

South Africa

Legal Provisions

Compiled by:**Swiss Business Hub Southern Africa****Pretoria, March 2020****GENERAL REMARKS**

The legal system is a mixture of English common law and civil Roman-Dutch law. Many legal doctrines can be traced back to the civil law heritage, but court procedures are strongly influenced by the common law tradition, with adversarial trial, detailed case reports and binding precedents. The position of customary law has been much improved with the new post-Apartheid Constitution. As a constitutionally protected cultural heritage, customary law now enjoys a status equal to that of Roman-Dutch law, but the written or unwritten rules of customary law may not conflict with the South African Constitution.

The legal system is based on the very modern Constitution of the Republic of South Africa, 1996. The post-apartheid legal system came into being in 1993; it established an independent judiciary, which includes a Constitutional Court with the power to review and to abolish legislation inconsistent with the Constitution.

The Constitution with its Bill of Rights includes provisions such as prohibition of all forms of discrimination and an emphasis on individual rights. These rights include “equality before the law and equal protection of the law”; freedom of expression, assembly, demonstration, petition and association; the right to “choose a place of residence anywhere in the national territory”; the right not to be deprived of citizenship without justification; full political rights; full access to the courts; and fair and lawful administrative justice mechanisms, including rights concerning detention, arrest and accusation.

The Constitution provides for the separation of the legislative, executive and judicial arms of government. There are elements of Federalism within the Constitution whereby the nine provinces (Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West, and Western Cape) may pass laws on matters such as education, health and housing. However, in the event of conflict, the national legislation can override provincial legislation.

Parliament consists of two houses – the National Assembly and the National Council of Provinces –, which are responsible for drafting the laws of the Republic. The third arm of central government is an independent judiciary. The Constitutional Court is the highest court for interpreting constitutional matters while the Supreme Court of Appeal is the highest court for non-constitutional matters.

CUSTOMS

South African customs passenger allowances entitle new or used goods of up to R 5 000 in value, to be brought into the country without any duty being paid. For additional goods, new or used, of up to R 20 000 in value, a flat rate of 20% duty will be charged. Thereafter, normal customs duties apply.

The following duty-free goods may also be brought in:

- Wine - up to 2 litres per person over the age of 18 years.
- Spirits and other alcoholic beverages - up to 1 litre in total per person.
- Cigarettes - up to 200 per person.
- Cigars - up to 20 per person.
- Cigarette or pipe tobacco - up to 250g per person.
- Perfume - up to 50ml and Eau de toilette – up to 250ml per person.

The alcohol and tobacco allowances only apply to people over 18.

Currency brought into or taken from South Africa is monitored by law. Should you have South African currency exceeding R 25 000 or foreign currency exceeding USD 10 000 (or equivalent), this must be declared.

For more details click on the link: www.sars.gov.za/ClientSegments/Customs-Excise/Travellers/Pages/Arrival-in-SA.aspx

IMPORT AND EXPORT REGULATIONS

Traders are subject to exchange control approval, administered by the South African Reserve Bank. The Department of Trade and Industry (DTI) is also empowered to regulate, prohibit or ration imports to South Africa in the national interest but most goods may be imported into South Africa without restrictions. Import permits are required only for specific categories of goods and are obtainable from the Director of Import and Export. Importers must possess an import permit prior to the date of shipment. Failure to produce a required permit could result in the imposition of penalties.

A summary of the main import regulations are:

- Certain goods imported into South Africa require an import permit, which may be obtained from the Director of Imports and Exports Control.
- The list of goods requiring import permits is specified each year in the annual Import Control Program.
- Permits are valid for imports from any country.
- Special Economic Zones in Atlantis SEZ (www.thedti.gov.za/industrial_development/sez.jsp), Nkomazi SEZ, Coega IDZ, Richards Bay IDZ, East London IDZ, Saldanha Bay IDZ, Dube Trade Port Maluti - A- Phofung SEZ, OR Tambo SEZ, Musina/ Makhado SEZ. According to dti, Special Economic Zones may be sector-specific or multi-product and the following categories of SEZs have been defined as per the SEZ Act No. 16 of 2014:
 - "Industrial Development Zone" means a purpose built industrial estate that leverages domestic and foreign fixed direct investment in value-added and export-oriented manufacturing industries and services;

- "Free Port" means a duty free area adjacent to a port of entry where imported goods may be unloaded for value-adding activities within the Special Economic Zone for storage, repackaging or processing, subject to customs import procedures;
- "Free Trade Zone" means a duty free area offering storage and distribution facilities for value-adding activities within the Special Economic Zone for subsequent export;
- "Sector Development Zone" means a zone focused on the development of a specific sector or industry through the facilitation of general or specific industrial infrastructure, incentives, technical and business services primarily for the export market.
- South Africa uses the Harmonised System (HS) of Classification.
- Samples are dutiable unless they are cut samples of cloth, leather, linoleum and wallpaper in book form and not for distribution as advertising matter.
- Samples that have no commercial value because of mutilation in some way are also allowed duty-free access.
- The South African Government has viewed counter-trade as a second-best alternative to be engaged in only when normal trade cannot be conducted.
- Bonded warehouses are available at various points of entry.
- South African banks can accommodate all international transactions and are situated throughout the country.
- General rebates of duty are available for specific situations, and duties may be rebated on goods on re-export.
- The Reserve Bank plays a pivotal role in the economic and financial sectors.
- Some imports may require permission from the Department of Agriculture, Health or Environment Affairs.
- Specific excise taxes are levied on alcoholic and non-alcoholic beverages, tobacco and tobacco products, mineral waters, some petroleum products and Ad Valorem products, such as motor vehicles, electronic equipment, cosmetics, perfumeries and other products generally regarded as "luxury items". South Africa is an adherent to the Customs Valuation Agreement negotiated under GATT/WTO. The dutiable value of goods imported into South Africa is calculated on the F.O.B. price in the country of export. In conformance with its WTO commitments, South Africa has lifted import surcharges.

