

# INVESTING IN SOUTH AFRICA

CHARTING THE LEGAL LANDSCAPE WITH **WEBBER WENTZEL**



2015 / 2016

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# INTRODUCTION

I am proud to introduce the latest edition of Webber Wentzel's signature publication, Investing in South Africa.

A good map is essential when navigating new territory. It helps to formulate meaning and can build a bridge between where you are now and where you want to be tomorrow. This publication is intended to help investors unlock the intricacies of our environment by providing an on-the-ground, tailored perspective of the place we so proudly call home.

As one of South Africa's leading law firms, Webber Wentzel has a long history of assisting clients when investing in our country and further afield on the continent. In fact, together with a network of best-friend law firms, we have been closely involved with many of the most significant deals in South Africa and the rest of sub-Saharan Africa in recent times.

I would like to acknowledge and thank those of my colleagues who contributed their time and specialist expertise to assist in the production of this book.

I hope you will enjoy reading it as much as we enjoyed compiling it.

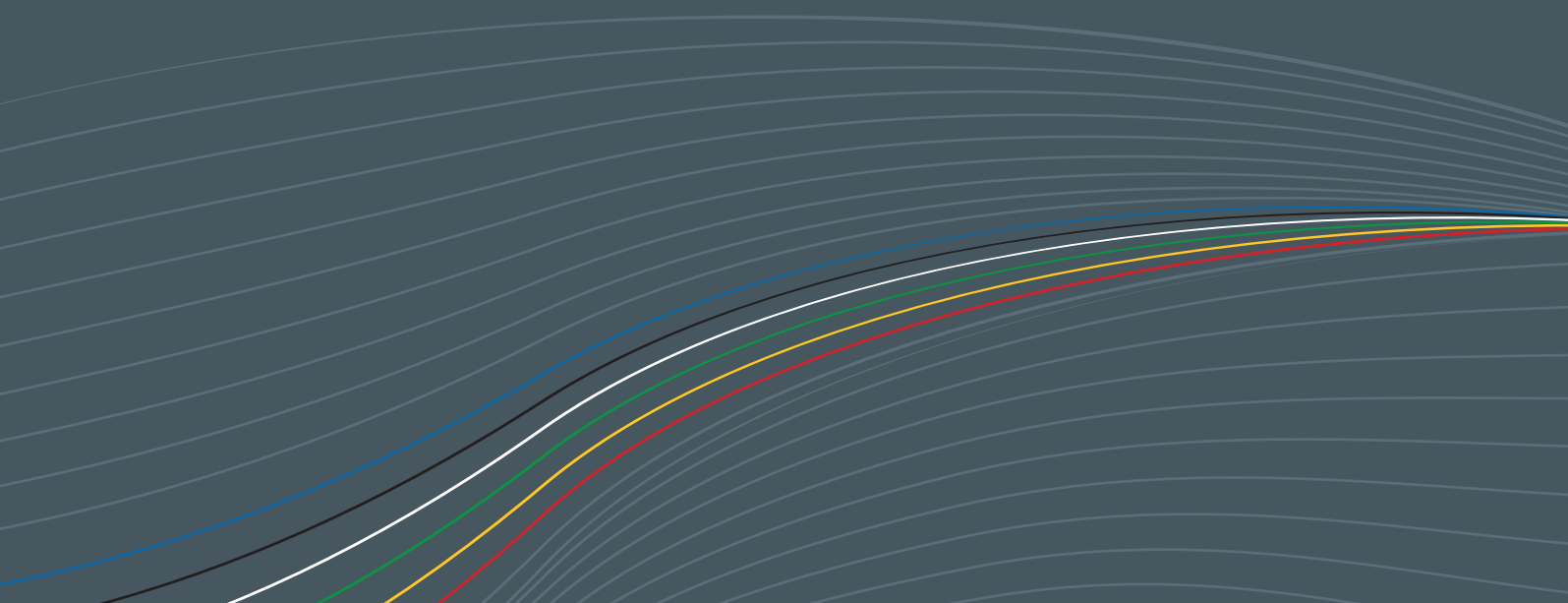
Haydn Davies | Partner

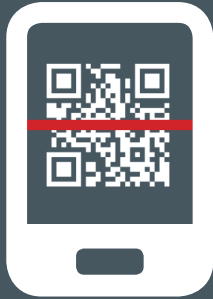
Haydn Davies

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### **Please note**

In the interest of environmental sustainability, this publication only contains the overviews of the various chapters. To access the full copy, we have provided you with a QR code for each chapter; simply scan the relevant code and read the relevant chapter on your smart device.

