs or the Provincial Development Corporations are available.

local authorities

Many of the local authorities provide special incentives, assistance and facilities to industrialists wanting to establish themselves in the area.

THE SOUTH AFRICAN REVENUE SERVICE

tax incentives

The Income Tax Act, 1962 (as amended) contains several specific tax incentives, including:

- **Annual capital allowance** over 4 years at a ratio of 40:20:20:20 per annum in respect of the cost of machinery and equipment used for the first time in a manufacturing or similar process.
- **Annual wear-and-tear allowance** for machinery, equipment, utensils and articles which do not qualify for the above 4-year capital allowance. Rates are prescribed on the straight-line basis, ranging between 10% and 50%.
- **5% annual depreciation allowance** on the cost of buildings (and improvements) used in a manufacturing or similar process.
- **5% annual allowance on new hotel buildings** and 20% annual allowance on improvements to hotel buildings.
- **Industrial incentive allowance** for qualifying strategic industrial projects. The allowance is equal to 100% of the cost of any industrial asset used in a qualifying strategic industrial project determined to have preferred status, and 50% of the cost of any industrial asset used in any other qualifying strategic industrial project in the year of assessment during which that asset is first brought into use, provided application for approval of the project is submitted by 31 July 2005.
- **Patents, copyright, trademarks, designs and other intellectual property acquisition and development costs** incurred before 29 October 1999 may be written off over the expected life of such assets or at a rate of 4% per year, whichever is the greater. For costs incurred after 29 October 1999, the allowance per year is 5% in respect of patents, trademarks (excluding trademarks acquired from another person) or copyright or 10% in respect of any design. For costs incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004 in acquiring patents, designs or copyrights (but not trademarks), the allowance is 5% or 10% as above.
- **CSIR (Council for Scientific and Industrial Research) approved capital investment** on buildings and equipment used exclusively for scientific research, may be written off, on a straight line basis, at the rate of 25% per year. However, no deduction will be allowed in respect of any expenditure incurred by the taxpayer during any year of assessment commencing on or after 1 January 2004.
- With effect from any year of assessment commencing on or after 1 January 2004, any **costs incurred in respect of research and development** aimed at devising, developing or creating any invention, patent, design or copyright, or in registering any such property, are deductible in the year of incurral. In addition, an annual capital allowance in the ratio of 40:20:20:20 is allowed in respect of the cost of buildings, machinery, plant or equipment brought into use for the purposes of research and development.
- **Annual residential building allowance** equal to 2% of the cost to the taxpayer of any residential unit erected by the taxpayer under a housing project, and a residential building initial allowance equal to 10% of the cost to the taxpayer of the residential unit, which may be deducted in the year in which the residential unit is let or occupied for the first time.
- **Lease premiums** paid for the use of land or buildings, plant and machinery, film recordings or advertising matter connected therewith, patent, design, copyright or similar property and any know-how connected with all of the above may be written off over periods for which the right of use has been granted or 25 years, whichever is shorter.
- **Double taxation avoidance agreements** are presently in place to avoid the full taxation of same income of certain persons, enterprises and property under the laws of two countries. Double taxation avoidance agreements have been entered into by South Africa

with Algeria, Australia, Austria, Belarus, Belgium, Botswana, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Korea, Lesotho, Luxembourg, Malawi, Malta, Mauritius, Namibia, Netherlands, New Zealand, Norway, Oman, Pakistan, Peoples Republic of China, Poland, Romania, Russian Federation, Seychelles, Singapore, Slovak Republic, Swaziland, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Uganda, Ukraine, United Kingdom, United States of America, Zambia and Zimbabwe.

EXPORT INCENTIVES AND FACILITIES

(source: www.southafrica.info, as at 15 April 2004)

Concessions and facilities are available to exporters through the DTI, which is South Africa's principal instrument of export promotion. The DTI also offers advice to industrialists and manufacturers on all aspects of foreign trade promotion as well as a vast number of incentive initiatives. The DTI's financial incentives are designed to assist exporters to break into new markets abroad and to expand existing markets and include, amongst others, the following:

the export marketing and investment assistance scheme ("EMIA")

EMIA is aimed at partially compensating exporters for costs incurred in respect of activities aimed at developing export markets and to attract new foreign direct investment into South Africa. Four marketing assistance schemes are operated under EMIA: The Primary Export Marketing Research Scheme, the Outward Selling Trade Missions Scheme, the Inward Buying Trade Mission Scheme, and the Exhibition Assistance Scheme. These schemes are only available to undertakings registered as exporters with the DTI.

Assistance is available for official group participation, and comprises the total cost of participating except for airfares, accommodation, insurance and transportation of products.

rebate provisions

Rebate provisions are aimed at the promotion of manufacturing and exportation of goods, and are available to all manufacturing industries in respect of duties applicable to imported goods, raw materials and components used in manufacturing, processing and for export.

duty credit certificate scheme

This scheme is designed as a temporary "kick-start" measure to enhance the export competitiveness of certain prescribed textile and clothing products by offering duty certificates to qualifying exporters.

motor industry development programme ("MIDP")

The MIDP is available to motor vehicle assemblers and component manufacturers and exporters. The programme enables local vehicle and component manufacturers to increase production runs and encourages rationalisation of the number of models manufactured by way of exports and complementing import of vehicles and components.

the export credit and foreign investment reinsurance scheme ("ECRS")

ECRS provides exporters with insurance cover against political and transfer risks, as well as commercial and insolvency risks. A special dispensation exists for SMMEs.

sector partnership fund

This fund has been established to form linkages and in so doing promote competitiveness and productivity. Any qualifying partnership with five or more organisations within South Africa manufacturing may, in an attempt to improve competitiveness and productivity, have access to 65% of costs of the projects with coverage up to R1,5 million.

export credit incentives

IDC financing at reduced rates is available for selected expansion schemes expected to result in increased foreign exchange earnings. Financing of credit for exporters of capital goods is also available through the IDC or private-sector merchant banks at reduced rates.

reduced rail rates, ocean freight rates and road transport concessions

Reduced rail rates are granted on commodities destined for territories overseas on a contract basis.

If products cannot be marketed abroad at competitive prices because of normal shipping costs, exporters may make representations accordingly, either directly to the shipping line or to the South African Shipping Board.

Similarly, exporters may apply to their local Road Transportation Board for road transport exemptions, which are negotiated on a contract basis.

credit facilities under the export finance scheme for capital projects

Credit facilities are available to exporters of capital projects under the Export Finance Scheme for Capital Projects to allow them to compete internationally by offering buyers competitive rates denominated in US Dollars.

SECTION 7: EXCHANGE CONTROL

Introduction

Exchange Control was first introduced in South Africa during the Second World War as a means of protecting South Africa's foreign exchange reserves and extends over the Common Monetary Area (**"CMA"**) (see discussion above).

Recent years have seen a relaxation in exchange control regulations in South Africa. The dual currency system of the Financial and Commercial Rand was abolished on 13 March 1995. Any investment or repatriation of capital is now through the medium of the Rand.

The Currency and Exchanges Act 9 of 1933 empowers the President to make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges. The regulations made under the Currency and Exchanges Act are contained in the Exchange Control Regulations, Orders and Rules, 1961, as amended (**"the Exchange Control Regulations"**).

The Treasury has delegated the administration of exchange control to the South African Reserve Bank (**"SARB"**), which is responsible for the day-to-day administration and functioning of exchange control. The Exchange Control Department of the SARB (**"Excon"**) has a wide discretion, but exercises its powers within certain policy guidelines.

The SARB has, in turn, delegated some of its powers to deal with exchange control matters to certain banks who are known as "authorised dealers" in foreign exchange.

"non-resident" and "emigrant" accounts

Although Excon's current practice is to allow all funds held in accounts designated "non-resident" to be freely transferable (despite technical restrictions which remain in regard to non-resident capital movements) restrictions remain on "emigrants" (former residents of South Africa who "emigrated" for exchange control purposes and are now non-resident emigrants). Emigrants' funds in excess of the emigration allowance are placed in blocked accounts in order to preserve foreign reserves. However, as a reflection of the improved strength and resilience of the South African economy, these blocked assets are now being unwound.

Specifically:

- the distinction between the settling-in allowance for emigrants and the private individual foreign investment allowance is to fall away and there will now be a common foreign investment allowance for both residents and emigrants of R750 000 per individual and R1.5 million for family units. A widow/widower with dependants may also be regarded as a family unit;
- amounts up to R750 000 (inclusive of amounts already exited) will be eligible for exiting without charge. Holders of blocked assets wishing to exit more than the allowed limit must apply to the Exchange Control department of the SARB to do so. Approval will be subject to an approved schedule and an exit charge of 10% of the amount. The same dispensation will apply for new emigrants.

Further relaxation of exchange controls

Since 1995 exchange control has further been relaxed in a number of ways. Insurance companies, pension funds and unit trusts are now able to invest a portion of their assets outside South Africa.

The limits permitted to be invested offshore have been increased over the period, and from 1 May 2003 will stand at an overall limit of 15% of total assets in the case of long-term insurers, pension funds and fund managers, and 20% of total assets in the case of collective investment scheme management companies.

In addition the limit on the use of South African funds for approved foreign investment has increased from R500 million to R1 billion for direct foreign investments outside of Africa, and from R500 million to R2 billion for approved foreign direct investments in Africa. The excess cost (being the difference between the total cost of the project and the R1 billion/R2 billion foreign direct

investment allowance) that can be funded from South Africa has increased from 10% to 20%, with effect from 18 February 2004.

Offshore loans accessed after 18 February 2004 will be subject to fewer exchange control restrictions. While interest payments on such loans must continue to be funded from offshore revenues, the permissible repayment of capital will be increased to the greater of R1 billion per project (R2 billion in the case of African investments) or 20 % of the total outstanding loan capital per project in any given year. The initial two-year waiting period for the repayment of the loan from domestic resources, that previously existed, has now fallen away, however, the total amount of South African funds that may exit in the first two years of the loan's life must not exceed R1 billion per project (R2 billion in the case of African investments.)

Funds from the Republic may not be used to purchase additional shares in existing offshore entities or for the expansion of existing offshore business ventures. However, if the initial amount transferred is less than the existing R1 billion/ R2 billion limit, an entity may qualify for a "top-up" allowance up to the current limit. The 20% excess cost limit referred to above would not apply for such expansion.

A number of further relaxations by the exchange control regime applicable in South Africa over the past few years have also been introduced:

- Dividends repatriated from foreign subsidiaries will be eligible for an exchange control credit, which will allow them to be re-exported, upon application, for approved foreign direct investments.
- Restrictions on current-account transactions such as the transfer of buying commissions, payment for computer packages purchased on a commercial basis, maintenance payments in respect of computer software, the importation of books, newspapers, periodicals as well as medical preparations and correspondence course material no longer apply.
- Payments for services rendered by non-residents will in most cases not require exchange control approval; this includes directors' fees payable to non-residents.
- Excon will now consider applications by South African individuals to purchase fixed property in Southern African Development Community countries.
- South African corporates will, on application, be able to transfer up to R1 billion from South Africa in order to finance new approved investments abroad, and to top-up previous investment to this limit. They will also be able to invest up to R2 billion per project for approved investments in Africa.
- Foreign investment allowances for South African residents have increased to R750 000 per person. This R750 000 may either be held offshore or in a foreign currency deposit with a domestic foreign exchange dealer. The annual travel allowance, which covers both holiday and business travel, has been increased to R160 000 per calendar year for children over the age of 12, and to R50 000 per calendar year for children under the age of 12.
- South African corporates will be allowed to retain foreign currency earnings in the form of export proceeds and service receipts for up to 180 days. This will also assist corporates in their foreign cash management strategies.
- The South African Government recognises the advantages to regional economic development of permitting the dual listing of companies on the JSE and other SADC stock exchanges. Henceforth such dual listings will on application be allowed subject to the consent of the Minister of Finance.
- Consideration will be given to the issue of SADC Depository Receipts in South Africa for companies listed elsewhere in SADC.
- Restrictions on the opening and operation of customer foreign currency accounts with local authorised dealers by businesses making profits or commissions on foreign transactions are removed subject to the 180 day limit for the repatriation of funds.
- South African corporates will now be allowed to utilise part of their local cash holdings to repay up to 20% of outstanding foreign debt raised to finance foreign investments.

- In line with international practice and to accommodate permissible foreign currency payments for small transactions, e.g. imports over the Internet, South Africans would be allowed to make such payments using their credit cards. The limit per transaction is R20 000.
- Primary listings offshore:

  Consideration will be given to requests by major corporates to establish primary listings offshore. The following guidelines will, inter alia, be taken into account:

  – foreign expansion is necessary and integral to the company, given its size and the nature of its business;

  – a significant proportion of revenues are derived from outside South Africa, making the company in effect an international concern;

  – there are clear monetary and balance of payment benefits to South Africa;

  – a substantial advantage can be demonstrated over alternative approaches to raising the required capital;

  – the direct and indirect South African assets may not be encumbered;

  – South Africa's reserves may not be negatively impacted by the outflow of dividends or other funds;

  – the company involved must commit itself to matching any dividends declared to the foreign holding company with dividends paid out to South African shareholders, to preserve balance of payments neutrality;

  – all the South African operations and assets of a South African corporate or the proceeds thereof, as well as any other cash holdings, must remain in South Africa and may be exported from South Africa only if payable pro rata to the non-resident shareholders of the listed holding company and with Exchange Control approval.

Exchange control regulations - effect on foreign investors

foreign loan

Loans by a non-resident to a South African resident require prior exchange control approval. In the past, Excon required certain requirements to be fulfilled before approval would be granted, for example, the loan capital had to provide working capital, and there were requirements to prohibit thin capitalisation. These requirements have, however, been done away with.

local borrowings

Loans by a South African resident to a non-resident require the prior approval of the SARB.

The ability of South African companies in which 75% (increased from 50% in May 1998) or more of the voting stock, capital or earnings is held or controlled directly or indirectly by a non-resident (**"Affected Companies"**) to obtain financial assistance in the domestic market is subject to certain restrictions. Financial assistance includes the lending of currency, the granting of credit, the taking up of securities, the conclusion of an instalment and/or hire purchase sale or a lease, the financing of sales or stocks, discounting, factoring, the guaranteeing of acceptance credits, the guaranteeing or accepting of any obligation, a suretyship, a buy-back, a leaseback, but excludes normal trade credits. The primary purpose of these restrictions is to ensure the adequate capitalisation of foreign investments.

An Affected Company's ability to borrow money from a South African lender is restricted by a formula which depends on both the composition of the company and the extent of the shareholder funds. Excon presently permits an entirely foreign owned company, or foreign wholly owned subsidiary to borrow up to 300% of the shareholder investment in the Affected Company, which is taken to mean the paid-up equity capital, preference shares, undistributed earned profits, shareholders' loans from abroad and, in certain instances, the hard core of shareholders' trade credit.

The formula for calculating the local financial assistance ratio is as follows:

$$300\% + 100 \times \frac{a}{b}$$

where

a = the percentage of the share capital held by South Africans (local shareholding)

b = the percentage of share capital held by non-South Africans (foreign shareholding)

So, for example, if a company has capital plus reserves of R2 000 000 and non-South Africans own 76% of the company's capital, the amount which the company can borrow from local sources is R66 315 895 calculated as follows -

$$300\% + (100 \times \frac{24}{76}) = 331{,}58$$

331,58 x R2 000 000 = R6 631 578.

establishing new industries

Where the intention of a subsidiary of a foreign concern is to manufacture under a foreign licence, DTI approval is required.

The DTI passes its recommendations to Exchange Control which in turn authorises the provision of the foreign exchange through the bankers of the applicant company.

In considering proposed licence agreements Excon would have regard to *inter alia*:

- the extent to which the local manufacturer of the commodity would conserve foreign exchange resources through a reduction of imports;
- the possibility of the product being exported;
- the rate at which royalties will be payable; and
- the benefit to the economy as a whole.

currency risks: imports and exports

Importers in South Africa may cover forward the Rand/US Dollar leg of any foreign exchange liability through authorised dealers, provided that such period does not extend beyond a period of twelve months. Authorised dealers must ensure that they possess the necessary documentation, including if necessary an import permit issued by the South African Directorate of Import and Export Control. Where certain corporates have been excused from having to provide satisfactory documentary proof for every foreign transaction that concerns an import transaction, this exemption extends to forward contracts that are concluded in respect of those import transactions. Satisfactory documentary proof must be provided of firm and ascertainable commitments covering the importation of goods into South Africa where the period involved is not in excess of twelve months.

Long-term forward cover, in excess of one year can be arranged with the Reserve Bank for certain freely transferable international currencies at market related rates. This facility is only available for certain transactions.

Certain goods as determined by the Minister of Trade and Industry are subject to export control. For all exports necessary forms and documentary evidence must be filed with customs and with the exporter's bank.

Repatriation of earnings

capital

There are no restrictions on the repatriation of capital investments by non-residents.

In the 1998/1999 budget speech it was announced that capital introduced into South Africa by resident private individuals may be repatriated at any future date.

royalties

Royalty and technology agreements where no local manufacturing is involved require prior approval of Exchange Control. Once approved, the royalty payments are freely transferable.

The same applies to management and technical service (or assistance) fees. Excon will need to be satisfied as to their merit and as to the basis of their calculation. Excon is not usually inclined to consent to the payment of management fees payable by a subsidiary company to its foreign parent, where the fee is set in advance. Excon also does not view favourably the payment of management fees expressed as a percentage of turnover, as they prefer to see foreign investors withdrawing their profits from South Africa in the form of dividends.

As a general rule the authorities will allow a royalty of up to 4% for consumer goods and up to 6% for intermediate and capital goods. A higher royalty rate will, however, be approved if the product is of strategic importance, or if the authorities are of the view that the economic benefits to South Africa of the royalty agreement are substantial.

Royalty agreements involving the local manufacturing of goods must first be referred to the DTI. This is done by submitting to the DTI a draft agreement supported by a completed questionnaire on a prescribed form. The following considerations apply to the acceptability of the application:

- the strategic importance of the product;
- the economic importance of the product in the furthering of industrial development by means of import replacement, export promotion or expansion of the domestic market and its contribution to the national income and employment;
- the new technological know-how entering the country through the manufacturing process in question;
- the domestic content of the particular product;
- the financial interest of the licensor in the local venture;
- the duration of the contract;
- the nature of any restrictions contained in the agreement; and
- the royalty should be expressed as a percentage of the ex-factory cost rather than as a percentage of the selling price.