* ATA Carnet is accepted by the South African authorities which allows the temporary importation of commercial samples, exhibition goods and professional equipment whether accompanied or not without having to pay duty or raise custom bonds. In South Africa the sole issuing authority for the ATA Carnet is the South African Chamber of Commerce and Industry (SACCI) (www.sacci.org.za).

South Africa uses a Single Administrative Document (SAD) for all customs clearances purposes. The SAD must be accompanied by some or all of the following documents:

- Pro-forma/original invoice
- Bill of Lading
- Air Waybill
- Packing declaration
- Transport documents
- Freight Transit Order
- Insurance documents
- Customs documents
- Import permit
- Special certificates/permits
- Phytosanitary certificate for products of plant origin, including honey
- Sanitary certificate for products of animal origin
- Product testing certificate
- Fumigation certificate
- Bill of entry
- Payment documents
- Commercial invoice

- Certificate of origin
- Packing list
- Export declaration
- Export permit
- Documents in support of any request for exemption from customs duties or taxes

The International Trade Administration (ITAC) is charged with issuing import and export permits, and with conducting investigations and ensuring enforcement of the International Trade Administration Act (2003).

For more details click on the link: <http://www.itac.org.za/>

CURRENCY REGULATIONS

The South African Government has taken steps to gradually reduce remaining foreign exchange controls, which apply only to South African residents. Private Citizens are now allowed a one-time investment of up to R 10 million in offshore accounts per calendar year over the age of 18 years. Since 2001, South African companies may invest offshore up to R 1 billion per company per year.

Non-residents may freely invest in South Africa, provided that suitable documentary evidence is viewed by the bank concerned, in order to ensure that such transactions are concluded at arm's length, at fair market related prices and are financed in an approved manner. Any income earned on the investment may be transferred abroad. Foreign nationals may disinvest from South Africa. Note that repatriation of funds attracts South African Exchange Control Regulations.

For exchange control regulations; go to the South African Reserve Bank website. (www.resbank.co.za)

REGISTRATION PROCEDURE FOR PRODUCTS

This will vary from product to product in that food stuffs are covered by different regulations to pharmaceutical products, but can at times cross. Medical devices have to be registered as of 2017. Machinery, etc. will be covered by other registration procedures, thus it is difficult to generalise. Should you have an enquiry concerning a particular product, then please contact us for the specific information.

STANDARDS, TECHNICAL RULES, LABELLING REGULATIONS

In order to promote international trade, South African regulatory practice is aligned with the requirements of international best practice (such as the guidelines of the OECD (Organization for Economic Co-operation and Development), and bilateral and international treaties such as the WTO (World Trade Organization) Agreement on Technical Barriers to Trade (TBT). The SABS (South African Bureau of Standards) is particularly concerned with the practical interpretation and implementation of the Agreement and guidelines, and is committed to supporting Government in meeting its obligations. The SABS Standards Division administers a Notification Point for technical regulations as required by the WTO and TBT.

For further information on standards, go to The South African Bureau of Standards. (www.sabs.co.za)

The NRCS (National Regulator for Compulsory Specifications), an entity of the department of Trade and Industry, established to administer compulsory specifications and other technical regulations with the view to protect human health, safety, the environment and ensure fair trade in accordance with

government policies and guidelines. All products imported and locally manufactured must comply with the compulsory standards as enforced by the NRCS.

For further information on any products subject to compulsory standard go to The National Regulator for Compulsory Specifications (<https://www.nrsc.org.za/>).

TAXES

South Africa has concluded tax treaties for the avoidance of double taxation with a number of countries. (<http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx>). The double taxation agreement with Switzerland is in force since 2009, having replaced the agreement of 1967. (<http://www.admin.ch/opc/de/classified-compilation/20053026/index.html>).

South African residents are taxed on their worldwide income. This includes the income of a foreign-controlled company. Certain types of income from outside are exempt and credit is allotted for foreign taxes paid. Non-South African residents are taxed only on South African-source income.

National Treasury has confirmed that it is going ahead with its plans to introduce an 'expat tax' amendment to the South African Income Tax Act by March 2020. As it currently stands, South Africans working abroad for more than 183 days (of which 60 days are consecutive) were able to earn income free of South African tax. However with the enactment of this amendment, South Africans will be required to pay tax in South Africa of up to 45% of their foreign employment income once it exceeds R1 million per annum.

Individuals are deemed to be resident in South Africa for tax purposes if they normally live in the country or are in South Africa for more than 183 days a year. The tax year is 1 March to 28 (or 29 February). Tax is payable in instalments by companies, close corporations and those individuals who are classified as provisional taxpayers (e.g. directors of companies and members of close corporations).

Individuals make two provisional payments based on estimated tax liability: the first due six months after the beginning of the assessment year and the second at the end of the assessment year.

Employees' tax is deducted at source (PAYE 'pay as you earn') and paid by the employers to the tax authorities monthly.

Income Tax Rates

Taxpayers who earn below R500,000 are no longer required to submit returns. This is an increase from the previous threshold of R350,000 provided that certain requirements are met:

- Their total employment income for the year before tax is not more than R500 000
- They only receive employment income from one employer for the full tax year.
- They have no other form of income (e.g. car allowance, business income, and rental income, taxable interest or income from another job)
- They do not have any additional allowable tax-related deductions to claim (e.g. medical expenses, retirement annuity contributions and travel expenses).