In order to do this you will need to download a QR scanner from your app store. The majority of these scanners are free to download.



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# SOUTH AFRICA - AN OVERVIEW

Ashleigh Blair and Johnathan Leibbrandt

The Republic of South Africa, a multiparty, constitutional democracy, is situated on the southernmost tip of the African continent. With a population of approximately 54 million people, close to 60% of whom are under the age of 35, it is a young, stable democracy.

The country's legal system is based on Roman-Dutch law, influenced by English law, and is subject to the Constitution of the Republic of South Africa, 1996, as the supreme law.

South Africa's economy has been completely overhauled since the advent of democracy in 1994. The country's abundance of natural resources (valued in 2010 by Citigroup at US\$2.5 trillion, the largest in the world); well-developed and highly regarded banking and financial sector; growing manufacturing and renewable energy sectors; and considerable tourism potential, all contribute to its vibrant emerging market economy.

South Africa is a member of, among others, the Southern Africa Customs Union, the Southern African Development Community, the World Trade Organisation, and the African Development Bank. In 2011 South Africa joined Brazil, Russia, India and China in the political grouping of leading emerging economies that has since become known as BRICS.



South Africa's inclusion in the group has thrust it into the league of the world's fastest-growing and potentially most influential group of nations. South Africa will also benefit from its participation in the US\$100 billion New Development Bank (formerly referred to as the BRICS Development Bank) and, in addition, a reserve currency pool worth over US\$100 billion.

Key targets for South Africa's growth towards 2030, and the steps required to achieve them, have been articulated in the National Development Plan that was released by the South African National Planning Commission in November 2011.

**The country's abundance of natural resources (valued in 2010 by Citigroup at US\$2.5 trillion, the largest in the world); well-developed and highly regarded banking and financial sector; growing manufacturing and renewable energy sectors; and considerable tourism potential, all contribute to its vibrant emerging market economy.**





# INVESTMENT VEHICLES & COMPANY LAW

Candice Meyer, Elodie Maume and Nasrin Kharsany

South Africa affords investors wishing to establish businesses in South Africa a number of possible investment vehicles, ranging from companies to business trusts and joint ventures. The most common form of investment vehicle used in South Africa is a private limited liability company. A foreign entity may also conduct business in South Africa without registering a local subsidiary, although in certain circumstances it may then have to register as an external company.

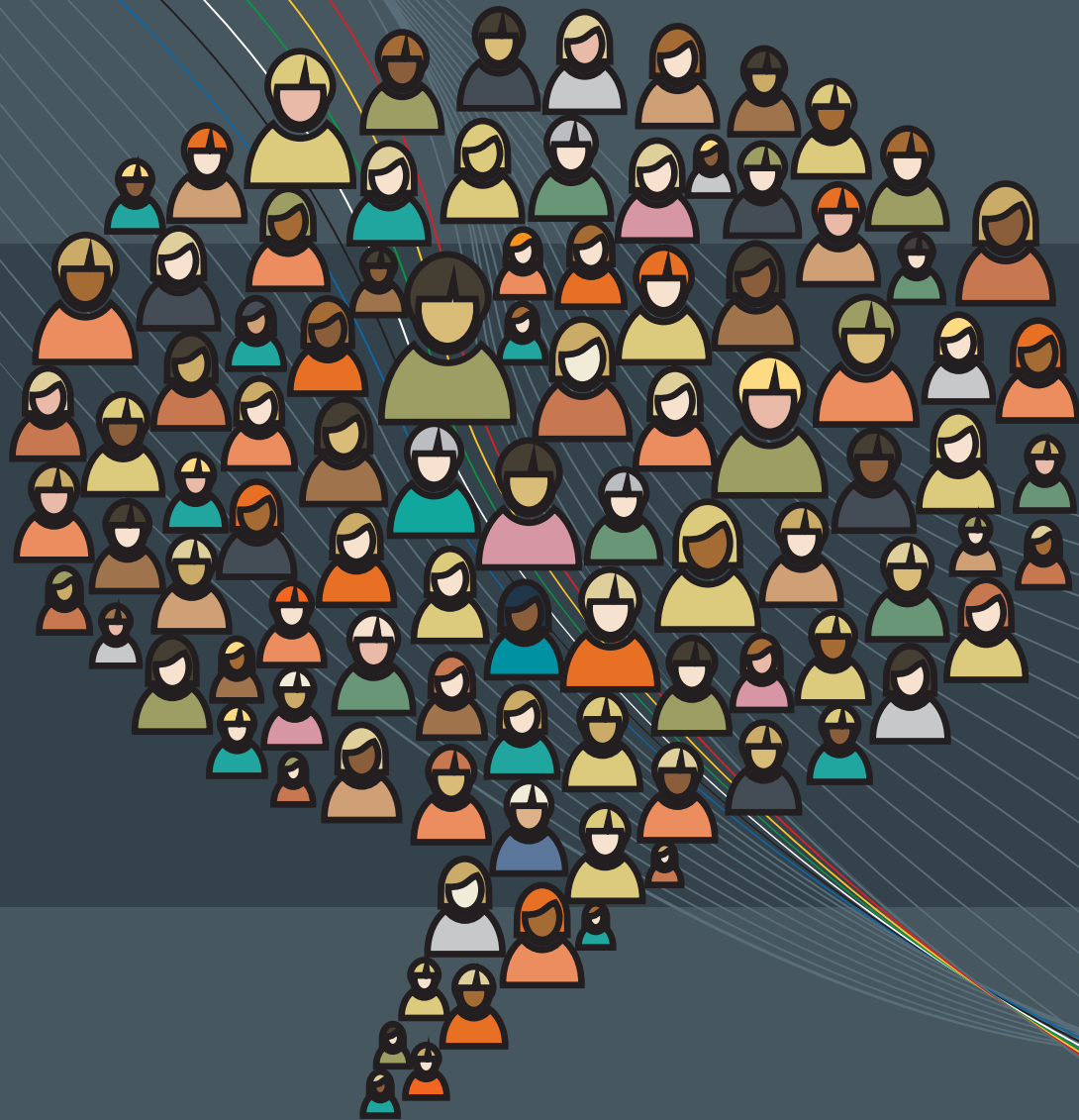
The incorporation, registration, organisation and management of companies and the capitalisation of profit companies are governed by the Companies Act, No. 71 of 2008 (the Act).