The DTI passes on the request with its recommendation to Exchange Control which makes a final decision.

dividends

For non-resident shareholders dividends/profits/income distributions are remittable in proportion to the percentage of shareholding/ownership. Distributions by affected persons who have local financial assistance at their disposal may be remitted, provided the relative distribution will not cause the entity to be placed in an over-borrowed position in terms of the formula requirements.

Emigrant shareholders of listed companies may only remit dividends declared out of income earned from normal trading activities subsequent to the date of emigration. A dividend declared out of capital gains, or out of income earned from normal trading activities prior to the date of the emigration remains subject to the blocking procedure.

Emigrant shareholders of non-listed companies are subject to a different set of requirements namely:

- producing an auditors report
- a representation letter in the prescribed form, signed by the a director or senior officer
- that no portion of the net income after taxation out of which the dividend/profit/income distribution has been declared, arises from surpluses as a result of the revaluation of assets or profits accruing from the realisation of any assets.

interest

There are no restrictions on interest payments, provided the required approval of Excon has been obtained for the loan facility.

Thin capitalisation rules have been introduced into legislation in the form of section 31 of the Income Tax Act, 58 of 1962, which allows the Commissioner for the South African Revenue Service to disallow excessive interest-charged deductions. The Commissioner will exercise his discretion to disallow such a deduction if in his opinion the financial assistance is excessive in relation to the fixed capital of the company. This section applies where such assistance is supplied or acquired in terms of an international agreement between a resident and non-resident.

SECTION 8: TAXATION

Introduction

Various forms of taxation are levied in South Africa and the extensive taxation legislation can prove to be a minefield for the unsuspecting foreign investor. To complicate matters further, significant changes to the tax legislation were introduced during the course of 2003 and 2004.

Individuals are taxed on a progressive basis up to a maximum rate of 40% on taxable income exceeding R300 000 per annum. A uniform rate of tax is applied to all individuals, irrespective of sex or marital status, and without child rebates.

Domestic companies are taxed at a flat rate of 29%. However, non-resident companies which trade in South Africa through a branch are subject to taxation at a rate of 34%.

Trusts (other than special trusts) are taxed at a flat rate of 40% on income which does not vest in a beneficiary of the trust during the year in question. Income which vests in a trust beneficiary is taxed in the beneficiary's hands and does not lose its identity because it first passes through the trust.

A "special trust" is a trust created solely for the benefit of a person who suffers from:

- any "mental illness" as defined in section 1 of the Mental Health Act, 1973; or
- any serious physical disability,
- where the illness or disability incapacitates the person and prevents him from earning enough income to provide for his own needs.

Special trusts are taxed on the same progressive basis as individuals.

Partnerships are not recognised as entities for tax purposes. Instead, the individual partners are taxed separately on their share of the partnership profits.

Income tax

The principal source of direct taxation revenue in South Africa is income tax, the liability for which is determined and regulated by the Income Tax Act, 1962 (**"the Income Tax Act"**).

basis of taxation

South African residents are (subject to certain exemptions) taxed on their world-wide income, while non-residents are taxed on South African sourced income.

The meaning of a "resident" is crucial to the current residence based system of taxation. In relation to a natural person, a "resident" is defined in the Income Tax Act to mean a person:

- who is ordinarily resident in South Africa (i.e. a person whose permanent place of abode is South Africa); or
- who was physically present in South Africa for at least 91 days during the year of assessment and was during the three preceding years present for at least 91 days in each year and for 549 days in aggregate over those three years. However, if a person is outside South Africa for a continuous period of 330 days that person will be deemed to have ceased to be a resident as from the first day of that 330-day period.

A person other than a natural person is a "resident" if it is "incorporated, established, formed" or has "its place of effective management in the Republic". This has far reaching implications as it means, for instance, that a trust which is established or formed in South Africa will constitute a "resident" despite the fact that it may be managed offshore. Similarly, a company which is incorporated under the South African Companies Act will qualify as a "resident" despite the fact that it is managed offshore.

controlled foreign companies

Section 9D incorporates into the income tax net of South African taxpayers income earned by a controlled foreign company (**"a CFC"**). It also applies to capital gains derived by a CFC.

A CFC is a "foreign company" in which South African residents individually or together hold more than 50% of the rights to participate directly or indirectly in any of the share capital, share premium, current or accumulated profits or reserves of the foreign company (**"participation rights"**). In determining whether South African residents hold more than 50% of the participation rights of a foreign entity which is listed on a recognised exchange or which is a foreign collective investment scheme, any person who holds less than 5% of the participation rights of that foreign entity is deemed to be a non-resident, except in circumstances where connected persons hold more than 50% of the participation rights in that foreign entity. (Foreign companies include any non-resident association, corporation, arrangement or scheme.)

Section 9D provides for the inclusion in the income of the resident shareholder in a CFC, a proportional amount of the "net income" of the CFC, determined at the same ratio as such resident's participation rights in the CFC. Subject to certain exclusions and exceptions, the "net income" of a CFC is an amount equivalent to its taxable income, determined in accordance with the Income Tax Act as if the CFC had been a South African resident.

There are a number of exclusions from the application of section 9D. In particular, the proportionate share of the net income of a CFC will not be imputed, *inter alia*:

- to a resident who (together with any connected person) holds less than 10% of the participation rights in the CFC;
- to the extent that the participation rights are held by a resident indirectly through any company which is a resident;
- to the extent that it is attributable to interest, royalties, rental or income of a similar nature payable to that CFC by any other foreign company, where that CFC and that other foreign company form part of the same group of companies;
- to the extent that it has already been subject to South African tax;
- where it is attributable to any business establishment carried on outside South Africa (this exclusion is, however, subject to a number of provisos); or
- to the extent that it relates to any capital gain of such CFC which is determined in respect of the disposal of any asset (excluding any financial instrument or intangible asset) attributable to any business establishment of that CFC or any other foreign company which forms part of the same group of companies as that CFC.

foreign dividends

Foreign dividends are taxable in the hands of residents, subject to the exemption provision in Section 10(1)(k)(ii). A foreign dividend received by or accrued to any person will be exempt from income tax, *inter alia*, to the extent that:

- the profits from which the foreign dividend is distributed relate to any amount which has been or will be subject to tax in South Africa, in terms of the Income Tax Act, unless those profits are exempt or taxed at a reduced rate because of a double tax agreement; or arose directly or indirectly from any dividends declared by a resident company;
- the foreign dividend relates to any amount which was declared by a listed company and more than 10% of the equity share capital in that listed company is, at the time of the declaration of that foreign dividend, held collectively by residents;

A foreign dividend received by or accrued to a person who holds more than 25% of the total equity share capital in the company declaring the dividend will be exempt from income tax, subject to certain provisos.

the calculation of "taxable income"

The "taxable income" of all taxpayers, including natural and juristic persons, is the basic point of departure for assessing income tax liability. A taxpayer's "gross income" must initially be ascertained. "Gross income" (subject to certain specific inclusions) is, in the case of a South African resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident during the relevant year, excluding receipts or accruals of a capital nature. In the case of a non-resident, "gross income" is limited to such receipts or

accruals which derive from a South African source or deemed South African source. Certain exemptions may be claimed from a taxpayer's "gross income" in respect of certain forms of receipts and accruals. (In addition, certain entities are exempt from income tax on all their receipts and accruals). The result of "gross income" less any exemptions is the taxpayer's "income", as defined in the Income Tax Act. From this "income", further amounts may be deducted or allowances claimed in terms of the Income Tax Act, giving rise to the taxpayer's "taxable income". Any taxable capital gains derived by the taxpayer (and determined under the Eighth Schedule to the Income Tax Act) are then included in the taxpayer's "taxable income".

exemptions: dividends

In terms of section 10(1)(k) of the Income Tax Act, dividends are exempt from income tax irrespective of the juristic nature of the taxpayer or the place of incorporation of the company paying the dividends.

The above exemption does not apply, *inter alia*, to:

- foreign dividends (except as outlined above);
- dividends distributed by a company the shares of which are "property shares" as defined in section 47 of the Collective Investment Schemes Control Act, 2002.

exemptions: public benefit organisations

The exempt status of non-profit organisations is governed by sections 10(1)(cN) and 30 of the Income Tax Act.

Section 10(1)(cN) provides that receipts and accruals of any "public benefit organisation" which has been approved by the Commissioner in terms of section 30(3) shall be exempt from tax. A "public benefit organisation" (which is defined in section 30 as a section 21 company, trust or association whose sole object is the carrying on in South Africa of a public benefit activity in a non-profit manner) may apply to the Commissioner for exempt status. The Commissioner must approve the application if the public benefit organisation complies with the criteria set out in section 30.

The ninth schedule to the Income Tax Act lists the public benefit activities which a public benefit organisation may carry on to become entitled to exempt status. The activities are categorised under the following headings:

- welfare and humanitarian;
- healthcare;
- land and housing;
- education and development;
- religion, belief or philosophy;
- cultural;
- conservation, environment and animal welfare;
- research and consumer rights;
- providing funds, assets or other resources; and
- sport.

Section 18A of the Income Tax Act allows deductions to be claimed for *bona fide* donations to certain public benefit organisations approved by the Commissioner under section 30. The deduction is limited to an amount not exceeding 5% of the taxable income of the taxpayer (before the deduction) .

deductions and allowances

Under the general deduction formula contained in section 11(a), read together with section 23(g) of the Income Tax Act, expenditure and losses actually incurred by the taxpayer in the production of the taxpayer's income are deductible, provided that they are not of a capital nature and only to the extent that they are laid out or expended for the purposes of trade. In addition, a number of specific deductions and capital allowances are provided for in the remainder of section 11 and, *inter alia*, sections , 12C, 12D, 12E, 12F, 12G, 12H, 13, 13bis, 13ter, 18, 18A, 21, 24C, 24F and 24G.

Some of the capital allowances provided for in the Act include:

- a wear-and-tear allowance under section 11(e), calculated on the straight line basis on the cost of plant, machinery, equipment or articles, at prescribed rates between 10% and 50%.
- an annual allowance under section 12C, in the ratio of 40:20:20:20 in respect of new or unused machinery or

plant which was or is brought into use by the taxpayer in the course of its business (other than banking, financial services, insurance or rental business) and is used by him directly in a process of manufacturing (or any other similar process);

- an allowance equal to the full cost of a qualifying asset brought into use for the first time by a "small business corporation" on or after 1 April 2001 (section 12E);
- a double deduction for start-up costs, which cannot exceed R20 000; and
- an industrial incentive allowance under section 12G for qualifying strategic industrial projects with the aim of encouraging investments in projects which have significant benefits for the South African economy. The allowance is equal to 100% of the cost of any industrial asset used in a qualifying strategic industrial project determined to have preferred status, and 50% of the cost of any industrial asset used in any other qualifying strategic industrial project in the year of assessment during which that asset is first brought into use. An industrial project will qualify as a "strategic" industrial project when it meets various requirements set by the Minister of Trade and Industry. This allowance is available in addition to any other deductions allowable in terms of the Income Tax Act.

group liability and tax losses

The Income Tax Act recognises the concept of an assessed loss. An assessed tax loss occurs where a taxpayer's total deductions exceed its total income. As provided in terms of section 20 of the Income Tax Act, this assessed loss can be carried forward and set off against the taxpayer's taxable income in the following year. Since companies within a group are treated as separate entities for tax purposes, the losses suffered by one company within the group cannot be set off against another company's profits within the group. The principle underlying this is that an assessed loss is peculiar to the particular taxpayer suffering the loss and accordingly cannot be transferred to another taxpayer.

Tax losses carried forward may be utilised indefinitely, the only proviso being that the company in question does not cease trading activities and become dormant.

A taxpayer is, in terms of section 20 of the Income Tax Act, prohibited from setting off against any amount derived by it from the carrying on of a trade within South Africa, any assessed loss or balance of assessed loss incurred by it in carrying on a trade outside South Africa. Thus, the losses of foreign branches of a resident company cannot be set off against the South African income of the company. A loss of a foreign branch may, however, be set off against the income of another foreign branch and South African losses may be set off against foreign income.

The new section 20A operates, in particular circumstances, to prevent a natural person from setting off his assessed losses arising out of certain trades (for example, the practice of a sport, the performing or creative arts, farming, gambling or betting) and against income derived otherwise than from carrying on those trades.

Capital gains tax

From 1 October 2001, any net capital gain which arises from the disposal or deemed disposal of assets of a resident and from the disposal or deemed disposal of certain assets of a non-resident effected are subject to tax in South Africa. Although this tax is colloquially referred to as "capital gains tax" (**"CGT"**), the net capital gain is actually not taxed separately from normal income but rather as an integral part of income tax.

The assets of a resident which are subject to CGT are all forms of property (movable or immovable, corporeal or incorporeal), or rights in such property, other than currency or coins (unless made mainly from gold or platinum), irrespective of where such assets are situated. In relation to non-residents, only disposals of immovable property which is situated in South Africa (or rights or interests in such property, which includes certain indirect interests in immovable property held through companies or other legal entities) and disposals of assets of a permanent establishment of that non-resident through which trade is carried on in South Africa are subject to CGT.

"Disposals" are broadly defined to be "any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset" and include, for example, the scrapping, loss or destruction

of an asset; the forfeiture, release, waiver, renunciation, expiry or abandonment of an asset; distributions of assets by companies to their shareholders; the grant, renewal, extension or exercise of an option; and transactions which result in a shifting of value between holders of interests in companies, trusts or partnerships who are connected persons to one another (value shifting arrangements). Certain events are, however, expressly excluded from constituting disposals. These include transfers of assets as security; the issue or cancellation of shares by a company; the grant by a company of an option to acquire a share or debenture in that company; and the issue of bonds, debentures, notes, or other borrowing of money or obtaining of credit.

A number of events are further deemed to constitute disposals. These include where:

- a person either ceases to be a resident or becomes a resident;
- an asset of a non-resident becomes part of its permanent establishment in South Africa, or ceases to be part thereof;
- assets held as trading stock cease to be held as trading stock, and vice versa; and
- a creditor reduces a debt without full consideration being paid therefor.

Turning to the tax itself, in broad terms and subject to various exceptions and special rules, the amount which is subject to CGT within the relevant tax year, is determined as follows:

- each disposal of an asset to which the tax applies results in either a capital gain or a capital loss. This capital gain or loss is the positive or negative difference, as the case may be, between the "base cost" of the asset and the "proceeds" derived from the disposal.

Generally speaking, the base cost of an asset is the sum of expenditure actually incurred by the taxpayer in respect of that asset which falls within permitted categories of expenditure identified in the Act. Subject to certain exceptions, such allowable expenditures include the actual costs of acquisition or creation of the asset (e.g. the purchase price); all costs directly related to the acquisition or disposal of the asset (e.g. transfer costs, relocation costs); valuation costs; and expenditure incurred to improve or enhance the value of the asset to the extent still reflected in its value. With the exception of assets which are used wholly and exclusively for business purposes, listed shares and interests in a unit portfolio, borrowing costs, expenditure on repairs, maintenance, insurance, and the like are not permitted to be included in an asset's base cost. The base cost of an asset is also reduced by the amount of any expenditure which has already been accounted for as a deduction from gross income, or which is recovered or recouped, or which has not been paid and is not due and payable in that year of assessment.

The principles identified above are, however, subject to a number of exceptions and qualifications. In particular, special rules apply in determining the base cost of: (a) assets which were acquired prior to 1 October 2001; (b) instruments; (c) identical assets; and (d) assets which are the subject of a value-shifting arrangement;

- the "proceeds" of a disposal are all amounts received by or accrued to the person disposing of the asset. The proceeds are reduced to take into account any amounts which are included in the taxpayer's gross income, or which are repaid or become repayable, and any reductions of an accrued amount. In addition, in a number of instances the Act deems the value of the proceeds to be certain amounts (usually the market value of the asset). These deeming provisions include gratuitous disposals, disposals for a consideration not measurable in money, and disposals between connected persons other than at an arm's length price;
- once a capital gain or capital loss has been determined, it may in certain instances be attributed to a person other than the person who disposed of the asset. Accordingly, in certain instances, capital gains are attributed to spouses, to donors, to parents of a minor child and to residents in respect of gains vesting in non-residents. Generally speaking, however, these attribution rules are only triggered where the gain is directly or indirectly attributable to a donation, settlement or other gratuitous disposition by the person to whom the gain is attributed, or where the

gain is derived from a tax avoidance scheme to which that person is a party;

- at the end of every year of assessment, the capital gains and capital losses of a taxpayer are then aggregated and, in the case of natural persons, reduced by the annual exclusion (presently R10 000, or R50 000 in the year of the taxpayer's death). This determines the aggregate capital gain or aggregate capital loss for that year of assessment. Certain capital gains and capital losses are, however, excluded or limited in one manner or another. Excluded gains and losses include those derived from: (a) the disposal of assets of a natural person which are used mainly for non-trade purposes (personal use assets), (b) the disposal by a natural person of the active business assets of a business (or such person's interest therein) of which the market value of all of its assets is less than R5 million (limited to a lifetime exclusion of R500 000) and (c) the disposal by a natural person of his or her "primary residence" (limited to R1 million per disposal). Capital losses incurred on disposals between certain connected persons are excluded, as are capital losses which arise on the disposal by a creditor of a debt of a connected person;
- the assessed capital loss carried forward from the previous tax year (if any) is then deducted from the aggregate capital gain or aggregate capital loss to derive the net capital gain or assessed capital loss, as the case may be, for that year;
- if a net capital gain arises, the net capital gain is multiplied by the relevant inclusion rate and the amount thus determined is then added directly to the taxpayer's taxable income and subject to normal tax at the applicable rate. The inclusion rates are presently:
- for unit trusts and untaxed policy holder funds: 0%;
- for natural persons, special trusts and individual policy holder funds: 25%;
- for all other taxable entities, including permanent establishments: 50%;
- if, however, an assessed capital loss arises in that year, such losses are carried forward to the next tax year and are not deducted from the taxpayer's taxable income. Capital losses are, in effect, therefore only deductible from capital gains.