Income tax rates for the assessment year from 1 March 2020 to of 28 February 2021 are as follows (www.sars.gov.za):

2020 tax year (1 March 2020 - 28 February 2021)

Taxable income (R)	Rates of tax (R)
R0 – R205 900	18% of each R1
R205 901 – R321 600	R37 062 + 26% of taxable income above R205 900
R321 601 – R445 100	R67 144 + 31% of taxable income above R321 600
R445 101 – R584 200	R105 429 + 36% of taxable income above R445 100
R584 201 – R744 800	R155 505 + 39% of taxable income above R584 200
R744 801 – R1 577 300	R218 139 + 41% of taxable income above R744 800
R1 577 301 and above	R559 464 + 45% of taxable income above 1 577 300

Taxation of Dividends

Dividend Tax has replaced the Secondary Tax on Companies (STC). Dividends received by individuals from South African companies are generally exempt from income tax, are subject to a 20% dividends tax, withheld by the entities paying the dividends to the individuals.

Most foreign dividends received by individuals from foreign companies are taxable at a maximum effective rate of 20% via the normal tax system (not dividends tax). As a general rule, dividends paid to non-residents are subject to a withholding tax of 20%.

Payroll tax

Payroll tax – A 1% payroll levy ("skills development levy") is imposed on all employers, but companies with payroll costs below R 500,000 are exempt.

Value Added Tax (VAT)

Value Added Tax (VAT) of 15% as of 1 April 2018 is levied on goods and services, excluding certain basic foodstuffs. Exports are zero-rated, provided that certain regulations are complied with.

At present, it is compulsory for companies with an annual turnover of over R1m to register for VAT. A vendor making taxable supplies of more than R 50 000 but not more than R1m per annum may apply for voluntary registration. Certain supplies are subject to a zero rate or are exempt from VAT.

Corporate Tax Rates

Standard rate of corporation tax in South Africa, financial years ending on any date between 1 April 2020 and 31 March 2021.

Income Tax: Companies

Type	Rate of Tax
Companies	28%
Personal service providers companies	Personal Service Providers are no longer taxed separately and are taxed as a company or as a Trust.
Foreign resident companies which earn income from a source in South Africa	33%

Income Tax: Small Business Corporations

Taxable Income (R)	Rate of Tax (R)
R0 – 83 100	0% of taxable income
R83 101 – R365 000	7% of taxable income above R31 100
R365 001 – R550 000	R19 733 + 21% of taxable income above 365 000
R550 001 and above	R58 583 + 28% of the amount above 550 000

Capital Gains Taxation

Capital gains on the disposal of assets are included in taxable income. Events that trigger a disposal include a sale, donation, exchange, loss, death and emigration.

Maximum effective rate of tax:

- Individuals: 18%
- Companies: 22.40%
- Trusts: 36%

Events that trigger a disposal include a sale, donation, exchange, loss, death and emigration. The following are some of the specific exclusions:

- R2 million gain or loss on the disposal of a primary residence
- most personal use assets
- retirement benefits
- payments in respect of original long-term insurance policies
- annual exclusion of R40 000 capital gain or capital loss is granted to individuals and special trusts
- small business exclusion of capital gains for individuals (at least 55 years of age) of R1.8 million when a small business with a market value not exceeding R10 million is disposed of
- instead of the annual exclusion, the exclusion granted to individuals is R300 000 for the year of death.

Transfer Duty

Transfer Duty is a tax levied on the value of any property acquired by any person by way of a transaction or in any other way. For the purpose of Transfer Duty, property means land and fixtures and includes real rights in land, rights to minerals, a share or interest in a “residential property company” or a share in a share-block company. All Conveyancers are requested to register with SARS. [See more on the registration of Conveyancers here.](#)

VALUE OF PROPERTY

RATE

(Rand)	
R0 – R1 000 000	0%
R1 000 001 – R1 375 000	3% of the value above R1 000 000
R1 375 001 – R1 925 000	R11 250 + 6% of the value above R1 375 000
R1 925 001 – R2 475 000	R44 250 + 8% of the value above R1 925 000
R2 475 001 – R11 000 000	R88 250 + 11% of the value above R2 475 000
R11 000 001 and above	R1 026 000 + 13% of the value above R11 000 000

Other taxes, duties and levies:

- Customs and Excise;
- Donations tax;
- Estate tax;
- Transfer duty on real estate transactions not subject to VAT;
- Various stamp duties;
- Fuel levies;
- Motor vehicle license;
- Municipal taxes on owners of real estate;
- Skills Development Levy (SDL);
- Airport taxes;
- Environmental levy;
- Road Accident Fund levy; and
- Electricity Levy.

For further details, please, visit the web site <http://www.sars.gov.za/>.

Professional Accountancy Bodies:

[SAICA](#), South African Institute of Chartered Accountants

[SAIPA](#), South African Institute of Professional Accountants

Carbon Tax

The Carbon Tax Act 15 of 2019 came into effect from 1 June 2019. The carbon tax, which aims to reduce harmful emissions by introducing the polluter-pays principle. The first phase has a carbon tax rate of R120 per ton of carbon dioxide equivalent emissions. This rate will increase annually by inflation plus 2 per cent until 2022, and annually by inflation thereafter.