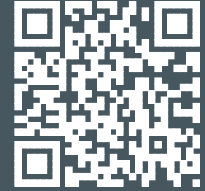
**“ The most common form of investment vehicle used in South Africa is a private limited liability company. ”**

Each type of company must comply with specific reporting and accountability requirements. The Act prescribes the management structure for each type of company. The board of a company has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the company's constitutional document provides otherwise. Directors are subject to common law duties as well as statutory duties.

“Fundamental transactions”, including the disposal of all or the greater part of the assets or undertaking of a company, schemes of arrangement, and amalgamations or mergers, are also governed by the Act. Shareholders who object to any of these transactions may demand that the company purchases their shares and compensates them in cash for the “fair value” of the shares they hold, subject to compliance with certain requirements. Transactions which result in the acquisition of control or change in control of public companies and certain private companies are regulated by the Act and takeover regulations.

South Africa's company law regime seeks to promote and facilitate commercial enterprise while protecting the interests of the various stakeholders of such enterprise, namely its shareholders, creditors and employees.





# EMPLOYMENT LAW

Nick Robb, Pamela Stein, Kate Collier and Kirsten Eiser

A number of acts regulate the various aspects of employment and labour relations in South Africa.

Chief among them is the Constitution of the Republic of South Africa. The Constitution enshrines the right to fair labour practices, the right to strike, the right to form and join trade unions and participate in trade union activities, and the right of trade unions and employers to engage in collective bargaining.

The Labour Relations Act of 1995 governs collective bargaining at the workplace, regulates the right to strike and the recourse to lockout, and governs the dismissal of employees as well as the relief to which unfairly dismissed employees are entitled.

Minimum terms and conditions of employment are governed by the Basic Conditions of Employment Act of 1997, while the Employment Equity Act of 1998 governs the implementation of affirmative action measures in the workplace in order to eradicate discrimination against previously disadvantaged groups. The latter act also provides for equal pay for equal work claims, prohibits unfair discrimination in any employment policy or practice, and requires designated employers to formulate employment equity plans and report on the implementation of such plans.



Other important legislation applicable to employment and labour relations includes the Occupational Health and Safety Act of 1993, as well as the Skills Development Act of 1998 and the Skills Development Levies Act of 1999.

In addition, various statutes make provision for the publication of Codes of Good Practice, and also provide that such Codes be taken into account in the application or interpretation of relevant laws.