Departing from the general principles outlined above, special rules exist in a number of instances which alter the amount, timing or incidence of CGT, including rules relating to: disposals between spouses; disposals to and from deceased estates; short-term disposals and re-acquisitions of identical financial instruments; certain involuntary disposals (roll-overs); certain re-investments in replacement assets; distributions by companies; and certain share-for-share transactions; assets-for-shares transactions; intra-group transactions; unbundling transactions and disposals to a resident holding company which arise from the liquidation, winding up or de-registration of its subsidiary.

Where a person disposes of an interest in the equity share capital of a foreign company (other than a foreign financial instrument holding company), paragraph 64B of the eighth schedule to the Income Tax Act provides that any capital gain or loss determined in respect of such a disposal must be disregarded if that person immediately before that disposal held more than 25% of the equity share capital in that foreign company; and held that 25% interest for a period of at least 18 months prior to that disposal, unless that person is a company and that interest was acquired by that company from any other company which forms part of the same group of companies and that company and other company in aggregate held that interest for more than 18 months; and, in the case where that person is a resident, that interest is disposed of to a person who is not a resident.

The incidence of CGT is, of course, also subject to any contrary provisions which may exist under any applicable double tax treaty. In this regard, the OECD Model Double Tax Treaty (on which many of South Africa's double tax treaties are modelled) provides that:

- gains from the disposal by a non-resident of immovable property situated in South Africa may be taxed in South Africa;
- gains from the disposal of movable property forming part of a permanent establishment of a non-resident

may be taxed in South Africa (disposals of ships and aircraft are dealt with somewhat differently);

- gains from the disposal of any other property of a non-resident are only taxable in the state in which the person is resident.

Secondary tax on companies

introduction

The Secondary Tax on Companies (**"STC"**) was introduced in South Africa in March 1993. The introduction of this source of corporate tax revenue coincided with the reduction of the rate of corporate income tax from 48% to 40%, which rate was reduced further in 1999 to 30% and is set to reduce to 29% in 2005, in line with the international trend towards lower taxation, or increased tax exemption, levels for business income.

STC is currently levied on companies distributing dividends to shareholders at a flat rate of 12,5% of the "net amount" of the dividends declared. Subject to certain provisos, the "net amount" of the dividends declared is the amount by which the dividends declared by a company exceeds the sum of any dividends which have accrued to the company during a stipulated period. STC is a tax on the actual distribution of the dividend to the shareholders and not on the dividend itself - as a result, it is not a withholding tax and is sometimes not relieved by double tax agreements (referred to below).

Although STC liability is determined by reference to the amount of dividends declared by a company, it is payable by the company declaring the dividends and is not deductible from the amount of the dividend declared. STC is, therefore, a corporate tax which targets distribution rather than income, ensuring that a company's distributed earnings are taxed at a higher rate than its undistributed earnings. STC thus provides an incentive for a company's shareholders to approve the productive re-investment of a greater proportion of the company's earnings, with the aim of encouraging corporate investment within the South African economy.

Subject to certain limited exclusions, STC also applies to distributions by a company to a shareholder, or to a connected person of such shareholder, which are deemed to constitute dividends under section 64C. Such deemed dividends include all distributions of cash or assets of any nature (e.g. loans), the waiver of a debt, the settlement of a shareholder's debt and certain amounts adjusted or disallowed under the transfer pricing provisions (section 31).

foreign companies

STC is only levied on dividends declared by companies which are resident in South Africa. Thus, STC is not imposed on dividends declared by foreign companies out of profits generated by a South African branch although, as outlined above, the rate of income tax for external companies with branches in South Africa is currently 34%.

exemption from STC

For a declared dividend to be subject to STC it must be a "dividend" as defined for income tax purposes. Even if it is so defined, it will be exempt from STC if it falls within the scope of one of the exemptions set out in section 64B(5). These exemptions include:

- dividends distributed in the course of or in anticipation of the liquidation or winding-up of a company in so far as such represent either (i) a distribution of profits derived during any year of assessment which ended not later than 31 March 1993, (other than any such profits derived by way of the revaluation of trading stock held by such company); or (ii) a distribution of profits of a capital nature (other than capital profits attributable to the disposal of any asset on or after 1 October 2001 which capital profits must, in the case of an asset acquired before that date, be limited to the amount of profit determined as if that asset had been acquired on 1 October 2001 for a cost equal to the market value of that asset on that date);
- certain dividends declared by a fixed property company, as defined in terms of the Collective Investment Schemes Control Act, 2002; and
- dividends declared by a company which accrue to a shareholder of that company if that shareholder is a company forming part of the same group of companies as the company declaring the dividend; to the extent

that the dividend is derived out of profits earned by that company when it formed part of the same group of companies as the shareholder; that shareholder would be subject to STC should that shareholder declare a dividend from that dividend so declared by that company and not elect that paragraph 54B(5)(f) must apply in respect of the dividend; and the company declaring the dividend elects to have the exemption apply.

share buy-backs and STC

Section 85 of the Companies Act, 1973, provides for:

- the acquisition by a company of its own shares; and
- the acquisition by a subsidiary company of shares in its holding company.

The definition of "dividend" in section 1 of the Income Tax Act provides that where a company acquires its own shares, so much of the consideration paid to the shareholder which exceeds the nominal value of the shares acquired shall be a dividend. STC will, therefore, be payable on such amount.

Where a share buy-back is funded by way of a reduction of the company's share premium account, it is necessary to distinguish between "true premium" and "tainted premium". While "true premium" arises pursuant to a subscription of shares, "tainted premium" arises pursuant to a transfer from the company's reserves to its share premium account. When "true premium" is returned to shareholders, no STC is payable. Where, however, "tainted premium" is returned, the return will constitute a dividend and STC will consequently be payable. Where the seller of the shares which are subject to the buy-back is a company and where the consideration paid to the seller constitutes a dividend, the seller may claim a credit for STC purposes.

Corporate Rules

Special rules relating to the tax consequences of corporate transactions qualifying as "company formations", "amalgamation transactions", "share-for-share transactions", "intra-group transactions", "unbundlings" and "liquidation distributions" are covered by Part III of the Income Tax Act. A qualifying corporate transaction is given tax concessions in the form of "roll-over" relief from capital gains tax and income tax. In addition, in terms of section 46 (which deals with unbundling transactions), a concession in the form of an exemption from secondary tax on companies is given. A number of further concessions are provided for in other parts of the Income Tax Act and in other taxing statutes in relation to qualifying corporate transactions. For instance, an intra-group transaction is exempt from donations tax and the acquisition of marketable securities by a company in terms of a qualifying corporate transaction is exempt from stamp duty and uncertificated securities tax. The original issue of shares by a company to another company in terms of an intra-group transaction is also exempt from stamp duty. The acquisition of property by a company in terms of an intra-group transaction or any liquidation distribution is exempt from transfer duty.

A "company formation transaction" is defined as a transaction in terms of which a person (other than an ordinary trust) transfers an asset to a resident company in exchange for equity shares of that company where such person, after that transaction, holds a qualifying interest in the company concerned (i.e. equity shares which are listed or will be listed within a specified period after the transaction or which constitute an interest of at least 25% of the total equity share capital of the company concerned).

A "share-for-share transaction" is defined as a transaction in terms of which a person (other than an ordinary trust) disposes of any equity share ("the target share") in a resident company ("the target company") to another resident company ("the acquiring company") in exchange for shares in the acquiring company. To qualify as a "share-for-share transaction", the acquiring company must, after the transaction, hold a specified percentage of shares in the target company (where the target company is listed or will be listed within a specified period after the transaction) or hold a direct interest of more than 50% in the target company. In addition the person disposing of the target share must, after the transaction, hold shares in the acquiring company (at least 25% where the acquiring company was not listed on the date of the transaction and any percentage where it was listed).

An “intra-group transaction” is defined as one in terms of which any asset is disposed of by a company to a resident company which is part of the same group of companies.

An “unbundling transaction” is a transaction which is carried out to enable the shareholder of any listed “unbundling company” or the holding company of any unlisted “unbundling company” to acquire all the equity shares held by that unbundling company in the company which is to be unbundled, in accordance with the effective interest of such shareholders.

Anti-avoidance provisions

Section 103(1) of the Income Tax Act contains a general anti-avoidance provision which targets transactions, operations or schemes which have the effect of avoiding or postponing a tax liability and which have been solely or mainly entered into for that purpose. The enquiry focuses on a consideration of whether the transaction:

- was entered into for the sole and main purpose of obtaining a tax benefit;
- was, in the case of a business activity, entered into or carried out in a manner not normally employed for *bona fide* business purposes, other than the obtaining of a tax benefit, or who has created rights or obligations not normally created between persons dealing at arm’s length;
- was, in the case of other activities, entered into in an abnormal means or manner or has created rights or obligations not normally created between persons dealing at arm’s length.

If section 103(1) applies, the Commissioner is entitled to determine the tax liability of the wrongdoer either as if the transaction had not been entered into “or in such manner as in the circumstances of the case he deems appropriate”.

There are a number of other anti-avoidance provisions in various sections of the Income Tax Act, dealing with particular transactions.

Section 103(2) of the Income Tax Act is specifically aimed at arrangements which have been entered into or effected by any person solely or mainly for the purpose of utilising any assessed loss, any balance of assessed loss, any capital loss or any assessed capital loss incurred by a company or trust, in order to avoid liability on the part of that company or trust or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof. The Commissioner may, if he is satisfied that section 103(2) applies, disallow the set-off of any such losses against income or capital gains, as appropriate.

Transfer pricing

Section 31 of the Income Tax Act deals with transfer pricing and thin capitalisation issues, and provides that when goods or services are supplied in terms of any “international agreement”, the Commissioner is entitled, for the purpose of assessing the taxable income of the supplier or acquirer, to adjust the consideration to reflect an arm’s length price, if:

- the acquiror is a “connected person” in relation to a supplier; and
- the goods or services are acquired at a price which is not at arm’s length;

The amount by which the consideration is adjusted is further deemed to be a dividend which is subject to STC.

Thin capitalisation restrictions

As outlined above, a company’s interest payments are generally tax deductible while dividends are not, which means that a company funded with loan capital has a taxation advantage over a company provided with equity capital. In order to limit this advantage, thin capitalisation rules are contained in section 31(3) of the Income Tax Act. These rules apply where a non-South African resident has granted “financial assistance” to:

- a South African resident “connected person” (as defined in section 1 of the Income Tax Act); or
- any other resident entity in which he has an interest entitling him to participate in at least 25% of the dividends, profits or capital of that entity or to exercise at least 25% of the votes of that entity.

“Financial assistance” is widely defined and includes loans, advances, debts and the provision of any security or guarantee.

In terms of SARS' Practice Note 2 (dated 14 May 1996), the thin capitalisation rules will generally be applied to disallow interest incurred on financial assistance which results in a debt-equity ratio of more than 3:1. Such disallowed interest is further deemed to be a dividend which is subject to STC.

Foreign tax credits

Section 6*quat* of the Income Tax Act grants rebates in respect of foreign taxes on income. A South African resident is entitled to a rebate equal to the sum of any taxes on income payable to the government of another country, in respect of, *inter alia*, income received by such individual from a source outside South Africa which has been included in that individual's taxable income in South Africa and which is not deemed to be from a South African source. To the extent that foreign dividends are taxed in South Africa, a credit is allowed for foreign taxes payable in respect of the dividends (subject to certain limitations).

Offshore mixing of foreign tax credits is allowed under section 6*quat*. In other words, the foreign tax credit against tax on income of one country may be used as a credit against tax on income from another country. Unutilised credits may be carried forward for seven years but may not be offset against any liability for STC.

A resident who is a beneficiary of a non-resident trust or a partner in a non-resident partnership may claim a credit for a proportionate amount of any foreign tax paid by the partnership or trust.

Taxation of a foreign company

The tax liability of a foreign company is contingent upon the nature of the income derived by it as well as the existence of a double tax agreement (**"DTA"**). Where it is established that the income is derived from a South African source, the enquiry then focuses on the existence or non-existence of a DTA with that other country. The number of DTA's entered into by the South African government in recent years has increased rapidly, encompassing most of Europe (including an increasing number of Eastern European countries), in addition to a number of African and Asian countries. Those countries with which South Africa has concluded a DTA are listed in schedule A.

The relevant DTA will usually provide that the foreign company will be subject to South African tax liability only where it has a "permanent establishment" or a "fixed place of business" as defined in a DTA. Generally, these two phrases are defined according to the model definition proposed by the Organisation for Economic Cooperation and Development, and include a branch, office, place of management, factory, workshop, mine or construction site.

interest payments to non-residents

In terms of section 10(1)(h) of the Income Tax Act, interest received by or accrued to a person who is not a resident of South Africa is exempt from income tax irrespective of its source, unless that person has, at any time during the relevant year of assessment, carried on business in South Africa through a permanent establishment, or is a natural person who was physically present in South Africa for a period exceeding 183 days during that year of assessment.

So much of any dividend distributed to a non-resident by a portfolio of a collective investment scheme out of exempt income in the hands of that portfolio, is deemed to be interest in the hands of the non-resident.

royalty payments made to non-residents

In terms of section 35 of the Income Tax Act, any person who becomes liable for the payment to a non-resident of an amount for the use in South Africa of intellectual property rights shall pay in advance, and on behalf of the non-resident concerned, a withholding tax amounting to 12% of the payment.

If the recipient of the payment is resident in a territory which is a party to a DTA with South Africa, the withholding tax may be reduced to 0% if so provided for in the DTA. The DTA may provide that taxation if the payment in the receiving state is a condition precedent to a reduction to 0%.

Donations tax

As provided by section 64 of the Income Tax Act, donations

tax is levied at a flat rate of 20% on the value of property donated by South African individuals and companies. Certain donations are exempt from donations tax, such as donations made by a public company, donations made between spouses and charitable donations. Donations tax is payable by the donor.

Donations to an offshore trust will be subject to donations tax, although non-residents are not liable for donations tax.

Value-added tax

The principal source of indirect taxation revenue in South Africa is value-added tax (**"VAT"**). VAT liability is assessed and regulated in terms of section 7(1) of the Value-Added Tax Act, 1991 (**"the VAT Act"**). At present, the standard rate of VAT is 14%, although South African exported goods and services are zero-rated.

A person who carries on an enterprise and provides "taxable supplies" in excess of R300 000 per year is required, in terms of the VAT Act, to register as a vendor. A person may register voluntarily as a vendor if it can show that it is in the process of acquiring an enterprise or part of an enterprise as a going concern, of which the total value of taxable supplies in the preceding twelve months exceeded R20 000. Alternatively, the Commissioner must be satisfied that the applicant is already carrying on an enterprise and that the total value of taxable supplies made by it in the preceding twelve months exceeded R20 000.

The application of VAT extends over a substantial part of economic activity, and section 7(1)(a) of the VAT Act provides that VAT will be imposed on the supply by any vendor of goods or services supplied by it in the course or furtherance of any enterprise carried on by it. It is apparent that the majority of transactions will fall within the scope of this particular provision, and will be subject to VAT. A number of supplies are exempt from VAT, including, the supply of "financial services" which includes the exchange of currency, the issue and transfer of debt and equity securities, the provision or transfer of a long-term insurance policy, the buying or selling of any derivative.

The VAT Act does not provide a clear definition of the term "supply", which means that, theoretically at least, supplies of goods or services made outside South Africa could nevertheless attract South African VAT, provided that the person making the supply is registered as a vendor under the VAT Act and the supply is made in the course of an "enterprise" (as defined) conducted by that vendor. Such an enterprise would, however, have to be at least partly based in South Africa. The effect of this unusual feature is largely nullified in practice, however, as supplies made outside South Africa are generally not subject to VAT, either because they are specifically classified as exempt transactions or because they are zero-rated.

The VAT system operates in practice as follows:

- a vendor incurs VAT on taxable supplies made to it in the furtherance of his enterprise; and
- the vendor charges VAT on the taxable supplies made by him in the course of or furtherance of his enterprise.

The VAT paid by a vendor is termed an "input tax", whereas VAT charged by a vendor is termed an "output tax". The "input tax" is claimable by a vendor as a deduction from the "output tax", which it is obliged to add to the cost of its supplies.

A vendor is obliged to submit VAT returns to the South African Revenue Service ("SARS") periodically, and to pay over to SARS the amount by which its "output tax" exceeds its "input tax" during the relevant period. Should a vendor's "input tax" exceed its "output tax", the vendor has a claim against SARS for the excess.

Any business registered as a VAT vendor in South Africa and which invests in any assets will effectively incur no VAT liability, since any VAT payable is fully reclaimable. The intention behind the introduction of VAT was not that the enterprise should incur the tax, but rather that the ultimate tax burden should rest on the consumer or final recipient of the taxable supplies.

Potential liability for VAT is a relevant tax issue for foreign investors, as the obligation to charge VAT is, in terms of section 7(1) of the VAT Act, imposed on any person who qualifies as a vendor.

Estate duty

Estate duty liability is assessed and regulated by the Estate Duty Act, 1955. The duty is levied at a flat rate of

20% on the “dutiable amount” of the deceased’s estate, after deducting an abatement of R1.5 million.

The determination of “dutiable” property will depend to an extent on the place where the individual was “ordinarily resident” at the date of his death. If the taxpayer was “ordinarily resident” in South Africa at the date of his death, all his assets wherever situated in the world form part of the total value of the estate for the purposes of determining liability for estate duty in South Africa.

If the taxpayer was ordinarily resident beyond the borders of South Africa, only those assets situated in South Africa will form part of the total value of the estate for the purposes of determining estate duty liability.

Transfer duty

Transfer duty is levied in terms of the Transfer Duty Act, 1949, which provides that the transfer of immovable property by an individual is subject to tax at a rate of 0% of the value of property up to R190 000, 5% of the value of property above R190 000, in the case of property with a value between R190 001 and R330 000, and R7 000 plus 8% of the value of property above R330 000, where the value of the property is R330 001 and above, and by a company or a trust at a rate of 10% of the value of the property.