Significant industry-specific tax-free emissions allowances ranging from 60 per cent to 95 per cent will result in a modest nett carbon tax rate ranging from R6 to R48 per ton of carbon dioxide equivalent emissions to provide current emitters time to transition their operations to cleaner technologies through investments in energy efficiency, renewables, and other low-carbon measures. <https://www.sars.gov.za/ClientSegments/Customs-Excise/Excise/Environmental-Levy-Products/Pages/Carbon-Tax.aspx>

COMMERCIAL LAW

SETTING UP COMPANIES

South Africa is ranked 84 in the world for ease of doing business-

Economy	Ease of doing Business	Starting a Business	Dealing with Construction	Getting Electricity	Registering Property	Getting Credit	Protecting Minority Investors	Paying Taxes	Trading across	Enforcing Contracts	Resolving Insolvency
Mauritius	13	20	8	28	23	67	18	5	72	20	28
Rwanda	38	35	81	59	3	4	114	38	88	32	62
Kenya	56	129	105	70	134	4	1	94	117	89	50
South Africa	84	139	98	114	108	80	13	54	145	102	68

World Bank Group Rankings 2020: <http://www.doingbusiness.org/en/rankings>

The new Companies Act of 2008 came into operation on the 1st of May 2011 and replaced the Companies Act of 1973. The new Act changed many aspects of business registration and company requirements including the discontinuation of the registration of partnerships and close corporations.

The businesses entities that may be registered in South Africa are as follows:

- **Private companies Pty (Ltd)** – subject to fewer disclosure and transparency requirements under the new Act; prohibited from offering its shares to the public and the transferability of shares is restricted; more than 50 shareholders is permitted; and the board of the private company must comprise of at least one director or any other minimum number stipulated within the incorporating documentation.
- **Public companies (Ltd)** – permitted to offer shares to the public; no limit to the number of shareholders; at least one shareholder is required to form a public company and a public company must have at least three directors.
- **State-owned company (SOC)** - either a company defined as a “state-owned enterprise” in the Public Finance Management Act 1 of 1999, or is owned by a municipality as contemplated in the Municipal Systems Act 32 of 2000, and is otherwise similar to an enterprise as referred to above. The name of a state-owned company must end with the expression “SOE Ltd” and is duly incorporated and registered in terms of the Act.
- **External company** - a foreign company that is carrying on business or non-profit activities within the Republic; must be duly incorporated and registered within 20 business days after it first begins to conduct activities within the Republic as an external non-profit company (NPC) or as an external company.
- **Personal liability company (Inc)** - directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company that were contracted during their respective terms of office.

- **Non-profit company (NPC)** – company incorporated for public benefit or other object as specific in the Act; income and property are not distributable to its incorporators, members, directors, offers or persons related except as reasonable compensation for services rendered; and three persons and three directors may form a NPC.

Documents required for starting a business in South Africa

The most common way to register is through the CIPC website.

- Decide on a name for the enterprise (with at least two other alternatives)
- Undertake a name search on the Companies and Intellectual Property Commission (CIPC) website to ensure your preferred name has not been reserved by another enterprise
- Reserve a proposed name by completing the relevant forms available from the CIPC
- Await a registration number for the proposed enterprise
- For detailed information visit the CIPC website.

The documents required for starting a business in South Africa is provided in the table on the following page.

- A valid passport
- Police clearance certificates for all countries resided in for one year or longer
- A business plan, outlining the feasibility of the business
- Proof or an undertaking that at least five South Africans or permanent residents will be permanently employed in the business
- A written agreement with details of the partners/directors and their residential status in South Africa, if the application is an investment in an existing business
- Certification that at least R2.5 million in cash or a capital contribution of at least R2.5 million or a combination of cash and a capital contribution is available.
- for detailed information visit the

Registering a company

The following institutions are important when starting a business in South Africa:

- Companies and Intellectual Property Commission (CIPC) for company registration and registration forms can be obtained from CIPC website (www.cipc.co.za).
- Office of the local receiver of revenue (SARS) for income tax, VAT, and employee withholding tax (PAYE and SITE).
- Department of Labour for Unemployment Insurance.
- Relevant metropolitan council for local revenue/salary levy.
- The Compensation Fund of South Africa, in accordance with the Compensation for Occupational Injuries and Diseases Act. Registration forms can be obtained from the Department of Labour's website (www.labour.gov.za).

Registration Intellectual Property in South Africa

South Africa is signatory country to international treaties pertaining to intellectual property and thus legislation has been developed which recognizes and protects intellectual property in the Republic. However, a Copyright Amendment Bill has been put to parliament. It seeks to introduce extensive changes to copyright legislation. On December 5, 2018, South Africa's National Assembly, one of the houses of the country's bicameral legislature, passed the Copyright Amendment Bill, 2017, which seeks to amend the 1978 Copyright Act. Copyright Act No. 98 of 1978. The Bill is currently before the President for signature.

CIPC

Postal Address: Companies

P O Box 429
Pretoria
0001

Postal Address: Intellectual Property

Private Bag x400
Pretoria
0001

Call Centre: 086 100 2472 (CIPC)
International Tel: +27 12 394 9500
Fax Number: 086 517 7224
International Fax: +27 12 394 9501
E-mail: info@cipc.co.za

Joint venture opportunities

Formerly a partnership could be formed between at least 2 and no more than 20 persons (the new Companies Act changed this in April 2011). This number may be increased with the permission of the relevant Minister. There are no formalities required to form a partnership and a partnership will exist if the following requirements are met:

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

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

A distinction is often drawn between the term “partnership” and “joint venture”. Although joint venture agreements may contain a statement that they are not to be construed as a partnership, joint ventures generally meet all the requirements of a partnership and may, where appropriate, be treated as a form of partnership. The term “joint venture” is usually used where the parties concerned intend to pursue a single venture only. For example, in the mining industry joint ventures are often formed for the purpose of prospecting for mineral deposits. If a viable deposit is found the exploitation of the minerals is thereafter carried out by a company in which the joint venture members become shareholders.

Source: <http://www.deneysreitz.co.za>

There are no specific rules that relate to foreign joint venture partners, other than the South African exchange control regulations. Neither joint ventures, nor joint ventures with foreign joint venture partners are specifically regulated in South Africa. If the joint venture vehicle is a company, company-law rules (mainly the South African Companies Act) would apply. If the joint venture is structured by way of an unincorporated partnership, the South African common-law rules applicable to partnerships would apply.