**Minimum terms and conditions of employment are governed by the Basic Conditions of Employment Act of 1997, while the Employment Equity Act of 1998 governs the implementation of affirmative action.**





# FINANCIAL ASSISTANCE FOR INVESTMENT

Neerasha Singh and Johnathan Leibbrandt

Following South Africa's first democratic elections in 1994, the Department of Trade and Industry (DTI) concentrated on reintegrating the country into the global economy after decades of isolation. This required new policies and the consolidation of existing ones. After the country's general elections in 1999, the DTI moved its focus to transformation, which involved the development of an organisational structure more suited to the economic needs of the country and the challenges of globalisation.

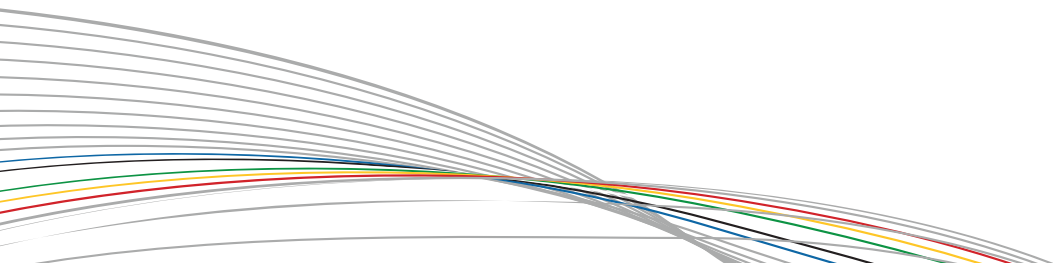
The DTI's sixth annual iteration of the Industrial Policy Action Plan, IPAP 2012/2013-2014/15-2016/17, and the National Development Plan 2030, entitled "Our future - make it work", will drive the direction of future Government policies.

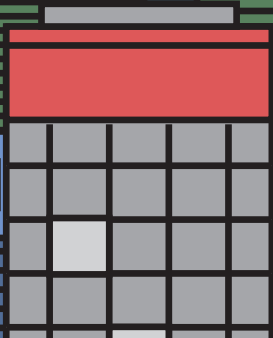
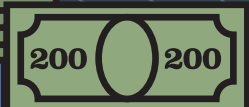
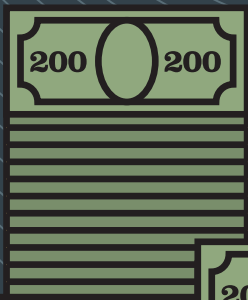
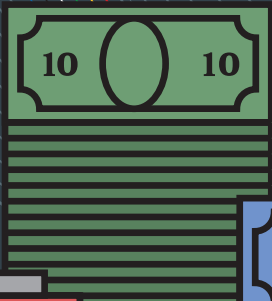
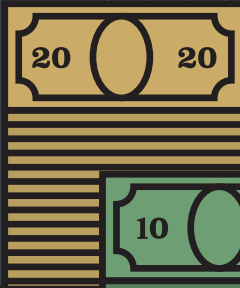
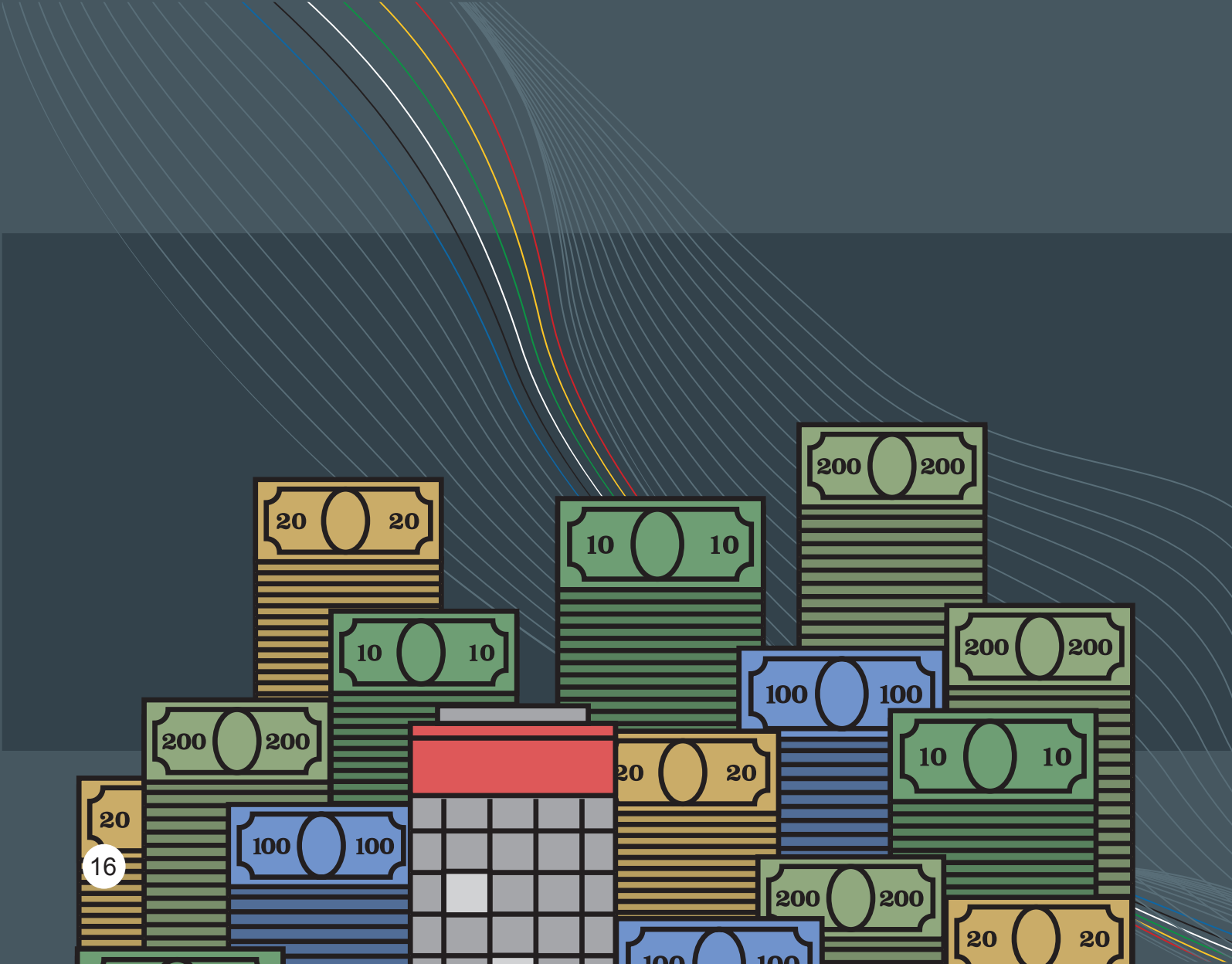
The DTI offers a variety of services to those interested in establishing or conducting business in South Africa. These centre on broadening the participation of individuals or groups formerly excluded from the mainstream economy; driving industrial development, including the development of small, micro and medium enterprises; and promoting trade, export and investment.