Stamp duty

In terms of the Stamp Duties Act, 1968, stamp duty is levied on the original issue of securities, and on the registration of transfer of securities if uncertficated securities tax is not otherwise payable. The current rate of stamp duty is 0,25%. As provided in terms of section 4 of the Stamp Duties Act, certain financial instruments are exempt from stamp duty. These include:

- any instrument if the duty is payable by the South African Government or by the government of any other country;
- any instrument executed by or on behalf of a religious, charitable or educational institution of a public character which is exempt from tax under the Income Tax Act; and
- debentures that constitute financial instruments as contemplated in section 24J of the Income Tax Act.

Uncertificated securities tax

The Uncertificated Securities Tax Act, 1998, provides for the payment of uncertificated securities tax on the issue and on the transfer of beneficial ownership of securities which are listed on the JSE Securities Exchange. The rate of tax is 0,25% of the issue price or selling price of the securities.

Uncertificated securities tax is not payable in respect of the buy-back of its own shares by a listed company, or on the issue or transfer of securities that constitute instruments as contemplated in section 24J of the Income Tax Act.

Taxation of Retirement Funds

In terms of section 10(1)(d) of the Income Tax Act, the receipts and accruals of any pension fund, provident fund or retirement fund (as defined) are exempt from tax.

Retirement funds are, however, subject to the tax on retirement funds which is levied in terms of the Taxation of Retirement Funds Act, 1996, at a rate of 18% of receipts and accruals in the form of interest and rental income.

Regional services and local authorities levies

At the regional level, regional services levies and regional establishment levies are imposed by regional services councils at nominal rates on both the turnover and the salaries and wages expenditure of businesses situated within their respective areas of jurisdiction.

Skills development levies

In terms of the Skills Development Levies Act, 1999, a skills development levy is imposed on employers. The amount of the levy is 2% of the remuneration paid or payable, or deemed to be paid or payable.

SECTION 9: INTELLECTUAL PROPERTY AND FRANCHISING

INTELLECTUAL PROPERTY

Introduction

South Africa has a comprehensive and modern set of statutes governing intellectual property.

International conventions

South Africa is a signatory to the Berne Convention, the Paris Convention and the Patent Co-operation Treaty. South Africa is also a member of the World Intellectual Property Organisation. South Africa's accession to the Paris Convention allows one to claim priority for patent, design and trademark applications lodged in South Africa from the corresponding application in a convention country. The South African application must, however, be filed within the relevant prescribed time period. Once registered, the effective date of application for the patent, design or trademark will be the date of application in the convention country. A convention country is any country which has acceded to the Paris Convention.

Trademarks

South African trademark law is regulated by the Trademarks Act, 194 of 1993 (**"the Trademarks Act"**) which came into force on 1 May 1995. The Trademarks Act has amended our trademark law so as to bring it more into line with developments within the European Union and other international trademark law developments.

The Trademarks Act allows a trademark owner to secure registration for a trademark by applying for registration to the Trademarks Office. The applicant must use or propose to use the mark. The use envisaged includes that by licencees, such as franchisees, with the consent of the proprietor. Local and foreign applicants enjoy equal rights on registration. Applications for, *inter alia*, marks which are already registered or applied for by a third party or which would be confusingly similar to such marks are refused.

Where one wishes to claim priority from a corresponding application in a convention country, the South African application must be filed within 6 months of the date of filing of the convention application.

Unlike the old legislation which made it possible lawfully to adopt and register a trademark if it had not previously been used or registered in South Africa irrespective of whether it was used or owned by another person in other countries, the Trademarks Act has introduced some important changes. The owners of trademarks which are considered "well-known" are entitled to "restrain the use in South Africa of a trademark which constitutes a reproduction, imitation, or translation of the well-known trademark."

Applications for registration are currently taking about 38 months to reach the stage of examination, and the average period between filing and registration is about 42 months. It is therefore advisable to lodge applications well before the time when widespread use will take place. Also note that registering a trademark in South Africa will not protect the mark in any other country. South Africa is part of a customs union which allows the free flow of goods between South Africa, Botswana, Lesotho, Namibia and Swaziland. Trademark registration in each of these countries, in addition to South Africa, is desirable.

Also of relevance are the Trade Practices Act, 1976, the Merchandise Marks Act, 1941, the Business Names Act, 1960, the Counterfeit Goods Act, 1997 and certain provisions of the Companies Act, 1973. The Merchandise Marks Act makes it a criminal offence to apply a false trademark or a false trade description to goods and the Counterfeit Goods Act criminalises dealing in "counterfeit" goods – which, as the definition is very broad and includes all goods incorporating another's intellectual property right, can include goods that are not counterfeit in the ordinary sense of the word. The Business Names Act and the relevant provisions of the Companies Act deal with the names that one may use in connection with businesses and companies. The Trade Practices Act outlaws certain advertising practices, including certain types of "ambush marketing". The Merchandise Marks Amendment Act, 61 of 2002 deals specifically with ambush marketing by intrusion and provides for the designation of "protected events" at which no one may use a trademark without the organiser's prior authority. Contravention is a criminal offence.

Registered designs

The appearance of a product is often the key to its success or failure in the market. A mechanism to protect the appearance of new products is provided in South Africa by the Designs Act, 195 of 1993, as amended (**"the Designs Act"**). This Act came into force on 1 May 1995 and introduced for the first time the possibility of registering a "functional design" in addition to an "aesthetic design" (previously the only type of registrable design).

Registration of an aesthetic design remains in force for a maximum period of 15 years and of a functional design for a maximum of 10 years, provided renewal fees are paid annually as from the 3rd year from the application date.

The procedure to obtain registered designs is relatively simple, and registration provides powerful rights that are easier to enforce in litigation than is copyright. There is no substantive examination by the Registrar of Designs, and the onus is therefore on the applicant to ensure that the design is "new" and "original" for aesthetic designs, and "new" and "not commonplace in the art" for functional designs. Whilst non-compliance with these requirements will not prevent registration of the design, the registration may later be revoked should it be revealed that there was no substantive compliance.

The period for filing convention design applications in South Africa is 6 months from the date of application in the convention country. The Designs Act specifically provides that such applications will not negate the novelty requirement.

Copyright

Copyright law in South Africa is governed by the Copyright Act, 98 of 1978, as amended, (**"the Copyright Act"**). The Copyright Act extends copyright protection to the following categories of works:

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

The term of copyright conferred by the Act is generally 50 years from the end of the year in which the author of the work dies.

The Copyright Act contains provisions governing the identity of the author of the various types of protected works, the nature of the copyright in the various types of works, the exceptions to the protection afforded by the Act, the transmission of copyright, provisions providing for moral rights, the infringement of copyright and remedies for infringement.

Provision is also made for the establishment of a Copyright Tribunal, with jurisdiction to determine disputes arising between licensing bodies and persons requiring licences.

It should be noted that copyright protection arises upon the creation of a work. Registration is not required. The Registration of Copyright in Cinematograph Films Act, 1977 makes it possible for the copyright in cinematograph films to be registered. Such registration is not necessary to establish the subsistence and ownership of copyright but is useful for evidential purposes.

Performing artists and musicians are protected by the Performers Protection Act, 1967. This Act gives partial effect to the Rome Convention, to which South Africa has not yet acceded.

Patents

Patent law is regulated by the Patents Act, 57 of 1978, as amended.

South Africa is a member of the Paris Convention which makes it possible for the applicant for a patent in another

member country to file a South African patent application corresponding to a home-country application within one year of the original filing date and to obtain the same effective filing date in South Africa.

As South Africa has acceded to the Patent Co-Operation Treaty (**"PCT"**), it can now be designated in a PCT application. A PCT application is an "international" patent application to the extent that it covers the large number of countries which have acceded to the PCT. A PCT application designating South Africa is deemed to be an application for a patent lodged in South Africa.

Patent applications are not examined on the novelty and non-obviousness of their subject matter or in any other substantive respect. If disputes arise about the registrability or scope of a South African patent, it is left to the parties to the dispute to attempt to reach a resolution by negotiation. If negotiation fails, the dispute can be taken to the Patents Court for adjudication by a judge, who may order the revocation of the registration of the patent.

Patents have a 20-year term and renewal fees are payable annually after the first 3 years following filing.

Confidential know-how

South African law allows confidential information and trade secrets to be ring-fenced with restrictions on its disclosure and use, and there are both contractual and delictual remedies for the breach of confidentiality.

Counterfeiting

The Counterfeit Goods Act, 1997 has been in force since January 1998 and enables owners of copyright and registered trademarks to take effective action against manufacturers and sellers of counterfeit goods. This Act provides for the seizure and detention of counterfeit goods and also makes dealing in counterfeit goods a criminal offence. It has not proven as effective as was hoped but efforts to improve the administration of this law continue.

Unlawful competition

South Africa recognises the doctrine of unlawful competition which includes the delict (tort) of passing off.

FRANCHISING

Introduction

Franchising has been promoted in South Africa in recent years as an engine for the achievement of rapid and substantial growth of businesses owned or managed by previously disadvantaged people - a factor recognised as being essential to sustained economic growth and the redistribution of wealth desired for South Africa.

The franchise offers a means for small and medium-sized businesses to expand and also creates employment while allowing for quality control for the benefit of the consumer.

Franchising allows the franchisor's retail and service know-how to be used profitably, requiring less investment and management and involving less risk.

Four basic types of franchise arrangements may be encountered, offering varying degrees of control to the franchisor. A **joint venture** offers the most control, since the franchisor actually owns a share of the franchise. Less control is exercised by the franchisor in **business format franchising**, in terms of which the franchisee owns the business for which he pays an upfront fee and a royalty or management service fee to the franchisor - but all procedures are laid down in an operations manual. More distant arrangements include a **dealership** in terms of which a company's brand name is used and its products are sold by other firms but where the brand name company has little say in the running of the business. The mere **licensing** of a product is also sometimes regarded as a species of franchising.

Business format franchising, being the most typical, is the focus of the following discussion. It must be understood to include not just the right to use a name or provide a service, but a full business system to which the franchisee must adhere. For the franchisee, a major advantage is that much trial and error is avoided by having a tested business formula. In addition, there is often ongoing back-up and support for the business from the franchisor.

The pattern for non-South African franchisors' involvement in South Africa has frequently been to conclude a franchise agreement with one South African entity, which then acts as sub-franchisor and concludes franchise agreements with a number of local franchisees. This arrangement tends to dilute the control of the foreign franchisor.

Franchising has an enviably free position in South African law in the sense that there are no special laws regulating it. However, certain abuses in the franchise community have appeared and there is a trend towards self-regulation.

A code of ethics, based on international norms, has been published by the South African Franchise Association (**"SAFA"**) (its members being franchisors). Nevertheless, there is no obligation on a franchisor to belong to SAFA and it tends to turn down any applications for membership from applicants whose business practices do not meet the ethical standards.

SAFA requires members to supply a disclosure statement, setting out basic minimum specified information for the benefit of franchisees.

Both the Competition Authorities and the Business Practices Committee have commenced investigations into franchising with a view to formulating regulations or guidelines for the franchising community.

The franchise agreement

The contents of this agreement bear careful consideration. Of particular importance are:

- Clarity on mutual rights and obligations.
- The time period of the agreement. Usually the agreement endures for a period of about five years; if its duration is shorter, the franchisee may be concerned that he will not be able to recoup his investment, and if it is longer, that he will not be able to withdraw from the deal. An option of renewal may be inserted.
- The degree of discretion to be afforded to the franchisee in the operation of the business.
- Provisions for the keeping of accurate accounts and records, since royalties owing are usually linked to turnover and clear records are vital.
- Upfront fees and royalties payable by the franchisee.
- The obligation on franchisee to purchase certain products or utilise certain services and to maintain specified standards;
- Rights of inspection of the franchisor.
- Obligations on the franchisor to assist in setting up, and operating the business (marketing, acquiring and decorating premises, training, procurement of equipment, granting of credit and provision of guarantees, software, general business advice).
- Restraints of trade.
- Provisions dealing with termination of agreement in the event of the death or insolvency of the parties.
- Protection of the franchisor's intellectual property and confidential business information.
- Security of tenure for the franchisee in the premises of an outlet. Some agreements stipulate that the franchisor should be the lessee of the premises, the franchisee being the sub-lessee; alternatively, a clause can be inserted in the lease between the landlord and franchisee as tenant, to the effect that if the franchise is sold, the franchisor is entitled to retain the premises.

Specific commercial law factors affecting franchising

Competition law

Competition law has been extensively dealt with elsewhere in this booklet. Of particular importance to the franchisor are the provisions dealing with exclusive supply agreements as well as practices that enforce retail price maintenance, which may be prohibited under the Competition Act.

Business Practices Committee

The Business Practices Committee, established under the Harmful Business Practices Act, 1988, is primarily concerned with the protection of consumers of goods and services obtained from retail suppliers, but also takes an interest, and if necessary intervenes, in relationships between businesses. It has more than once looked at the position of franchisors in relation to the consuming public and is in favour of a disciplinary code or other form of regulation to ensure the activity of franchising itself, and the relationship of the franchising community to the general public, is maintained on a fair and honest basis.

Advertising and the Advertising Standards Authority

The Advertising Standards Authority (**"ASA"**) is a body representing the media, advertisers and advertising agencies and is in a position to dictate what the media will decline to publish by way of advertisements. It has considered proposals to eliminate some of the worst features of franchise advertisements, many of which in the past have been extravagant, wildly over-optimistic, and positively misleading.

The ASA has, for example, considered the prohibition of advertisements which use the word "franchise" for anything other than a business format franchise.

Section 9 of the Trade Practices Act, 1976, prohibits the publication of misleading advertisements. While this section is primarily intended to protect the consuming public, the courts also allow it to be used by one trader against another where the second trader's advertisements damage the interests of the first and it is possible to obtain court interdicts at the instance of a competitor on the basis of a contravention. It is a little-used but useful weapon in the battle against dishonesty and misrepresentation.

SECTION 10: EMPLOYMENT LAW – INCLUDING DISCRIMINATION IN THE WORKPLACE

OVERVIEW OF SOUTH AFRICAN LABOUR LEGISLATION

The most important legislation governing South African Labour Relations is:

- the Labour Relations Act, 1995 (**"the LRA"**), which governs collective bargaining at the workplace, regulates the right to strike and the recourse to lockout in conformity with the Constitution, and governs dismissal of employees;
- the Basic Conditions of Employment Act, 1997 (**"the BCEA"**), which governs minimum terms and conditions of employment;
- the Employment Equity Act, 1998 (**"the EEA"**), which governs the implementation of affirmative action measures in the workplace in order to eradicate discrimination against those previously disadvantaged, prohibits unfair discrimination in any employment policy practice, and which requires employers to formulate employment equity plans and report on implementation of such plans to the Department of Labour;
- the Occupational Health and Safety Act, 1993 (**"the OHSA"**), which provides for the health and safety of persons at work and for the establishment of an advisory council for occupational health and safety;
- the Pension Funds Act, 1956 (**"the PFA"**), as amended, governs retirement funds in regard to employee benefits; and the Amendment Act which provides for the apportionment of surpluses in pension funds;
- the Medical Schemes Act, 1998 (**"the MSA"**), as amended, governs medical schemes with regard to employee benefits;
- the Skills Development Act, 1998 (**"the SDA"**) and the Skills Development Levies Act, 1999 (**"the SDLA"**), which provides for an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce and provide for the imposition of a skills development levy payable by employers;
- the Broad-Based Black Economic Empowerment Act, 2003 (**"the BBBEEA"**), which sets the stage for the introduction of black economic empowerment targets at every level of business and empowers the Minister to issue codes of good practice and publish transformation charters;
- the Prevention and Combating of Corrupt Activities Act, 2004 (**"the PCCAA"**), which provides for the strengthening of measures to prevent and combat corruption and corrupt activities and places a duty on persons in positions of authority to report certain corrupt activities;
- the Protected Disclosures Act, 2000 (commonly referred to as **"The Whistleblowers Act"**), which provides for the protection of employees who disclose information and then fall victim to reprisals or occupational detriments at the workplace;
- the Unemployment Insurance Act, 2002 (**"the UIA"**), which provides for payment of unemployment benefits to certain employees;
- the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (**"the PEPUDA"**), which provides for the prevention and prohibition of unfair discrimination, harassment and hate speech;
- the Compensation for Occupational Injuries and Diseases Act, 1993 (**"the COIDA"**), which governs the compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injury or disease.

The labour legislation is extensive and far reaching, and should be studied in detail. Several of the major issues which are regulated are canvassed below.

The Labour Relations Act

The Constitution enshrines the right of employees to

strike. Through their constitutional right to engage in collective bargaining, employers enjoy a corresponding right to lockout. The LRA provides that employees who have followed a prescribed procedure are protected from dismissal whilst striking; striking employees are not entitled to be paid whilst on strike. There are certain limitations on the right to strike e.g. employees engaged in essential services or in maintenance services do not have the right to strike. Employers have the right to lockout employees in order to compel compliance with legitimate employer demands; however, an employer who locks out its employees is not entitled to employ replacement labour during the course of the lockout unless the lockout is in response to a strike.

All employees have the right not to be unfairly dismissed. Aside from its normal meaning, "dismissal" is defined to also include the following situations:

- the employer fails to renew a fixed term contract, or the employer renews the contract on less favourable terms in circumstances where the employee had a reasonable expectation that the contract would be renewed on the same or similar terms and conditions;
- the employer refuses to allow an employee to resume work after returning from maternity leave;
- the employer dismisses a group of employees for the same or similar reasons, and selectively re-employs some of them without re-employing others;
- the employee has no choice but to terminate the contract of employment because the employer has made the employee's continued employment intolerable; and
- the employee terminates the contract of employment after a transfer of a business when the new employer provides the employee with substantially less favourable conditions or circumstances at work.

The LRA provides that an employee may only be fairly dismissed for a fair reason and in accordance with a fair procedure. The LRA recognises 3 categories of dismissal: misconduct, incapacity and for a reason connected to the employer's operational requirements (retrenchment). A consensual termination of the employment contract would not constitute a dismissal in terms of the LRA. The LRA provides that a dismissal will only be fair if it is effected for a fair reason and in accordance with a fair procedure.