PROMOTION OF INVESTMENT

The Government of South Africa is open to investment as means to drive growth, improve international competitiveness and obtain access to foreign markets, virtually all business sectors are open to foreign investors and no government approval is required. There are very few restrictions on the form or extent of foreign investment. In April 2018 President Cyril Ramaphosa announced his goal of attracting USD 100 billion investment for South Africa within five years.

InvestSA, a division of the Department of Trade and Industry (DTI) provides assistance to foreign investors <http://www.investsa.gov.za/>.

N.B. South Africa has cancelled a number of 'Protection of Investment Treaties' in 2013, the treaty with Switzerland being one of them.

The Protection of Investment Act, 2015 (South Africa) came into effect on 13 July 2018, with the objective to "substitute" the treaty protections with domestic legislation.

ENTRY CONDITIONS, WORK PERMITS, RESIDENCE PERMITS, LABOUR LAW

Section 11(2) – Visitors Visa with authorization to work

Commonly referred to as a business visa, holders of a section 11 (2) are now permitted to work. This applied to those who are employed by a company abroad and have a need to work in South Africa for a South African business/company for a maximum period of 90 days. This visa can now also be extended once, for a further 90 days.

Non Visa Exempt Citizens will no longer have to apply for an authorization letter from the DHA Head Office in Pretoria and then apply in their home country for a business visa. They will now instead be allowed to go directly to the SA Embassy/High Commission/Consulate/VFS offices in either their home country or country of residence and apply for the visa in one step. This will save time for the applicant.

Visa exempt citizens will also no longer apply for an authorization letter from South Africa and will now have to apply for the letter also from the SA Embassy/High Commission/Consulate/VFS offices in either their home country or country of residence.

Retired Visa

This visa is evaluated around a person's ability to financially support themselves in South Africa by proving a certain amount of guaranteed income or lump sum of money:

- Pension, retirement annuity, retirement policies or fund memberships generating a monthly income to a minimum of R 37 000; or
- Assets, which generate a monthly income equivalent to a minimum of R 37'000.

Spouses and Dependent Children

One of the biggest issues, under the previous Act for various visas, was the lack of an accompanying spouse option. As an example – in the retired visa category this meant that both spouses were required to meet the financial qualifying rules. This will no longer be the case and Spouses will now be permitted to immigrate to South Africa on an accompanying basis.

In June 2018 the Constitutional Court ruled that it is permissible for foreign spouses and children of South African citizens or permanent residents to apply for a change of visa status from outside of South Africa.

Other categories of visas including the list below now also allow accompanying spouses and dependent children to accompany the main applicant into South Africa : Study, Treaty, Business, Medical, Relative,

Work, Retired and Exchange visas – this a great added bonus from DHA especially where the option didn't exist in the past.

Study Visas

The new rules may see significant impact on some learning institutions, as study visas will now only be granted for learning institutions that are established under the Department of Higher Education and Learning. For example – Primary, Secondary Schools, Colleges and Universities. Language schools and other private learning facilities do not qualify. There are also very strict guidelines for the Principal / Registrar to adhere to including:

- Providing proof of registration of the Student within 60 days of registration. If a Student fails to register, provide proof of failure to register within 7 days of the closing date of registration.
- Notifying the DHA within 30 days of de-registration of a student and within 30 days of completion of their studies.

These learning institutions now need to ensure that their systems, or those of their appointed Immigration Company, are robust enough to comply as failure to do so will have serious consequences and in worse case scenarios Students illegally in SA facing bans from the country,

Students at Colleges or Universities are still permitted to work part time for 20 hours per week.

Business Visa

The Business Visa will be issued for up to three years at a time. A Business Visa can be applied for businesses that have not been declared undesirable by the Minister of Home Affairs. Businesses deemed as undesirable are:

- Businesses that import second hand motor vehicles into South Africa for the purpose of re-exporting to other countries.
- Exotic entertainment industry; and
- Security industry.

As a general rule, a minimum capital amount of R 5 million has to be invested or actually having been invested already. Other requirements include:

- The applicant must submit an undertaking that at least 60% of the total staff complement to be employed in the operations shall be South African Citizens or permanent residents, permanently employed in various positions.
- A police clearance certificate from each country where you resided since the age of 18 years, including the Republic of South Africa ^[1]_[SEP]
- A yellow fever vaccination certificate if you have travelled or intend travelling through a yellow fever endemic area ^[1]_[SEP] Medical and radiology reports
- A letter of recommendation will be required from the DTI with all applications, outlining the feasibility and the interest to South Africa of the planned business.
- Undertakings required from the applicant will include registration with SARS, UIF (Unemployment Insurance Fund), COIDA (Compensation Fund for Occupational Injuries), CIPC and (if applicable) any relevant professional body.
- If the applicant is investing in an existing business they will also be required to submit financial statements of the business they are investing into for the previous financial year.

Work Visas

Work visas see the removal of two categories, the “Quota” work permit and the “Exceptional Skills” work permit. The 2 permits have been ‘amalgamated’ and create the addition of a new work visa category – the “Critical Skills” work visa – see below for more details on this and other work visas.

No matter the work visa being applied for, there is now a little more onus on the employer as they must sign an undertaking for all repatriation costs as well as ensuring that the employee has a valid passport at all times. Proper physical records must be maintained at all times.

General Work Visa

This general work permit is valid for the duration of the contract. This visa will be issued for a maximum of up to 5 years.