Operational requirements are defined in the LRA as those based on the "economic, technological, structural or similar needs of the employer". The LRA requires that as soon as an employer contemplates dismissing one or more employees for reasons based on its operational requirements, it must consult with employees and engage in a meaningful joint consensus-seeking process **before** a final decision is taken to dismiss on account of its operational requirements. Employers are required to consult on a number of issues, including:

- the appropriate measures to avoid dismissal;
- the appropriate measures to minimise the number of dismissals;
- the appropriate measures to change the timing of dismissal;
- the appropriate measures to mitigate the adverse effect of dismissal;
- the method for selecting employees to be dismissed; and
- severance pay for dismissed employees.

An employee who is unfairly dismissed may refer a dispute to the CCMA or relevant bargaining council within 30 days of his/her dismissal. The employee is entitled to be reinstated unless the dismissal is only unfair because the employer did not follow a fair procedure, or it is not reasonably practicable for the employer to reinstate the employee, or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. In addition, Labour Court Judges and arbitrators are entitled to award unfairly dismissed employees compensation equivalent to a maximum amount equivalent to 12 months' remuneration. Certain dismissals are categorised as automatically unfair, in which event the maximum compensation payable is increased to the equivalent of 24 months' remuneration. Automatically unfair dismissals include dismissals for a reason connected to:

- the employee’s participation in a protected strike;
- the employee’s pregnancy, intended pregnancy or any reason relating to her pregnancy;
- unfair discrimination against the employee on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; and/or
- a transfer of a business or a reason related to such transfer.

The LRA prohibits employees from striking where the reason for the strike is the alleged unfair dismissal of a co-employee or employees.

The LRA requires that certain organisational rights are granted to representative unions, and provides that collective agreements between unions and employers enjoy an enhanced legal status. The LRA seeks to encourage and promote formal collective bargaining between employers and unions at national, sectoral and plant level.

The LRA provides that where a business or a portion thereof is sold as a going concern, there is an automatic transfer of the contracts of employment. The transfer does not affect the continuity of transferred employees and all rights and obligations between the “old employer” and each employee in existence at the time of the transfer continue as if they had been the rights and obligations between each employee and the “new employer”, unless otherwise agreed.

The LRA also provides that any person who works for or renders services to any other person is presumed to be an employee, regardless of the form of the contract. Independent contractors who earn less than a stipulated amount are regarded as employees for the purposes of the LRA if one or more factors listed in the LRA are present.

The Basic Conditions of Employment Act

The BCEA establishes minimum standards of employment for virtually all employees in South Africa; the only exceptions are members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, and unpaid volunteers working for charitable organisations.

An employee is defined as:

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assist in carrying on or conducting the business of an employer.”

The BCEA requires an employer to regulate the working time of employees:

- in accordance with the provisions of any Act governing occupational health and safety;
- with due regard to the health and safety of employees;
- with due regard to any code of good practice relating to the regulation of working time; and
- taking into account the family responsibilities of employees.

Certain categories of employees are excluded from the working time provisions, being senior managerial employees, employees who earn in excess of R115 572,00 per annum, sales representatives and employees who work less than 24 hours a month for an employer.

The BCEA enshrines certain employee rights as being “core rights”; such rights are incapable of being varied under any circumstances, even with the consent of the employees concerned. Core rights include ordinary hours of work (a maximum of 45 hours a week), the protection afforded to employees who perform night work, minimum annual leave, maternity leave, sick leave, and employment of children under 15 years of age.

A basic condition of employment, in terms of the BCEA, automatically constitutes a term of any contract of employment except to the extent that:

- any other law provides for a term that is more favourable to the employee or the basic condition of employment is replaced, varied or excluded in accordance with the provisions of the BCEA; or

- a term of the contract of employment is more favourable to the employee than the basic condition of employment.

As mentioned above, the BCEA provides for maximum ordinary hours of work per week of 45 hours, and 9 hours per day if the employee works for 5 days or fewer in the week. Such ordinary hours of work may be extended by up to 15 minutes per day subject to a maximum of 1 hour per week.

Employers are prohibited from obliging employees to work overtime unless the employees have agreed to do so. Where there is agreement, employees are not permitted to work more than 3 hours overtime per day subject to a maximum of 10 hours overtime per week.

Employees working overtime are required to be paid at an enhanced rate of 1½ times their ordinary rate.

The parties may agree that the employee be allowed to take paid time off at the employee's ordinary rate instead of receiving overtime pay.

Employees who do not ordinarily work on a Sunday must be paid at double their hourly rate while employees who ordinarily work on a Sunday must be paid at 1½ times their hourly rate. Should an employee work fewer hours than his ordinary shift on a Sunday, and the payment to which he is entitled is less than his ordinary daily wage, the employer must nevertheless pay the employee the employee's ordinary daily wage for such work.

Employees may not be required to work on public holidays except in accordance with an agreement. Should the public holiday fall on a day on which the employee would ordinarily work, the employer must pay the employee who does not work on that public holiday his ordinary wage.

An employee who ordinarily works on a public holiday must be remunerated the greater amount of either double his ordinary wage or his ordinary wage plus an amount in respect of time worked on that day.

Where an employee works on a public holiday on which he would not ordinarily work, he must be paid his ordinary daily wage plus an amount earned in respect of work performed that day.

An employee may only perform night work after 18h00 and before 06h00 the next day if:

- the employee has agreed to do so;
- the employee is compensated in some way, whether by payment of an allowance or by a reduction of working hours; and
- transportation is available between the workplace and the employee's residence.

Employees who regularly (i.e. at least 5 times per month or 50 times per year) work longer than 1 hour after 23h00 and before 06h00 the next day must be informed of the health and safety hazards associated with such work, and must be able to undergo a medical examination at the employer's expense.

Should the employee suffer from a health condition that is associated with performance of such night work, he/she may be transferred to suitable day work if it is practicable to do so.

All employees are entitled to 21 consecutive days leave per year (3 weeks for employees working a 5 day week), which must be granted not later than 6 months after the expiry of the annual leave cycle.

Employees are entitled to 30 days paid sick leave for every 3 year cycle.

Employees are entitled to unpaid maternity leave of at least 4 months. The job security of a pregnant employee is guaranteed in terms of the BCEA upon her return to work.

The BCEA provides for 3 days paid family responsibility leave per year, granted to employees after 3 months of employment, and provided that the employee works at least 4 days per week for the employer. The circumstances in which such leave may be taken are the birth of the employee's child, sickness of the employee's child, or in the event of the death of the employee's spouse or life partner or the death of the employee's parent, adoptive parent, grand-parent, child, adopted child, grand-child or sibling.

The BCEA stipulates certain minimum periods of notice of termination of employment:

- 1 week, if the employee has been employed for 1 month or less;

- 2 weeks, if the employee has been employed for more than 1 month but for less than 1 year;
- 4 weeks, if the employee has been employed for more than 1 year.

However, the BCEA acknowledges the right of an employer to dismiss an employee summarily in particular circumstances without notice and “for any cause recognised by law” which would include misconduct dismissals for offences such as assault, dishonesty and intoxication at work.

In terms of the BCEA, an employee who is dismissed on account of the employer’s operational requirements i.e. retrenched, is entitled to receive a severance package equal to at least 1 week’s remuneration in respect of each completed year of continuous service. This severance package is in addition to notice pay and the value of accrued leave pay at termination of employment. An employee who unreasonably refuses to accept an offer of alternative employment is not entitled to payment of a severance package.

The BCEA has introduced extensive provisions which impose administrative burdens on employers. These include the employer being required to give each of its employees, on commencement of employment, detailed and written particulars of the conditions of employment which covers a host of information, including any period of continuous employment with any previous employer that counts towards the employee’s period of continuous employment with it, the employee’s ordinary hours and days of work, the employee’s wage or the rate and method of calculating such wage, the rate of pay for overtime work, the place of work and, when the employee is required or permitted to work at various places, an indication of this, any other cash payments to which the employee is entitled, any payment in kind to which the employee is entitled and the value of such payment in kind, the frequency of remuneration, any deductions to be made from the employee’s remuneration, and all periods of leave to which the employee is entitled.

The BCEA, unlike its predecessor, is decriminalised. Employers who offend against its provisions are accordingly not subject to criminal sanction, but labour inspectors are given the power to enter premises in order to make investigations, to serve compliance orders on non-compliant employers, and eventually to enforce compliance by securing appropriate orders from the Labour Court.

The BCEA also provides that any person who works for or renders services to any other person is presumed to be an employee until the contrary is proved, regardless of the form of the contract, if any one or more of a number of factors listed in the BCEA is present.

The Employment Equity Act

The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace. The designated groups who are deemed to have been disadvantaged in employment in the past are black people, women and people with long-term or recurring physical or mental disabilities which would otherwise substantially limit their prospects of entry into, or advancement in, employment.

The chapter of the EEA which prohibits unfair discrimination applies to all employers. Every employer is obliged to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice, and no employer may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth. It is noteworthy that HIV status is a prohibited ground of unfair discrimination; it does not appear in the corresponding section in the LRA dealing with automatically unfair dismissals, referred to above.

The EEA specifically provides that it does not constitute unfair discrimination for an employer to take affirmative action measures in order to give employees from

historically disadvantaged groups equal employment opportunities in the workplace or to distinguish, exclude or prefer any person based on the inherent requirements of a job.

The EEA prohibits medical and psychological testing, or testing of an employee to determine his/her HIV status, except in certain circumstances. Medical testing is only permitted where legislation permits or requires testing or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. Psychological testing is prohibited unless the test being used has been scientifically shown to be valid and reliable, can be applied fairly to all employees, and is not biased against any employee or group. Testing to determine an employee's HIV status is permitted only on the authorisation of the Labour Court.

The chapter in the EEA which requires employers to implement affirmative action measures only applies to defined "designated employers". The number of employees in its employ and its annual turnover determines whether an employer falls within the definition. An employer who employs 50 or more employees is deemed to be a designated employer, and if the employer employs fewer than 50 employees it will nevertheless be a designated employer if its total annual turnover is in excess of designated thresholds e.g. R10 million per annum in the manufacturing sector or finance and business services sector; R25 million in wholesale trade, commercial agents and allied services sector.

Designated employers are required to implement affirmative action measures for people from designated groups; such measures are defined as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer". Such measures must include:

- measures to identify and eliminate employment barriers which adversely affect people from designated groups;
- measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; and
- the retention and development of people from designated groups and the implementation of appropriate training measures.

However, the EEA makes it clear that employers are not required to adopt employment policies that adversely affect people who do not come from historically disadvantaged groups.

The EEA requires designated employers to draft an employment equity plan. Before drafting its plan, the employer is required to take the following steps:

- it must consult with its employees' trade union, nominated representatives, or the employees themselves;
- the employer has to ensure that those with whom it consults reflect the interests of employees from across all occupational categories and levels of its workforce, including employees from designated groups and from non-designated groups;
- it must disclose to the employees or representatives with whom it consults all relevant information in order to enable and allow the parties to consult effectively;
- it must collect information and conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups and such analysis must include a profile of its workforce within each occupational category and level in order to determine the degree of under representation of people from designated groups in various occupational categories and levels in the workforce.

Once the employer has consulted, disclosed the information it is required to disclose, and conducted the analysis, it is required to compile an employment equity plan, the stated aim of which is to achieve "reasonable progress towards employment equity in its workforce". The plan must state the following:

- yearly objectives;
- affirmative action measures to be implemented;
- numerical goals that have been set where under representation of people from designated groups has been identified by the analysis;
- the timetable for each year of the plan for the achievement of goals and objectives;
- the duration of the plan (which may not be shorter than 1 year or longer than 5 years);
- procedures that will be used to monitor and evaluate the implementation of the plan;
- internal procedures to resolve disputes arising out of the interpretation or implementation of the plan;
- those employees responsible for monitoring and implementing the plan.

Designated employers are required to report to the Department of Labour. Larger employees i.e. those who employ more than 150 employees, are required to report every 12 months on or by 1 October. The first reporting date for such employers was 1 June 2000. Employers who employ fewer than 150 employees (i.e. who qualify by virtue of employing between 50 and 150 employees, or because their turnover is in excess of the threshold) were required to render their first report on 1 December 2000, and have been and are required to report every 2 years thereafter on or by 1 October of the applicable year.

Employers who do not comply with the administrative provisions of the EEA are liable to penalties. In other words, an employer which does not consult with its workforce, analyse its policies, disclose information during the consultation process, prepare a plan, report to the Department of Labour, publish its report (in the case of a public company) prepare successive employment equity plans, designate a manager, keep its employees informed of the provisions of the Act, or keep records, will be subject to such penalties as the EEA prescribes. However, the failure of an employer to meet goals, achieve its self-imposed timetable, or achieve employment equity via affirmative action measures is **not** subject to penalty. It is not the aim of the EEA to penalise employers for failing to implement satisfactory affirmative action measures despite their intention, or stated intention, to do so.

Designated employers are required to submit a statement, at the time that each report is submitted, on the remuneration and benefits received in each occupational category and level of its workforce. This "income differential statement" is submitted to the Employment Conditions Commission. The EEA provides that where disproportionate income differentials are reflected, the designated employer must take measures to progressively reduce such differentials. The EEA does not attempt to define "disproportionate"; the Employment Conditions Commission is obliged to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister of Labour on appropriate measures for reducing disproportional differentials. The income differential statement submitted to the Employment Conditions Commission is to be kept confidential by the Commission, although employees and their trade union engaged in collective bargaining with the employer (e.g. annual wage negotiations) may request the information contained in the income differential statement which must then be disclosed subject to certain safeguards contained in the LRA.

The Occupational Health and Safety Act

The main purpose of OHSA is to provide for the health and safety of people at work and for the health and safety of persons in connection with the use of plant and machinery and to provide for protection against hazards to health and safety at work. It sets health and safety standards at work and attempts to prevent accidents occurring. The OHSA therefore places extensive duties on employers and users of machinery by, for example, obliging the employer to appoint health and safety representatives and establish safety committees in various circumstances.

The Pension Funds Act

The PFA provides for the registration, incorporation, regulation and dissolution of pension funds.

The Medical Schemes Act

The MSA provides for the establishment of the Council for Medical Schemes, which, *inter alia*, protects the interests of beneficiaries and controls and co-ordinates the functioning of medical schemes in a manner that is complimentary with the national health policy.

The MSA provides that a medical scheme shall not be registered or carry on business unless provision is made in its rules for, *inter alia*, the appointment of a board of trustees, a principal officer and an auditor, the power to invest funds, the amendment of the rules and the payment of beneficiaries.

The Skills Development Act

The SDA provides an institutional framework to devise and implement sector and workplace strategies to develop and improve the skills of the South African workforce; to integrate those strategies within the national qualifications framework contemplated in the South African Qualifications Authorities Act, 1995; provide for learnerships that lead to recognised occupational qualifications; provide for financing of skills development by means of a levy grant scheme and a National Skills Fund and to regulate employment services.

The SDA established the National Skills Authority to advise the Minister on national skills development policy and strategy and to allocate subsidies from the National Skills Fund.

The Minister may establish a Sector Education and Training Authority with a constitution for any national economic sector (**"the SETA"**). The SETA will co-ordinate training and implement a skills plan for the industry in which it has jurisdiction. A SETA consists of organised labour, organised employers, relevant government departments and any interested professional bodies for each sector of an industry.

A SETA is a body accredited in terms of the South African Qualifications Authorities Act to monitor and assess learning and training. As an accredited body a SETA may establish learnerships if the learnerships consist of a structured learning component, practical work experience and may lead to a qualification registered by **the South African Qualifications Authority.**

The learnership involves an employer, training provider and the learner.

Skills development is funded by levies collected in terms of the Skills Development Levies Act and monies appropriated by parliament for the National Skills Fund.

The Skills Development Levies Act

The SDLA provides that employers currently pay a skills levy of 1% of payroll.

Every employer in South Africa who is registered with the South African Revenue Service for PAYE or has an annual payroll in excess of R250 000,00 must pay the levy.

An employer who is liable to pay the skills levy must register with the South African Revenue Service. The employer must choose one SETA which is most representative of its activities. The list of SETAs include accounting and other financial services sector, banking, chemical and allied industries, clothing textile and footwear, construction, defence, education training and development practices, energy and so forth.

Each month the South African Revenue Service will provide all registered employers with a return for remittance form which will enable employers to calculate the amount payable and effect payment. The first payment must be made to the revenue service after registration, not later than 7 days after the end of the month in respect of which the levy is payable.

A labour inspector appointed in terms of the BCEA is empowered to monitor and enforce compliance with the SDLA insofar as it relates to the collection of levies by a SETA or approved body. The inspector is granted powers to enter and search the business premises of the employer.

Employers who are already training their workforce qualify for a grant in terms of the SDLA. There are 4 categories of grants:

- The first category is grant A which amounts to 15% of the total levy payment. An employer must show that it has appointed or used a skills development facilitator who is an employee or formally contracted to the employer.

- Grant B amounts to 10%. The employer qualifies for grant B only if the employer's application for grant A has been approved. It can recover 10% of the total levy by preparing and submitting a work skills plan.
- Grant C amounts to 20%. An employer who is approved for grants A and B can claim grant C for the implementation of the work skills plan in year 1.
- The last grant is grant D amounting to 5%. A SETA will make available a grant to the equivalent of 5% of the levy payment by the employer for specific skills shortages in its sector and to implement recommendations from the National Skills Fund.

Failure to pay the levy is an offence which may on conviction attract a fine or imprisonment for a period not exceeding one year.

The Broad-Based Black Economic Empowerment Act

The BBBEEA establishes a legislative framework for the promotion of black economic empowerment. Government, business and organised labour felt that the EEA had not been as successful as it could have been in achieving transformation in the workplace. This necessitated the further steps envisaged in the BBBEEA and the various transformation charters.

The BBBEEA defines "black people" as Africans, Coloureds and Indians. It defines "broad-based black economic empowerment" as the economic empowerment of all black people, including women, workers, youth, people with disabilities, and people living in rural areas, through diverse but integrated socio-economic strategies that include:

- increasing the number of black people that manage and control enterprises and productive assets;
- facilitating management of enterprises and productive assets;
- human resource and skills development; and
- achieving equitable representation in all occupational categories and levels in the workforce.

The objectives of the BBBEEA are to facilitate broad-based black economic empowerment by, *inter alia*:

- achieving a substantial change in the racial composition of management structures and in the skilled occupations of existing and new enterprises;
- increasing the extent to which communities, workers, co-operatives and other collective enterprises manage existing and new enterprises; and
- increasing the extent to which black women manage existing and new enterprises.

In order to promote the purposes of the BBBEEA, the Minister of Trade and Industry is entitled to issue codes of good practice, which may include indicators to measure broad-based black economic empowerment, and guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for such sectors. A code of good practice issued by the Minister may specify targets consistent with the objectives and the period within which those targets must be achieved.

Only organs of state and public entities, as defined, must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued by the Minister.

The Minister is also required to publish and promote a transformation charter for a particular sector of the economy if he is satisfied that the charter has been developed by major stakeholders in that sector and advances the objectives of the BBBEEA. Three major transformation charters have been prepared within the Mining Sector, the Financial Sector and the Information Communications Technology Sector.

The Prevention and Combating of Corrupt Activities Act

The purpose of the PCCAA is to prevent and combat corruption and related corrupt activities. The PCCAA deals, amongst other things, with the offences of receiving or offering unauthorised gratifications by or to a party to an employment relationship. The PCCAA provides that any person who is a party to an employment relationship and who, directly or indirectly gives, accepts, or agrees or offers to give or accept from or to any other person

any unauthorised gratification, whether for the benefit of that person or some other person is guilty of the offence of receiving or offering an unauthorised gratification.

The PCCAA also provides that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed any offence under Part 1, 2, 3 or 4 of chapter 2 or the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more, must report such knowledge or suspicion to any police official. Any person in a position of authority who fails to comply with the above, is guilty of an offence. The PCCAA lists those people who, for the purposes of the section, hold positions of authority. It includes directors of companies and those in positions of managerial authority at the workplace.

The Protected Disclosures Act

The purpose of the Whistleblowers Act is to create a culture in which employees will disclose information of criminal and other irregular conduct by employers or their co-employees in the workplace in a responsible manner, promote the eradication of crime and other irregular conduct in organs of state and in private bodies, and ensure that such employees are not subjected to any occupational detriment by their employers on account of the protected disclosures being made.

The Whistleblowers Act details which type of information may be disclosed, and to whom it may be disclosed, in order for the employee to qualify for the protection afforded by the Act.

The intention behind the Whistleblowers Act is to co-opt employees to assist in eradicating corruption and maladministration in the public service, and to highlight and expose general criminal activity and conduct in both the public service and in private companies, without fear of reprisal.

The Unemployment Insurance Act

The UIA seeks to overcome shortcomings in the present system, including the scope of coverage, financial sustainability, enforcement and compliance measures. In terms of the Act, all employees will pay unemployment insurance and will be entitled to benefits on a sliding scale and subject to a cap.

The Promotion of Equality and Prevention of Unfair Discrimination Act

The PEPUDA provides for the prevention and prohibition and elimination of unfair discrimination, hate speech and harassment.

The PEPUDA also provides for the creation of equality courts and the procedures to be followed when instituting a claim in such a court.

The Compensation for Occupational Injuries and Diseases Act

COIDA applies to all employers and casual workers who, as a result of a workplace accident or work-related disease, are injured, disabled or killed, or become ill. This excludes the following people:

- workers who are totally or partially disabled for less than 3 days;
- domestic workers;
- anyone receiving military training;
- members of the South African National defence Force and the South African Police Service;
- any worker guilty of wilful misconduct, unless they are seriously disabled or killed;
- anyone employed outside South Africa for 12 or more consecutive months; and
- workers working mainly outside South Africa and only temporarily employed in South Africa.

COIDA provides that employees are entitled to compensation if they are injured while working or contract any work-related disease. Employees may receive compensation for temporary or permanent disablement and their dependants may receive compensation in the event of the employee's death.

Employees may apply for additional compensation if they are injured or contract an occupational disease due to the negligence of their employer or an employee of the employer.

Employees or their dependants must submit claims for compensation to the Compensation Commissioner, their employer or the relevant mutual association within 12 months of the injury or diagnosis of a disease, or the date of death.

Employers are obliged to submit the required forms to the Compensation Commissioner within 7 days after an injury and within 14 days of being notified of the diagnosis of a disease.

Employers are required to register with the Compensation Fund and pay annual assessment fees if they employ one or more full- or part-time worker.

For the purposes of calculating assessment fees, all employers are required to submit a statement of earnings paid to all their workers from the beginning of March every year to the end of February the following year. The annual assessment fee is calculated on workers' earnings and an assessment tariff based on the risk associated with the type of work being done. The following employers are not required to pay assessment fees:

- national and provincial governments;
- local authorities who have exemption certificates;
- municipalities; and
- employers who are fully insured by a mutual association.

Codes of Good Practice

Several Codes of Good Practice have been published. These codes serve as guidelines and cover a wide range, including dismissals for incapacity, disability and sexual harassment.

SECTION 11: MEDIA AND COMMUNICATIONS; TELECOMMUNICATIONS AND BROADCASTING

MEDIA AND COMMUNICATIONS LAW

Freedom of expression

The right to freedom of expression is contained in section 16(1) of the Constitution (Act 108 of 1996). This provision states that everyone has the right to freedom of expression, which includes:

“(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.”

The Constitutional Court has followed the lead of courts in many jurisdictions which have acknowledged that freedom of expression protects and fosters a number of values, including the pursuit of truth, the functioning of democracy and individual self-fulfilment.

Defamation

Defamation law is a branch of the law of delict (or tort) which protects a person’s reputation. The law of defamation seeks to find a workable balance between two conflicting rights:

- the right to an unimpaired reputation (the right to dignity); and
- the right to freedom of expression.

The law of defamation protects the reputation of a person, where reputation is defined as “the estimation or good opinion which an individual has in the eyes of society”.

All natural persons are entitled to sue for defamation, as are trading and non-trading juristic persons in certain circumstances. Political parties are also, at present, entitled to sue for defamation. However, the government as an entity is precluded from suing for defamation on the grounds that it would be a serious interference with freedom of expression if the wealth of the State, derived from the State’s subjects, could be used to bring defamation actions against those subjects. A recent decision of the Supreme Court of Appeal permits a Cabinet Minister to sue for defamation in circumstances where the criticism is directed at the Minister as an individual, rather than at governmental policies or decisions.

The law allows a plaintiff to claim against a defendant if the plaintiff is able to prove three elements: that the defendant (a) published (b) defamatory matter (c) referring to the plaintiff. It is interesting to note that, in respect of defamatory material published on the Internet, a High Court has recently held that publication takes place where the material is accessed (i.e. where the content of the website is downloaded). On proof of the above three elements, the defendant is presumed to have published the matter wrongfully and intentionally.

It is then for the defendant to rebut either of these presumptions on a balance of probabilities. There are three traditional defences to rebut the presumption of unlawfulness:

- Truth for the public benefit. In terms of this defence, the defendant argues that the material allegations contained in the defamatory statement are substantially true and were made for the public benefit.
- The defamatory statement amounted to fair comment on a matter of public interest.
- Qualified privilege. The defendant will escape liability in the absence of malice if he or she is under a legal, moral or social duty to publish defamatory matter, and the recipient has a similar interest or duty in receiving it. This defence also extends to the *bona fide* reporting of the proceedings of Parliament, courts and certain other public bodies.

If the plaintiff succeeds in an action for defamation he or she will be entitled to damages to compensate him or her for the infringement of reputation. In certain limited circumstances, an interdict may also be granted prohibiting publication where the defamatory material has not yet been released, or is sought to be published on a continuous basis (a so-called prior restraint).

defamation and the media

In respect of the media, certain specific considerations apply. Before 1998, a media defendant was strictly liable for defamation. This meant that a media defendant was liable in the absence of fault and could thus not escape liability on the basis that it lacked the intention to defame the plaintiff. A media defendant could only rely on the traditional defences negating the presumption of unlawfulness.

Following the advent of the Constitution, the Supreme Court of Appeal has now re-examined the law in respect of defamation actions against the media in *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA). In this case, the court rejected the test of strict liability for the media and held that the appropriate test for media liability is reasonableness. A media defendant will therefore not be liable for defamation if, in light of all the circumstances, it was reasonable to publish the relevant material in the particular way and at the particular time.

As a result of the *Bogoshi* case, the legal position in relation to defamation is that two legal regimes apply. The first system applies to all non-media defendants, and postulates that a non-media defendant will be able to escape liability by relying on one of the traditional defences negating the unlawfulness presumption (or any other defence that may be recognised over time), or by rebutting the presumption that the non-media defendant intended to defame the plaintiff. In respect of media defendants, the position is that such a defendant will be able to escape liability for defamation if it proves one of the traditional defences (truth, fair comment or qualified privilege) or that, in all the circumstances, the publication was reasonable. Moreover, the media defendant will escape liability on proof that the publication was not negligent.

It should also be noted that defamation is not only a delict in South Africa, but can also be a crime. In the criminal context, the State must prove all the elements of the offence beyond a reasonable doubt, including the fact that the defendant acted unlawfully and with the intention to defame.

The Films and Publications Act

The Publications Act, 1974 (**"the 1974 Act"**) gained notoriety as the tool with which the government of the day prevented the general public from viewing and reading any materials which were considered to be "undesirable". The 1974 Act included within its scope, the power to ban items such as statues, models, films and newspapers on the basis that they were undesirable. The term "undesirable" was the subject of much debate.

The transition to a democracy based on freedom and tolerance brought about a radical rethink of the censorship regulations. The result of this process was the Films and Publications Act, 1996 (**"the 1996 Act"**), which came into force on 1 June 1998. The 1996 Act established two bodies known as the Film and Publication Board and the Film and Publication Review Board. The 1996 Act sets up a structure through which any publications or films which are intended for distribution and exhibition are required to pass. The Act provides for the classification of publications and films in accordance with the material that is contained therein. The schedules to the Act provide the criteria upon which such classifications are based. The criteria are specific and were designed to create greater clarity in the area of censorship. The two types of publications and films which are subject to the greatest restrictions are the XX and X18 ratings.

Schedule 1 sets out the criteria for an XX rating for publications:

(1) it contains a visual presentation, simulated or real, of child pornography, explicit violent sexual conduct, bestiality, explicit sexual conduct which degrades a person and which constitutes incitement to cause harm, or the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm;

(2) it or any independent part of it describes predominantly and explicitly child pornography.

The 1996 Act prohibits the distribution of publications or films which have been classified as XX, except in the case of a publication or a film of a *bona fide* scientific, dramatic, documentary or artistic nature (this exception does not apply to child pornography). In order to be

found guilty of the Act's criminal prohibitions, the person accused of contravening the 1996 Act must have done so knowing that the publication or film is prohibited.

It should be noted that, while the possession of child pornography is prohibited, the prohibition or possession does not apply to the other XX publications or films. This is a radical departure from the approach of the 1974 Act, which contained wide search and seizure provisions to enforce the anti-possession provisions.

The constitutionality of certain provisions of the 1996 Act (in particular, provisions relating to the possession and distribution of child pornography) were recently challenged in *De Reuck v. Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC). The Constitutional Court unanimously held that, while the criminalisation of, *inter alia*, the possession and distribution of child pornography amounts to a limitation of the rights to freedom of expression and privacy, the infringement of these rights is reasonable and justifiable. The constitutionality of these provisions of the 1996 Act was therefore affirmed.

In summary, the laws in regard to censorship of graphic and literary material in South Africa now represent a significant departure from the restrictive approach of the past, where freedom of expression was severely compromised.

Promotion of Access to Information Act

The Promotion of Access to Information Act, 2000 (**"PAIA"**) gives effect to the constitutionally enshrined right of access to information, contained in section 32(1) of the Constitution. PAIA allows for access to information held by public bodies, or information held by other persons or bodies which is required for the exercise or protection of rights.

public and private bodies

PAIA is primarily divided into two components. Part 2 deals with access to information held by a public body, while Part 3 allows for access to records of private bodies. PAIA defines a 'private body' in section 1 as either "a natural person who carries on or who has carried on any trade, business or profession, but only in such capacity; a partnership which carries on or has carried on any trade, business or profession; or any former or existing juristic person". A "private body" specifically excludes a "public body".

Public bodies are, in turn, defined as "any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; any other functionary or institution when exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation".

access to information of public bodies

Persons requesting records from public bodies must be given such information if they comply with the procedural requirements, and no grounds of refusal are applicable. PAIA lists the grounds for the refusal of access to information of public bodies.

Access to the following records of a public body can be refused in terms of PAIA:

- personal information about a third party;
- certain records of the South African Revenue Service;
- commercial and confidential information of a third party;
- information endangering the physical safety of an individual;
- legally privileged records;
- records relating to the defence, security, international relations, economy and financial welfare of South Africa;
- research information of a third party;
- records relating to the operations of public bodies; and
- frivolous or vexatious requests for information.

Nevertheless, section 46 of PAIA contains a general public interest override. In terms of this provision, a record must be disclosed if it reveals evidence of a substantial contravention of law or an imminent and serious public safety or environmental risk, and the public interest in disclosure clearly outweighs the harm caused by disclosure.

access to information of private bodies

PAIA states that a record of a private body must be disclosed when "that record is required for the exercise or protection of any right"; the procedural requirements set out in the Information Act are met; and there is no applicable ground of refusal.

The grounds of refusal for private bodies are generally similar to those listed in terms in the section on public bodies. They relate to:

- protecting the privacy of a third person;
- protecting certain confidential information of a third party;
- protecting the safety of individuals;
- protecting information that is privileged from production in legal proceedings;
- preventing disclosure of commercial information of a private body; and
- protecting research information of a third party or private body.

Once again, there is a general mandatory public interest override in relation to private bodies.

publication of a manual

Sections 14 and 51 of PAIA state that all public and private bodies respectively are required to produce a manual which sets out, *inter alia*, the subjects and categories of records which are held by that body. The deadline for the compilation of manuals by private bodies (excluding public companies) has been extended to 31 August 2005. Manuals for public bodies and public companies were due to be compiled by 31 August 2003. It is no longer a mandatory requirement that the manuals of public and private bodies are published in the Government Gazette.

The Judicial Matters Second Amendment Act, 2003 came into effect on 31 March 2005 and amended certain provisions of PAIA. In particular, section 90 of PAIA now provides that it is an offence to wilfully or grossly negligently fail to compile a manual as required in terms of sections 14 or 51 of PAIA. Upon conviction, the information officer of a public body or the head of a private body will be liable to a fine or imprisonment for a period not exceeding two years.

importance of the Act

This Act is an important step in our democracy towards allowing for access to information. It provides for a more open and trusting society, a society in which citizens will feel more confident in being able to access information held by the State and by private bodies. Furthermore, instead of refusing to disclose records simply as a matter of principle, information must now be disclosed unless one of the grounds of refusal can be established.

Nevertheless, our courts appear to be applying this principle less strictly in instances where information is requested from a private body. In the recent case of Clutchco (Pty) Limited v. Davis (an as yet unreported decision of the Supreme Court of Appeal), it was held that a shareholder is not entitled to use PAIA to access the books of account of a company to determine its true financial position and the true value of his shares, in circumstances the Companies Act, 1973 does not provide for such access and where he had not shown that he reasonably required the records for the exercise or protection of his rights.

Data Protection

The traditional South African common law principles of protecting individual privacy and identity appear to be inadequate in circumstances where a person's personal particulars (data) are being processed (collected, stored, used and communicated) by another person or institution. The South African Law Reform Commission (**"SALRC"**) published Issue Paper 24 with a view to addressing the current legislative dearth in South Africa regarding data protection. The Issue Paper looks at various principles relevant to data protection, and puts forward a number of approaches which could be adopted. Comments were requested to be submitted to the SALRC by 1 December 2003. The Issue Paper will be followed by a discussion paper containing draft legislation and a report setting out final recommendations.

In addition, section 51 of the Electronic Communications

and Transactions Act, 2002 (**"ECTA"**) sets out a number of principles to which a data controller may voluntarily subscribe, in respect of personal information obtained by way of an electronic transaction.

TELECOMMUNICATION AND BROADCASTING SERVICES IN SOUTH AFRICA

Introduction

In 1993, the Independent Broadcasting Authority Act (**"the IBA Act"**) was passed, in a move away from state-dominated broadcasting. The IBA Act established the Independent Broadcasting Authority (**"IBA"**), the function of which was to monitor and control functions such as the granting of broadcasting licences, the monitoring of complaints, and the allocation of broadcasting frequencies to new licencees. Over the next few years the state-controlled public broadcaster (**"the SABC"**) sold several of its radio stations, and several new radio licences were granted to applicants who had to undergo a series of hearings before final licences were granted. The IBA also oversaw and awarded the first private free-to-air television broadcasting licence to a consortium made up of various black empowerment groups and Time-Warner (now AOL Time Warner).

The Broadcasting Act came into force during 1999. The purpose of the Act was to put in place a new broadcasting policy for South Africa and to amend certain provisions of the IBA Act. The Broadcasting Act was recently amended by the Broadcasting Amendment Act, 2002 (**"the Broadcasting Amendment Act"**).

Telecommunication activities in South Africa are governed separately from broadcasting by the Telecommunications Act, 103 of 1996 (**"the Telecoms Act"**). The Telecoms Act came into full force on 1 July 1997. It made provision for a statutory regulatory body, the South African Telecommunications Regulatory Authority (**"SATRA"**), which was responsible for the regulation of all telecommunication services in South Africa, excluding broadcasting.

The Independent Communications Authority of South Africa Act, 2000 (**"the ICASA Act"**) amended the IBA, Broadcasting and Telecoms Acts. The ICASA Act provides for the establishment of a joint regulatory body for both telecommunications and broadcasting, the Independent Communications Authority of South Africa (**"ICASA"**). In terms of the ICASA Act, the IBA and SATRA were immediately dissolved and their functions were transferred to ICASA. The primary reason for this merger of the regulatory bodies, is the rapid convergence of broadcasting and telecommunications technologies. Accordingly, the current position is that ICASA regulates telecommunications in terms of the Telecoms Act, and broadcasting under the IBA Act, as supplemented by the Broadcasting Act. Furthermore, ICASA continues to perform the duties imposed, and to exercise the powers conferred, upon the IBA and SATRA by the IBA Act, the Telecomms Act and the Broadcasting Act and all licences issued, rights granted and undertakings given by the IBA or SATRA by or under the IBA Act or the Telecoms Act, respectively, are enforceable by or against ICASA.