Applications for General Work Visas will require:

Applications for General Work Visas will require:

- A duly completed and signed application form
- A passport valid for no less than 30 days after the expiry of intended visit
- Payment of the prescribed fee
- A vaccination certificate, if required by the Act
- Proof of financial means to cover envisaged living expenses in the Republic until the applicant receives a salary.
- Medical and radiology reports
- A police clearance certificate from each country in which the applicant resided for 12 months or longer since the age of 18 years
- A written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his/ her dependent family members, should it become necessary.
- An application for a general work visa shall be accompanied by –
 - A certificate from the Department of Labour confirming that despite a diligent search the prospective employer has been unable to find a suitable South African or Permanent Residence holder to fill the position. This leads to a considerable amount of additional preparation time for an application.
 - Proof of qualifications evaluated by SAQA and translated by a sworn translator into one of the official languages of the Republic
 - A contract of employment signed by both the applicant and the employer and commencement of employment is made conditional upon the work visa being granted.
 - Full particulars of the employer including proof of registration with the Registrar of Companies
 - An undertaking by the employer to inform the Director- General upon the employee no longer being in the employ of such employer or when employed in a different capacity or role.
 - All required documentation for a spouse and/or children if they intend to accompany the applicant
- Applications must be able to prove the applicant has the necessary skills and qualifications in line with the job offer; and
- That the benefits offered are not inferior to the average salary of a South African Citizen or Permanent Resident holding similar positions; and
- A SAQA (South African Qualifications Authority) certificate is obtained and submitted – evaluation of foreign education according to South African standards.

Critical Skills Visa

In order to apply for the Critical Skills Work Visa, the applicant's occupation needs to feature on the Critical Skills list of job titles. The Critical Skills Visa will be valid for the duration of employment or for a period of up to 5 years. Permanent residence can also be applied if you qualify for this visa – see Permanent Residence section for further information
http://www.dha.gov.za/images/immigration_critical_skills.pdf

The application will have to be supported by a confirmation from a suitable professional body that the applicant possesses the required skills and / or qualifications along with appropriate experience.

Some embassies have started to decline applications or reduce the validity period of the visa to 12 months if no copy of an employment contract undertaking letter on behalf of the employer is submitted.

A new draft Immigration Act is expected to be available for comment in March 2019, and a new critical skills list is intended to be implemented in April 2019. Among others, the designation 'corporate general manager' appears to have been dropped from the list, and no provision is made for equivalent skills.

Intra Company Transfer Visa

Under the old Act, this visa had been issued for a period of up to 2 years. This has been extended to a maximum of 4 years under the new Act. A person already in South Africa on an Intra Company Transfer (ICT) visa will be allowed to extend their visa to maximize the 4-year validity option. No further applications for extension beyond this 4-year period can be made.

ICT Visas were possible to achieve where the relationship between the foreign and South African entities existed as either: a branch, subsidiary or an affiliate relationship. There has been an apparent tightening of the definition of what constitutes an affiliate relationship – it is now defined by existence of a shareholding interest between the two companies. The branch and subsidiary relationship between entities will still allow the ICT option to take place as before.

The employer's obligations will include:

- ensuring that the employee is only employed in the specific position for which the work visa has been issued;
- notifying the DHA of any changes to the employee's status; and
- Ensuring that a plan is developed for the transfer of skills to a South African or Permanent Resident.

Corporate Visa

Corporate visas can be applied for by any business that is not listed as undesirable (we similarly await the publication of this list by DHA). A corporate visa is granted for a maximum period of three years.

Businesses will need to apply for the authorization to employ a certain contingent of foreigners of specific skills and training. They further need:

- to prove that they need to employ the requested number of foreigners;
- be able to get a certificate from the Department of Labour confirming that despite a diligent search they were unable to find suitable South African citizens to fill the roles;
- the proposed remuneration package shall not be inferior to the average salary of South African Citizens or Permanent Residence holders occupying similar positions;
- Proof of registrations with SARS, UIF, COIDA, CIPC;
 - an undertaking to inform DHA of any changes and to cover employee repatriation costs if this becomes necessary; and
 - That 60% of total staff are South African Citizens or Permanent Residents at any time before and after the application.

Once the Corporate Visa Employees have been recruited, employed and obtained their Corporate Worker Visa, there are also a number of obligations that the employer needs to be able to meet:

- Foreign employees passports are kept valid at all times;
- That the foreigner only conducts work in a position that the visa was issued for;
- That the foreigner departs South Africa upon completion of his contract; and
- The employer immediately informs the DHA if the foreigner is not compliant with the immigration and visa rules.

Individual Corporate Work Visas now require some extra documentation including SAQA (mandatory) and a certificate of registration with professional body (where applicable).

N.B – A corporate worker may no longer renew their permit or apply for a change of status whilst in South Africa!

Life Partner Visas

It is now a requirement that the relationship between a South African Citizen or Permanent Residence holder and a foreign partner must have existed for 2 years before an application for this visa may be made. Interviews with both the applicant and the South African will be conducted individually and at the same time.

Two years after being issued the Life Partner Visa, a visit to DHA is required in order to prove that the relationship still exists and maintain the validity of the permit granted.

There is some confusion with the interpretation of this part of the new Act whereby it appears that a Life Partner can also apply for Permanent Residence at the same time as applying for Temporary Residence if they meet the 2 year criteria. However when referring back to the original immigration Act of 2002 and the lack of change in the 2011 Amendment Act we are of the belief that permanent residence can only be applied for if it can be proven that the relationship has been of a permanent nature for 5 years.

Please be very careful if applying for Permanent Residence before you have proof of 5 years. Applications may be taken in by the Department of Home Affairs and then being rejected 1-2 years later based on current processing times within South Africa.

Spousal Permits

Temporary Residency – This has not changed and can be applied for if a foreign national is married to a South African Citizen or Permanent Resident holder.