Broadcasting Services

The Broadcasting Act contemplates three broad categories of broadcasting services, namely public broadcasting, commercial broadcasting and community broadcasting. Within these broad categories, the broadcasting licences which can be granted by ICASA are as follows:

- free-to-air radio service;
- free-to-air television service;
- satellite free-to-air radio service;
- satellite free-to-air television service;
- satellite subscription television service;
- terrestrial subscription television service;
- direct to home delivery service, including multi-channel satellite distribution;
- local delivery service;
- cable television subscription service;
- low-power radio service; and
- any other class of licence as determined by ICASA from time to time.

A key innovation of the Broadcasting Act is the wider recognition and regulation of various broadcasting services. The Broadcasting Act aims to require multi-channel distribution services, such as satellite television broadcasters, to apply for broadcasting licences. The Broadcasting Act also sets out ICASA's functions in regulating and setting conditions for the following:

- local content requirements;
- programme requirements;
- coverage obligations;
- language service provision;
- ownership and control compliance;
- compliance with the Code of Conduct for Broadcasting Services; and
- the empowerment of previously disadvantaged groups.

The Broadcasting Amendment Act

The Broadcasting Amendment Act came into effect on 7 March 2003. The Broadcasting Amendment Act seeks to amend the Broadcasting Act to provide, amongst other things, for the conversion of the SABC into a public company in terms of the Companies Act and to provide for the continued existence of the SABC during the transition period, and to clarify the relationship between the policies governing commercial services and the values of the public broadcasting service. In addition, the Broadcasting Amendment Act seeks to open subscription television to full competition and to provide for the application and granting of television licences.

The Broadcasting Amendment Act also amended certain provisions of the IBA Act and the ICASA Act relating primarily to the Broadcasting Monitoring and Complaints Committee.

Telecommunication Services

The 3 distinct areas of telecommunications, over which ICASA has jurisdiction, are:

- radio frequency spectrum or telecommunication stations;
- telecommunication services; and
- telecommunication equipment and supply.

There is a general prohibition against the provision of telecommunication services without a licence issued in accordance with the Telecoms Act. The Telecoms Act sets out the procedure for the issue of telecommunication licences.

The most important telecommunication services provided for under the Telecoms Act are the following:

- public switched telecommunication services (**"PSTS"**);
- mobile cellular telecommunication services;
- multimedia services;
- value-added network services (**"VANS"**); and
- private telecommunication networks (**"PTN"**).

PSTS

In terms of section 36(3) of the Telecoms Act, Telkom Limited (**"Telkom"**) was granted the exclusive right to provide PSTS over a fixed period of 5 years, commencing on 7 May 1997. Telkom's PSTS exclusivity therefore legally expired on 7 May 2002. However, due to the delay in the licensing process of the Second National Operator (**"the SNO"**), whose introduction is intended to compete with Telkom in the provision of PSTS services, Telkom remains the sole provider of PSTS in South Africa.

The Telecoms Act was recently amended by the Telecommunications Amendment Act, 2001 (**"the Telecoms Amendment Act"**) in order to, amongst other things, facilitate this licensing process and to create the legal framework for the South African telecommunications landscape following the end of Telkom's exclusivity period. The Telecoms Act has recently been further amended by the Telecommunications Amendment Act, 2004 in order to give powers and assign duties to certain categories of operators for the purposes of interconnection and facilities leasing.

In terms of the amended Telecoms Act, the elements of the PSTS, include:

- a national long-distance telecommunication service;
- an international telecommunication service;
- local access telecommunication services;
- public pay-telephone services;
- maritime telecommunication services;

- fixed-mobile services;
- service comprising provision of telegrams;
- supply of telecommunications equipment installation, service, maintenance and repair of the PSTN; and
- any other service reasonably complementary.

ICASA is authorised by section 36(1)(d) of the Telecoms Act to intervene where it appears that Telkom (or another PSTS provider) is taking steps in the provision of its telecommunication services which may prejudice a future licence-holder or competitor of Telkom.

VANS

VANS are governed by section 40 of the Telecoms Act. A VANS is defined in the Telecoms Act as "a telecommunication service provided by a person over a telecommunication facility… to one or more customers of that person concurrently, during which value is added for the benefit of the customers".

VANS are a deregulated service in that any person may, without an invitation, apply to ICASA for a licence to provide a VANS. ICASA has also made a ruling that Internet service providers (**"ISP"**) constitute VANS for the purposes of section 40 of the Telecoms Act.

On 3 September 2004, the Minister of Communications published various determinations in terms of the Telecoms Act (**"the Ministerial Determinations"**). It is widely acknowledged that the ambit and scope of the Ministerial Determinations will have a large impact on the sector, and should lead to a liberalised and more competitive telecommunications industry in South Africa. In relation to VANS, the Ministerial Determinations provided that, as of 1 February 2005:

- VANS may carry voice using any protocol;
- VANS may be provided by telecommunications facilities other than those provided by Telkom and the SNO or any of them;
- a person who provides a VANS shall be entitled to cede or assign the right to use, or to sublet or part with control or otherwise dispose of the telecommunications facilities used for the provision the VANS.

PTNs

The Telecoms Amendment Act inserted a definition of PTN in the Telecoms Act: "a telecommunication system provided by a person for purposes principally or integrally related to the operations of that person and which is installed onto two or more separate, non-contiguous premises and where the switching system (nodes) of at least two of these premises are interconnected to the public switched telecommunications network …".

Where a PTN operator is providing a PTN for purposes principally or integrally related to its own operations, such a PTN operator does not require a telecommunication licence ordinarily required under section 32(1) of the Telecoms Act. Such an operator is also not required to be interconnected to the network of Telkom or any other person providing a PSTN. Nevertheless, where the PTN is interconnected to Telkom or the SNO, the PTN operator will require a licence under section 41(1)(b) of the Telecoms Act.

A PTN is not restricted to the carrying of voice-only or data-only telecommunications and, therefore, a PTN may be utilised as a flexible telecommunications service by the PTN operator. The only critical restrictions are in respect of the use of telecommunication facilities other than those made available by Telkom or any other PSTN service provider. A PTN provided by means of a telecommunication system situated on a single piece or contiguous pieces of land owned by the same person is, however, not required to use Telkom's facilities.

In relation to PTNs, the Ministerial Determinations provide that 1 February 2005 is the date from when a PTN operator shall be entitled to resell spare capacity and facilities or to cede or assign its rights to use such facilities or to sublet or otherwise part with control thereof.

Mobile cellular telecommunication services

There are currently three mobile telecommunications service providers in South Africa, comprised of the following companies:

- Vodacom (Pty) Limited;
- Mobile Telephone Networks (Pty) Limited (**"MTN"**); and

- Cell C (Pty) Limited.

The provision of mobile services is governed by the Telecoms Act, and is subject to the terms and conditions of the licences granted to the mobile operators.

Other categories

Other categories of telecommunication services which are not specified in the Telecoms Act include:

- mobile data network services; and
- global mobile personal communications by satellite (**"GMPCS"**). This constitutes a separate category of service which is to be governed by a separate licensing framework. The invitation to apply for licences to operate a telecommunications service by means of GMPCS was issued on 7 January 2002. Policy directions and regulations governing the provision of GMPCS services have subsequently been published by the Minister of Communications. These policy directions define a GMPCS service as "the transmission of any type of telecommunications service – voice, data, fax, or paging – which is provided directly to end users, anywhere on earth, by means of a GMPCS system".

The Telecoms Amendment Act

The Telecoms Amendment Act came into effect on 30 November 2001. As discussed above, the Telecoms Amendment Act amends the Telecoms Act by, amongst other things, inserting new definitions, making provision for new categories of licences, making further provision for applications for licences, and providing anew for decisions on applications of licences.

The Telecoms Amendment Act also provides for a carrier of carriers licence and the multimedia licence to be granted to Sentech Limited (currently a parastatal signal distributor). The carrier of a carriers licence contemplated in the Telecoms Amendment Act authorises Sentech to carry signals through an international gateway on behalf of other licenced telecommunications operators. Such service may not be provided directly to end users.

The Telecoms Amendment Act also introduced the definition of a multimedia service as "a telecommunications service that integrates and synchronises various forms of media to communicate information or content in an interactive format". The definition then goes on to list a number of examples of multimedia services, including Internet through television, pay-per-view, video on demand and electronic transactions.

The Sentech multimedia service licence came into effect on 7 May 2002 and was granted together with a radio frequency spectrum and radio station licence, which authorises Sentech to operate on and provide its multimedia services through the use of frequencies assigned for broadcasting signal distribution. Prior to the grant of the multimedia service licence Sentech provided only broadcasting signal distribution services licenced under the IBA Act. It is important to note that multimedia services are defined as a telecommunication service under the Telecoms Act. The Telecoms Act, in turn, expressly excludes broadcasting and broadcasting signal distribution from its application.

Convergence Bill, 2004

On 3 December 2003 the Department of Communications published the Draft Convergence Bill for public comment. Following the receipt of numerous written submissions in respect of the Draft Convergence Bill and a lengthy internal amendment process, the Department of Communications published the Convergence Bill in February 2005. Public comment on the Convergence Bill was invited by the Parliamentary Portfolio Committee on Communications for submission by 8 April 2005. The Bill was tabled in Parliament in May 2005, which preceded a series of public hearings before the Parliamentary Portfolio Committee during May and June of 2005.

The intention of the Convergence Bill is to introduce a new technology neutral licensing regime in South Africa, which will result in the distinction between broadcasting and telecommunications, to a large extent, falling away under a single, converged environment.

Other recent legislation

Electronic Communications and Transactions Act, 2002

ECTA, mentioned previously in the section on data protection, came into effect in August 2002.

Amongst other things, ECTA states that its purpose is to promote understanding, acceptance and growth of e-commerce; to promote legal certainty in respect of e-transactions; to ensure that e-commerce in SA conforms to the best international practice and to develop a safe, secure and effective environment for consumers and businesses to use e-commerce.

Based largely on similar legislation in other jurisdictions and on the UNCITRAL Model law, ECTA is essentially divided into the following parts and addresses the following issues: legal requirements for data messages; communication of data messages; registration of cryptography providers; authentication service providers; consumer protection; protection of critical databases; e-government; domain name authority; cyber inspectors and computer crime.

While ECTA governs electronic commerce in the general sense, many of the provisions in this Act empower the legislature to enact specific regulations to provide further impetus to the substance and application of ECTA.

The Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002

The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (**"the Interception Act"**) was assented to by the President on 20 December 2002 but has not yet come into effect. (Interception and monitoring is currently governed by the Interception and Monitoring Prohibition Act, 1992.) The Interception Act seeks to regulate the interception of certain communications and radio frequency spectrums and the provision of certain communication related information. The Act's objects include the prohibition of the provision of telecommunication services which do not have the capability to be intercepted, to provide for costs to be borne by telecommunications service providers and for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund and to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment.

SECTION 12 - OVERVIEW OF SA ENVIRONMENTAL LEGISLATION

South Africa's environmental legal framework

Environmental issues in South Africa are largely regulated by statute. The inclusion of an environmental clause in Section 24 of the Bill of Rights of the Constitution of the Republic of South Africa Act, No. 108 of 1996, (**"the Constitution"**) has resulted in the rapid development of South Africa's environmental legal framework. The government's commitment to give effect to the environmental rights enshrined in the Constitution is evident from the enactment of various pieces of environmental legislation since 1996. In addition, the Department of Environmental Affairs and Tourism has embarked on a law reform programme to draft new legislation on biodiversity, protected areas, air quality management, sustainable coastal development and integrated pollution control and waste management.

Environmental Rights

Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

- prevent pollution and ecological degradation;
- promote conservation; and
- secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The Constitution also provides for the right to have access to adequate water.

The enforcement of these rights

In terms of section 38 of the Constitution, anyone listed in the section may approach a competent court alleging that a right has been infringed or threatened. These persons include:

- anyone acting in their own interest;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;
- anyone acting in the public interest; and
- an association acting in the interest of its members.

Administration of environmental laws

Administration of environmental laws in South Africa has in the past been described as fragmented and dispersed. Responsibility for the environment has been divided between many different government departments, including the relevant provincial authorities. As a result, the enforcement of environmental laws in South Africa has, in the past, been uncoordinated. The following national departments administer and enforce environmental laws in South Africa:

- Environmental Affairs and Tourism;
- Water Affairs and Forestry;
- Mineral and Energy Affairs;
- Transport;
- Health;
- Land Affairs; and
- Agriculture.

Also involved in the administration of environmental laws are the nine provincial authorities responsible for environmental issues.

In 1997, South Africa published a White Paper on Environmental Management Policy (**"the White Paper"**). The White Paper sets out the powers and responsibilities of the different spheres and agencies of government and the regulatory approach to environmental management. The White Paper investigates ways of integrating and co-ordinating all government functions affecting environmental management. The White Paper aims to develop a co-ordinated approach to the integration of environmental

concerns in the policy processes of all national departments. The White Paper names the national Department of Environmental Affairs and Tourism as the lead agent for environmental management in South Africa.

The National Environmental Management Act

The National Environmental Management Act, No. 107 of 1998 (**"NEMA"**) came into operation in January 1999. NEMA's primary purpose is to provide for co-operative environmental governance by establishing principles for decision-making on all matters affecting the environment. NEMA also establishes procedures and institutions that will promote public participation in environmental management.

NEMA recognises that the State must respect, promote, protect and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities.

The principles enshrined in NEMA guide the interpretation, administration and implementation of the Act and all other laws concerned with the protection or management of the environment in South Africa. These principles serve as a framework within which environmental management must be formulated. The following important principles are outlined:

- environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably;
- the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment; and
- development must be socially, environmentally and ecologically sustainable.

sustainable development

The concept of "sustainable development" is identified in NEMA. Sustainable development is required to ensure the integration of social, economic and environmental factors in decision-making so that development serves present and future generations. Furthermore, sustainable development requires that a risk-averse and cautious approach be applied to decision-making.

the polluter-pays principle

The "polluter-pays" principle provides that "the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment". NEMA imposes a duty of care on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent the pollution or degradation of the environment from occurring, continuing or reoccurring. Insofar as such harm to the environment is authorised by law or cannot reasonably be avoided, NEMA requires that the pollution must be minimised and rectified.

The State may direct any person who fails to take these reasonable measures, to commence, continue and complete the reasonable measures. Should a person fail to comply with a directive, the State may itself take the reasonable measures to remedy the situation and recover all of the costs, of *inter alia*, remediation when undertaken by the State, from the following persons:

- any person who is or was responsible for, or who directly or indirectly contributed to, the pollution of the environment;
- the owner of the land at the time when the pollution occurred, including that owner's successor in title;
- the person in control of the land or any person who has a right to use the land at the time when the activity or the process was performed or undertaken or the situation came about; or
- any person who negligently failed to prevent the activity or process being performed or undertaken, or the situation from coming about.

The recovery of costs is subject to the proviso that the person failed to take the measures required of him or her in terms of NEMA. NEMA also contains provisions allowing for the apportionment of liability according to the degree to which each person was responsible for the harm to the environment.

NEMA makes provision for damages to be awarded by the courts where loss or damage has occurred (including the costs incurred in rehabilitating or preventing damage to the environment) as a result of a contravention of certain environmental statutes. For example, offences under the National Water Act, No. 36 of 1998 and the Environment Conservation Act No. 73 of 1989 may result in penalties being imposed in terms of NEMA.

Importantly, NEMA provides for the liability on conviction of employees, managers, agents and directors for any offences resulting from the failure to take all the reasonable steps that were necessary under the circumstances to prevent the commission of an offence.

As part of the Department of Environmental Affairs and Tourism's law reform process, amendments to NEMA have been made. These amendments are contained in the National Environmental Management Amendment Act No. 46 of 2003 (**"the 2003 Amendment Act"**) and the National Environmental Management Amendment Act No. 8 of 2004 (**"the 2004 Amendment Act"**). The 2003 Amendment Act came into effect on 1 May 2005, whereas the 2004 Amendment Act came into effect on 7 January 2005. These amendments bolster the provisions of NEMA in relation to its enforcement, compliance mechanisms and integrated environmental management provisions.

Administration and enforcement

The 2003 Amendment Act provides for the inclusion of a new provision in NEMA dealing with the application and enforcement of its provisions and specific environmental management acts. The amendment provides for the enforcement of specific environmental acts and enables the Director General or the Provincial Head of Department to designate Environmental Management Inspectors to implement this function. For the purposes of the 2003 Amendment Act, "specific environmental management Acts" includes the National Environmental Management: Biodiversity Act, 2003 and the National Environmental Management: Protected Areas Act, 2003.

Integrated environmental management

The 2004 Amendment Act amends the provisions of NEMA addressing integrated environmental management. The 2004 Amendment Act amends NEMA to enable the system of environmental impact assessments and related management tools to be regulated in terms of NEMA (which originally established a framework for environmental impact management) rather than under the Environment Conservation Act No. 73 of 1989.

The 2004 Amendment Act substitutes the implementation provisions of integrated environmental management in its entirety by incorporating an entirely new section which stipulates that the potential impact on the environment of listed activities must be considered, assessed and reported on to the competent authority. In addition, the section allows the Minister and the relevant MEC to identify certain activities that will be subject to environmental impact assessments, and to identify specified activities within determined geographical areas. An assessment will mean the process of collecting, organising, analysing, interpreting and communicating information that is relevant to decision-making.

The National Water Act

The National Water Act, No 36 of 1998 (**"the National Water Act"**) recognises that water is a natural resource that belongs to all people. The National Water Act regulates the manner in which persons obtain the right to use water and provides for just and equitable utilisation of water resources.

Sustainability and equity are identified as central guiding principles in the protection, use and management of water resources. These guiding principles recognise:

- the basic human needs of present and future generations;
- the need to protect water resources;
- the need to share some water resources with other countries; and
- the need to promote social and economic development through the use of water.