To get Permanent residency the foreign spouse will need to apply for a South African Spousal Permit and one of the requirements is a minimum of 5 years of marriage,

Please note there has been confusion surrounding the amount of years that you need to be married here but this stays as 5 years and not 2 as some information states online and in the press.

Permanent Residence Permits

The below is a quick overview of various options that allow an individual to apply for Permanent Residence.

- Spouses of South African Citizens or Permanent Residents who have been together for 5 years;
- Holder of work visa for 5 years (strictly section 19 Work Visas and excluding that of a Corporate Worker visa);
- Children of South African Citizens or Permanent Residents;
- Parents of South African Citizens or Permanent Residents;
- Applicants, who have been a holder of a Work Visa or combination of a General Work Visa, previous Quota Work Permit and Exceptional Skills Work Permit, for a period of at least five years, and who received a permanent offer of employment may be granted a Permanent Residence Permit. Amongst other things, the employer must provide a signed employment contract, salary benchmarking from the Department of Labour. The holders of intra-company transfer visas cannot qualify for permanent residency on this basis.
- Critical Skills applicant who can show proof of post-qualification experience of 5 years, testimonials from previous employers, a CV and a letter of motivation;
- Business Visa applicants (own business); and
- Retired applicants depending on financial eligibility rules (financial values also yet to be published).

Other Major Points to Note

Travelling Rules

If someone has a pending application and the previous visa/permit has lapsed while in process of waiting, the employee if wanting to travel out of South Africa will be asked to sign a form confirming they are undesirable and will be added to the v-list and not permitted back to SA for a prescribed number of years.

Your employees must remain in South Africa for the outcome of their application or travel within the validity of an existing permit. Travel with a pending application and an expired visa is no longer an option.

Undesirable Persons – “foreigners who over stay the validity of their visa”

Harsher treatment will be handed out to those who overstay their visa and can result in them being declared undesirable for as many as 5 years. The message here is very clear – all foreigners will need to have a valid visa in their passport or face not being allowed back in to South Africa for a time period ranging from 1 to 5 years.

Applying for a visa

Note that you may not enter South Africa on a visitor’s visa and apply for a change of status (for example a work visa). All first time applications for temporary residence must be applied for in the foreigners’ home country or country of residence.

Exception is made for the Accompanying Spouse or Accompanying Minors who are on long term visitor visas while accompanying a Business Visa or Work Visa holder. In the event they want to change to taking up their own employment or to start school, application in South Africa for a change of status may be allowed

The e-Visa system trial was launched in November for those in South Africa who want to travel abroad and those abroad who want to come to South Africa. The biometrics can be done online instead of having to visit the embassy, which saves time and money.

Renewals

If you wish to renew or apply for a change of conditions to your visa, it must be submitted to Home Affairs not later than 60 days in advance of your existing visa expiring.

For further information go to <http://www.home-affairs.gov.za/index.php/immigration-services>

PROCEDURES FOR COLLECTING PAYMENT

The following are the most common forms of payment for orders placed by South African companies on suppliers in Switzerland:

1. Letter of Credit (L/C), either confirmed by a Swiss bank or not. An L/C could include payment terms of say 90 – 180 days.
2. Open account, usually including payment terms. This term of payment applies to a supplier and customer who have extensive dealings and/or have built up a relationship of trust.
3. Payment before shipment of goods. This usually applies when a product has to be manufactured to a customer's requirements or where the amount of the order is very low.
4. Payment by the Swiss representative or by the buying agent of the buyer.

LAND / PROPERTY ACQUISITION

There are very few restrictions at present on the purchase of property by non-residents, but there are procedures and requirements which must be complied with in certain circumstances. For example, entities registered outside of South Africa who intend to purchase property in South Africa must be registered here and must appoint a South African resident public officer for a local company whose shares are owned by a non-resident. In the event that a non-resident plans to purchase property in South Africa with the intention of residing here for longer periods, he or she will have to apply for permanent residency in accordance with the given requirements and procedures of South African law.

The South African Reserve Bank refers to foreigners as NON-RESIDENTS (regardless of whether they are natural persons or legal entities) whose normal place residence; domicile or registration is outside the common monetary area of South Africa. If the non-resident intends paying cash for the property, the transaction can be processed without intervention from the South African Reserve Bank.

Property in South Africa is usually purchased through a registered broker or real estate agent, who would be registered as such with Estate Agency Affairs Board (EAAB).

The different forms of ownership available are:

Non-residents can own property partially or wholly, in their own names or through ownership of an interest in one or other forms of legal entity. Freehold is the most common form of property ownership, while other forms of ownership include leasehold, sectional title and share block.

Property can be owned individually (i.e. ownership by individual title), jointly in undivided shares, or by an entity such as a company, close corporation or trust or a similar entity registered outside South Africa. The choice is dependent on decisions in relation to tax transfer duty issues, or relating to the protection of assets.

LAND REFORM

Land is an important and sensitive issue to all South Africans. It is a finite resource that binds all together in a common destiny. As a corner stone for reconstruction and development, a land policy for the country needs to deal effectively with:

- The injustices of racially-based land dispossession of the past
- The need for a more equitable distribution of land ownership
- The need for land reform to reduce poverty and contribute to economic growth
- Security of tenure for all; and
- A system of land management that will support sustainable land use patterns and the rapid release of land for development.

The government's vision of a land policy and reform programme is one that contributes to reconciliation, stability, growth and development in an equitable and sustainable way. It presumes an active land market supported by an effective and accessible institutional framework. In an urban context, the vision is one where the poor have secure access to well-located land for the provision of shelter. The poverty focus of the land reform programme is aimed at achieving a better quality of life for the most disadvantaged.

Currently, there is concern about the newly declared policy of land expropriation without compensation and the plans of the South African government to tackle the land reform with new instruments and to turn ownership of agricultural land into long-term leases.

Lawmakers in both chambers of parliament - the National Assembly (NA) and the National Council of Provinces (NCOP) in December 2018 approved a committee report that recommends the change to section 25 of the constitution. They set up a separate, ad-hoc committee to come up with the bill needed to effect the amendment.

Alongside the initiative to amend the Constitution, the Minister of Public Works has published a draft of the legislation that will be utilised to give effect to the new expropriation regime.

The Expropriation Bill, which is merely a draft, is intended to repeal and replace the current Expropriation Act, a statute that was brought into force in 1975.

At present it is not clear when these processes will be completed. For more information go to the following website: <http://www.ruraldevelopment.gov.za/DLA-Internet/content/pages/Home.jsp>

BROAD-BASED BLACK ECONOMIC EMPOWERMENT (B-BBEE)

The B-BBEE process was identified as crucial to the future viability of South Africa's economy. It is not a legal requirement to be B-BBEE compliant. However it is a prerequisite for government tenders and a higher compliance level improves the competitiveness level of a company. Companies are classified according to a Generic Scorecard, which is aligned in accordance with the Governments key priorities by focusing on the following five elements:

1. Ownership
2. Management Control
3. Skills Development
3. Enterprise and Supplier Development
5. Socio-Economic Development

The amendments to the generic Broad-Based Black Economic Empowerment (BBBEE) Codes of Good Practice became effective on 1 December 2019. For further information go to: https://www.thedti.gov.za/economic_empowerment/bee_codes.jsp

The Youth Employment Service Initiative, enables up to two levels of enhanced BBBEE recognition: <https://www.yes4youth.co.za/>

To read more about B-BBEE, kindly visit the Website of the South African Department of Trade and Industry: https://www.thedti.gov.za/economic_empowerment/economic_empowerment.jsp

THE CONSUMER PROTECTION ACT / THE NATIONAL CREDIT ACT

The Consumer Protection Act came fully effective on the 31st March 2011.

The Act aims to provide a legal framework for consumer protection and attempts to codify SA's common law with specific regard to the rights of consumer and the obligations of those providing services and products to them. Established ways of conducting every day commercial transactions have been altered and in a number of respects the proposed changes have removed the current protections afforded to suppliers when dealing with unscrupulous consumers.

The Act's objectives are to:

- Promote a fair, accessible, and sustainable marketplace for consumers, responsible consumer behaviour, and a consistent framework relating to consumer transactions and agreements;
- Prohibit unfair marketing and business practices; and
- Provide for improved standards of customer information, harmonisation of consumer laws, and the establishment of the National Consumer Commission.

The main topics of the Act are:

- Consumers will be guaranteed equal access to markets.
- Consumers' privacy will be protected.
- Consumers will have a right to choose.
- Fair disclosure of information to customers
- Fair and responsible marketing.
- Consumers will be entitled to honest and fair dealing.
- Terms and conditions need to be fair, just and reasonable.
- Consumers should expect fair value, good quality and safe products.
- Suppliers need to be accountable to customers.
- Consumers have a right to be heard and receive compensation if they are unfairly treated.

One of the important parts of the Act for importers and producers is "section 61" which calls for a major change in product liability laws. It states:

"... the producer or importer, distributor or retailer of any goods is liable for any harm as described in subsection (6), caused wholly or partly as a consequence of—

- a) supplying unsafe goods;*
- b) a product failure, defect or hazard in any goods; or*
- c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective whether the harm resulted from negligence on the part of the producer, importer, distributor or retailer, as the case may be."*

In other words, producers, importers, distributors or retailers would be liable for consequential damages suffered by consumers as a result of products sold by the retailers, regardless of their negligence. The clause does not require proof of negligence on the part of the consumer, as a common law currently

does. In fact, a consumer needs only to prove the product caused the loss, including illness, injury death or economic.

Similarly to consumer law in most first world countries, the Bill is designed to protect the consumer and ensure a socially responsible attitude is adopted by companies.

Therefore a company will be:

- liable for all harm, including economic, through product failure or inadequate instructions or warnings;
- prohibited from unfair contracts or business practices;
- required to provide consumers with goods and services that are reasonably suitable for purchase and free from defect, and
- liable unless it successfully argues one of the statutory defences above.

As a result, companies may need to carry additional insurance limits in order to mitigate their exposure to this increased liability.

Suppliers are also obligated to accept the return of waste goods that may not be accepted in the common waste collection system.

There is, however, still confusion concerning how the act applies to various industries and as to how it will be implemented.

<https://www.westerncape.gov.za/general-publication/national-consumer-protection-act/>

The National Credit Act

The National Credit Act (NCA), came into effect on 1 June 2007. It aims to amongst other things, protect the consumer from being granted credit recklessly, and the creation of a fair and non-discriminatory credit market.

Two new regulatory institutions have been established to administer the NCA: The National Credit Regulator (NCR) is the administrative regulator dealing with issues such as research and policy development, registration of industry participants and investigation of serious complaints. The NCR will take responsibility for the enforcement of the NCA. The National Consumer Tribunal (NCT) will conduct hearings into complaints relating to the NCA.

On 19 August 2019 the President signed into law the National Credit Amendment Act. In terms of the act, courts, the NCR and the NCT will be able to provide free of charge debt intervention services.

<https://www.banking.org.za/consumer-information/consumer-information-legislation/national-credit-act/>

Sources of information and links

Additional information and a more detailed look into the above can be obtained from the following websites:

- www.statssa.gov.za

- www.thedti.gov.za
- www.resbank.co.za
- www.doingbusiness.org
- www.dha.gov.za
- www.banking.org.za

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