National government, acting through the Minister of Water

Affairs and Forestry, is responsible for the achievement of these fundamental principles. Being empowered to act on behalf of the nation, the Minister has the ultimate responsibility to fulfil certain obligations relating to the use, allocation and protection of water resources.

water-use licensing

Water use will require a licence or other form of regulatory authorisation under the Act. For the purposes of the National Water Act, "water use" includes, *inter alia*: taking water from a water resource; storing water; impeding or diverting the flow of water in a watercourse; disposing of waste in a manner which may detrimentally impact on a water resource; and altering the bed, banks, course or characteristics of a watercourse. The exception to this is 'water use' identified under schedule 1 to the Act. In terms of schedule 1 the following water uses are allowed without a licence:

- the taking of water for reasonable domestic purposes;
- small gardening not for commercial purposes;
- the watering of animals; and
- the use of water in emergency situations.

Water use is also permissible without a licence if that water use is permissible as a continuation of an existing lawful use. An existing lawful water use means a lawful water use that has taken place during a period of two years immediately before the commencement of the National Water Act. A person, or that person's successor-in-title, may continue with an existing lawful water use subject to: any existing conditions or obligations; the replacement by a licence in terms of the National Water Act; or any other limitation or prohibition made under the National Water Act.

Water use is permissible without a licence if that water use is permissible in terms of general authorisation or if the responsible authority waives the need for a licence. In all other circumstances a water use must be licenced.

pollution of water resources

The National Water Act provides for situations where the pollution of a water resource occurs as a result of activities on land. The person who owns, controls, occupies or uses the land in question is responsible for taking all reasonable measures to prevent any pollution of a water resource from occurring, continuing or recurring.

If these measures are not taken, the catchment management agency concerned may itself do whatever is necessary to prevent the pollution or to remedy its effects. The catchment management agency may then recover all the costs incurred as a result of it so acting jointly and severally from -

- any person who was responsible for or who directly or indirectly contributed to the pollution;
- the owner of the land at the time when the pollution occurred or that owner's successor-in-title;
- the person in control of the land or any person who has a right to use the land at the time when the activity was undertaken or the situation came about; and
- any person who negligently failed to prevent the activity from being performed or the situation from coming about.

In recovering these costs, the catchment management agency may claim from any person who would have benefited from the measures taken by it.

The National Water Act lists the acts and omissions which are offences under the Act, including the associated penalties. These offences include unlawfully, intentionally or negligently committing any act or omission which pollutes or detrimentally affects a water resource.

In addition to the criminal proceedings, the National Water Act also provides for an enquiry into the harm, loss or damage suffered as a result of an act or omission constituting an offence. In this regard, the court may award damages for the loss or harm suffered by the person. Furthermore, the court may order that the remedial measures to be implemented be undertaken either by the accused or the relevant water management institution. The offences set out in the National Water Act have also been designated in terms of schedule 3 to NEMA.

Air Pollution

The law relating to air pollution in South Africa is in the process of being reformed in accordance with the Department of Environmental Affairs and Tourism's law reform process. The Atmospheric Pollution Prevention Act, No. 45 of 1965 (**"the APPA"**) has for many years been denounced as having inadequate compliance and enforcement mechanisms necessary to implement its provisions effectively. In addition, the Act largely governs point-source emission control which does not take into consideration the cumulative impacts of air pollution in areas where the concentration of emissions of harmful substances into the atmosphere are substantial. Accordingly, the APPA has been replaced by the National Environmental Management: Air Quality Act No. 39 of 2004 (**"the Air Quality Act"**). The Air Quality Act has been promulgated following the President's signature on 24 February 2005. As at the date of writing, the Act is not yet in force.

The Environment Conservation Act

The Environment Conservation Act, No. 73 of 1989 (**"the Environment Conservation Act"**) provides for the protection and control of the environment. Following the enactment of NEMA, a number of the provisions of the Environment Conservation Act have either been repealed or assigned to the provinces. The remaining provisions of the Act deal with protected natural environments, littering, special nature reserves, waste-management, environmental impact assessments and regulations on noise, vibration and shock.

identified activities

Of particular importance are the sections in the Environment Conservation Act, which identify activities that may have a substantial detrimental effect on the environment. The identification of these activities results in the activity being prohibited unless the competent authority has granted a written authorisation. This authorisation is only issued after the consideration of an environmental impact report following an environmental impact assessment.

The following activities, among others, have been identified as those which will probably have a substantial detrimental effect on the environment:

- the construction, erection or upgrading of: facilities for commercial electricity generation; nuclear reactors and facilities for the production, enrichment, processing, storage or disposal of nuclear fuels and wastes; roads, railways, air fields and associated structures, marinas and harbours, above-ground cableways and associated structures;
- the change of land use from agricultural zoned or undetermined use or an equivalent zoning to any other land use;
- scheduled processes listed in the schedule to the Atmospheric Pollution Prevention Act;
- the disposal of waste, excluding domestic waste but including the establishment, expansion, upgrading or closure of facilities for all waste, ashes and building rubble; and
- the disposal of waste and the cultivation or use of virgin ground.

environmental impact assessments

Environmental impact assessment regulations have been promulgated under the Environment Conservation Act. These provide for the application for authorisation to undertake an identified activity. The application procedure is also set out in the regulations. After the authority has considered the relevant application a plan of study for scoping may be requested. On acceptance of the plan of study, a scoping report may be submitted. The scoping report must include certain specified information. Should it be necessary, the applicant may be required to submit a full environmental impact assessment and thereafter an environmental impact report.

waste management

Pending the introduction of legislation on integrated waste management and pollution control, the provisions of the Environment Conservation Act relating to waste management remain in force. The Act specifically requires that no waste disposal site is to be established or operated without a permit issued by the Minister of

Environmental Affairs and Tourism. A waste disposal site means a site used for the accumulation of waste with the purpose of disposing or treating of such waste.

For the purposes of the Environment Conservation Act, waste includes an undesirable or superfluous by-product, emission, residue or remainder of any process or activity. Waste includes any matter, gaseous, liquid or solid or any combination of these which is discarded by any person or which is accumulated and stored by any person.

In order to control and manage disposal sites, the Department of Water Affairs and Forestry published a Minimum Requirements Series of standards and procedures. These guidelines comprise three volumes:

- the Minimum Requirements for Waste Disposal by Landfill;
- the Minimum Requirements for the Handling of and Disposal of Hazardous Waste; and
- the Minimum Requirements for Monitoring at Waste Management Facilities.

The Minister of Environmental Affairs and Tourism, may in terms of the Environment Conservation Act, direct any person to cease any activity that may result in the environment being seriously damaged. This may include the issuing of a direction to take steps with a view to eliminating, reducing or preventing the damage, danger or detrimental effect. Failure to comply with the direction may lead to the authority taking the necessary steps itself and recovering the costs incurred from the offender.

Other important environmental legislation

heritage resources

The Heritage Resources Act, No. 25 of 1999 (**"the Heritage Resources Act"**) protects and manages certain categories of heritage resources in South Africa. For the purposes of the Heritage Resources Act, a "heritage resource" includes any place or object of cultural significance. The Act provides that certain activities relating to heritage resources require consents from relevant heritage resources authorities. For example, no person may destroy, damage, disfigure or alter heritage objects without a permit issued by the South African Heritage Resources Authority and no person may alter or demolish any structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.

hazardous substances

In South Africa substances which may cause injury or ill-health by reason of their toxic, corrosive, irritant, strongly sensitising or flammable nature are largely controlled by the Hazardous Substances Act, No. 15 of 1973 (**"the Hazardous Substances Act"**).

In addition, the Hazardous Substances Act controls certain electronic products and provides for the prohibition and control of the importation, manufacturing, sale, use, operation, application, modification, disposal or dumping of such substances and products.

public nuisance

The Health Act, No. 63 of 1977 (**"the Health Act"**) contains certain provisions which relate specifically to a "nuisance". The Health Act defines nuisance widely and has among other meanings, the following:

- any stream, watercourse, drain, sewer, ash heap or dung heap so foul or in such a state as to be offensive or to be injurious or dangerous to health;
- any accumulation of refuse, offal, manure or other matter which is offensive or is injurious or dangerous to health;
- any factory or industrial or business premises not kept in a cleanly state and free from offensive smells arising from any drain or any other source, or not ventilated so as to be injurious or dangerous to the health of the employees;
- any factory or industrial or business premises giving rise to smells which are offensive or which are injurious or dangerous to health; and
- any area of land kept or permitted to remain in such a state as to be offensive.

Every local authority is required to take all lawful, necessary and reasonably practicable measures to prevent the occurrence within its district of any nuisance. Where a nuisance has occurred the local authority will issue a nuisance abatement notice requiring the offender to remove, remedy or abate the nuisance.

nuclear energy

The Nuclear Energy Act, No. 46 of 1999 (**"the Nuclear Energy Act"**) and the National Nuclear Regulator Act, No. 47 of 1999 (**"the National Nuclear Regulator Act"**) came into operation on 24 February 2000. A primary objective of the Nuclear Energy Act is to prescribe the measures regarding the discarding of radioactive waste and the storage of irradiated nuclear fuel. The authority over the management and discarding of radioactive waste and the storage of irradiated nuclear fuel vests with the Minister of Minerals and Energy.

The Nuclear Energy Act also provides that, except when authorised by a Ministerial authority issued under the Hazardous Substances Act, no person may, without the written permission of the Minister, discard radioactive waste in any manner. The permission may be granted subject to any conditions that the Minister in concurrence with the Minister of Environmental Affairs and Tourism and the Minister of Water Affairs and Forestry deems fit to impose. The conditions so imposed would be additional to any conditions contained in a nuclear authorisation as defined in the National Nuclear Regulator Act.

The National Nuclear Regulator Act establishes a juristic person to be known as the National Nuclear Regulator. Certain actions are prohibited in terms of the Act. For example, no person may construct, operate, decontaminate or decommission a nuclear installation, except under the authority of a nuclear installation licence. In addition, no person may engage in any activity that may be capable of causing nuclear damage, except under the authority of a certificate of registration or a certificate of exemption.

protected areas

The National Environmental Management: Protected Areas Act, No. 57 of 2003 (**"the Protected Areas Act"**) provides for the continued existence of South African National Parks and the declaration and management of protected areas in South Africa.

pesticides and fertilisers

The use of pesticides and fertilisers is controlled in South Africa under the Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, No. 36 of 1947. The Department of Agriculture administers this Act. In terms of the Act, fertilisers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest-control operators are to be registered. The importation, sale, acquisition, disposal and use of such remedies are regulated.

marine management

The Marine Living Resources Act, No. 18 of 1998 (**"the Marine Living Resources Act"**) provides for the conservation of the marine ecosystem and the long-term sustainable utilisation of marine living resources. The Marine Living Resources Act provides for the orderly access to exploitation, utilisation and protection of certain marine living resources. The Marine Living Resources Act recognises the need for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa.

SECTION 13 - BLACK ECONOMIC EMPOWERMENT

The Broad-Based Black Economic Empowerment Act, 53 of 2003 ("the Act")

On 7 January 2004 the BEE Act came into force by way of Presidential signature. This landmark legislation is reflective of the transformation imperative to a contemporary South African society. The BEE Act seeks to remedy the racial disparity existing in South by way of facilitating broad-based black economic empowerment (**"BEE"**), which includes promoting economic transformation of the economy towards more inclusion of black people, substantially changing the racial composition of ownership and management structures of new and existing enterprises, promoting community and collective ownership of enterprises and promoting investment programmes that lead to broad-based, meaningful participation by black people in the economy. These goals are to be achieved through the introduction of empowerment targets and standards into all levels of the economy.

The BEE Act's empowerment intentions have largely been driven by the compiling of codes of good practice (**"the Codes"**), which in terms of section 9 of the Act, the Minister of Trade and Industry may publish as a means to facilitate and promote the goals the Act aims to achieve. At present the Codes are still in draft form, with the first opportunity for public comment earlier this year. It is expected that the second draft shall become available for public comment in due course.

Draft Codes

The ambit of the Codes include:

- the further interpretation and definition of black economic empowerment and different categories of black empowerment entities;
- qualification criteria for preferential purposes for procurement and other economic activities;
- indicators for the measurement of black economic empowerment;
- the weighting to be attached to such indicators; and
- guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector.

Although the Codes are as yet only in draft form, and thus not legally binding in nature, they do enjoy significant public support - with the commercial sector rallying in adopting empowerment structures and activities in compliance with their terms and requirements.

On 20 August 2003, the Department of Trade and Industry released a draft Code entitled *"A balanced scorecard for broad-based black economic empowerment"* (**"the Scorecard"**).

The Scorecard serves to standardise the measurement of BEE through the introduction of a balanced scorecard setting out the indicators for measuring BEE. The scorecard is intended to be adapted by the various sectors in the economy and by individual enterprises, as a residual 10% of the scorecard is set aside to allow sectors to tailor the scorecard to reflect their unique circumstances.

Clause 3.2 of the Scorecard provides:

"this code will be used by government… to measure progress in achieving black economic empowerment by organs of state and public entities and by private sector enterprises that are not signatories to a transformation charter published by the Minister in terms of section 12 of the Act."

Despite the index to the Draft Codes envisaging that some 10 Codes shall ultimately be released, only three have to date been released in full, namely Code 000: Black Economic Empowerment Framework, Code 200: Management and Code 900: Public Private Partnerships was released in August 2004. Code 100: Equity Ownership has been released in part, as Statement 100: Recognition and Measurement of Equity Ownership is available but neither Statement 110: Indicative Ownership for Multinationals, nor Statement 120: Government Ownership have been released as yet.

The Codes are of particular significance, given that section 10 of the BEE Act compels organs of state and public entities to take into account and, where reasonably possible, apply any relevant Code in determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law and in developing and implementing a preferential procurement policy. To the extent that a company requires a licence for any part of its business or to the extent that it participates in any dealings with organs of state or public entities, such company will be directly affected by its level of compliance with the provisions of the Codes. To the extent that any clients of a company require licences or have organs of state or public entities as clients, such company will be indirectly affected to the extent that such clients will necessarily be mandated to meet their own empowerment requirements.

In terms of section 12 of the BEE Act, the various sectors of the economy are empowered to develop sector transformation charters applicable to that sector. Should the Minister be satisfied that such charter has been developed by all the major stakeholders within that particular sector and that it advances the objectives of the BEE Act, he or she must publish such charter for general information and so as to promote its operation. The Act itself does not make any reference as to the binding force of these charters, which does result in the status of their regulatory framework being uncertain. The effect of publishing a charter as a ‘transformation charter’ under section 12 does not oblige organs of state or public entities to take account of or apply the transformation charter as they are compelled to do with reference to the Codes.

The draft Codes furthermore provide that, in addition to the publication of a sector transformation charter, the Minister may elect to publish a transformation charter for a particular sector of the economy as a ‘code of good practice’, should the Minister be satisfied that the charter satisfies all of the requirements of section 12 and all the principles and requirements of the draft codes. Upon such publication the charter will acquire the same force and effect as a code of good practice. The effect of such publication is that :

- enterprises subject to a charter published as a code of good practice in the Gazette, shall be assessed using the BEE Scorecard and targets contained in the sector transformation charter. Should there be any conflicts of principle, however, the principles contained in the BEE Act, codes of good practice and the strategy document shall override the principles contained in the charter;
- the charter’s BEE Scorecard shall be the measurement criterion used by organs of State and public entities for determining the broad-based BEE contribution of an entity; and
- notwithstanding the publishing of the charter as a Code in the Gazette, Government and other organs of State can elect to apply the generic scorecard as presented in Statement 000, instead of the charter Scorecard in extenuating circumstances.

As per clause 47 of Statement 010, if a sector transformation charter is not published in the Gazette as a code of good practice, the general measurement criteria contained in the Codes shall be used by organs of state and public entities when measuring the BEE status of the enterprises in that sector.

To date, the following charters have been compiled, although none have as yet been published as sector transformation charters by the Minister:

- The Broad-based Socio-economic Empowerment Charter for the South African Mining Industry
- The Charter for the South African Petroleum and Liquid Fuels Industry
- The Financial Sector Charter
- The Forwarding and Clearing (F&C) Industry Charter
- The ICT Charter (4th Working Draft)
- The Maritime Transport and Service Industry BEE Charter
- The South African Tourism Industry Empowerment and Transformation Annual Review 2002 (Transformation Charter for the Tourism Industry) .

DOUBLE TAXATION AGREEMENTS

COUNTRY	EFFECTIVE DATE
Algeria	12 June 2000
Australia	21 December 1999
Austria	6 February 1997
Belarus	29 December 2003
Belgium	9 October 1998
Botswana	21 September 1978
Bulgaria	27 October 2004
Canada	30 April 1997
Croatia	7 November 1997
Cyprus	8 December 1998
Czech Republic	3 December 1997
Denmark	21 December 1995
Egypt	16 December 1998
Finland	12 December 1995
France	1 November 1995
Germany	28 February 1975
Greece	14 February 2003
Hungary	5 May 1996
India	28 November 1997
Indonesia	23 November 1998
Iran	23 November 1998
Ireland	5 December 1997
Israel	27 May 1980
Italy	2 March 1999
Japan	5 November 1997
Korea	7 January 1996
Lesotho	9 January 1997
Luxembourg	8 September 2000
Malawi	2 September 1971

COUNTRY	EFFECTIVE DATE
Malta	12 November 1997
Mauritius	20 June 1997
Namibia	11 April 1999
Netherlands	3 February 1972
New Zealand	23 July 2004
Norway	12 September 1996
Oman	29 December 2003
Pakistan	9 March 1999
People's Republic of China	2 February 2001
Poland	5 December 1995
Romania	21 October 1995
Russian Federation	26 June 2000
Seychelles	29 July 2002
Singapore	5 December 1997
Slovak Republic	30 June 1999
Swaziland	23 August 1973
Sweden	25 December 1995
Switzerland	11 July 1968
Taiwan	12 September 1996
Thailand	27 August 1996
Tunisia	10 December 1999
Uganda	9 April 2001
Ukraine	29 December 2004
United Kingdom	31 January 2003
USA	28 December 1997
Zambia	31 August 1956
Zimbabwe	3 September 1965