The Industrial Development Corporation exists as part of the DTI's overall strategy and consists of divisions, with each division composed of strategic business units ensuring an industry specific approach.

A plethora of financial assistance measures are available. These provide both general and targeted measures to increase economic activity in areas where South Africa has endowments and comparative advantages. Investors, both local and foreign, can gain substantially by employing the financial assistance measures available to them.

**“ The DTI offers a variety of services to those interested in establishing or conducting business in South Africa. ”**







# 5 SECURITISATION

Karen Couzyn

South Africa's securitisation regulations are designed to encourage securitisation issuance and foreign capital investment while managing risk to securitisation issuers and all movements of foreign exchange in and out of the country. The relevant legislation also incorporates internationally agreed-upon regulations pertaining to the finance industry and protection for both local and foreign investors.

“ **The legislation in force in South africa  
balances the many investment opportunities  
offered through securitisation with effective  
risk management for its issuers.** ”



Securitisation transactions in South Africa are regulated by the South African Registrar of Banks under the Banks Act, No. 94 of 1990 (Banks Act), and its regulations. The securitisation regulations provide that securitisation issuer special-purpose vehicles are exempt from having to register as banks.

The legislation in force in South Africa balances the many investment opportunities offered through securitisation with effective risk management for its issuers. Because of the complex nature of securitisation in South Africa, investors (especially those who are non-resident), should consult knowledgeable advisers.





# COLLECTIVE INVESTMENT SCHEMES, EXCHANGE TRADED FUNDS & HEDGE FUNDS

Johann Scholtz, Dawid de Villiers and Lerato Lamola

South African legislation makes provision for the regulation of most investment vehicles including pooled investment vehicles and most types of exchange traded funds.

The Collective Investment Schemes Control Act, No. 45 of 2002 (CISC Act), regulates the promotion of local and foreign collective investment schemes in the country. It provides that soliciting investment in a foreign collective investment scheme that is not approved is an offence punishable by a fine or a term of imprisonment. This penalty is only applicable to schemes that are offered or marketed to members of the public for only such schemes require prior approval. Under local rules and regulations, even institutional investors would qualify as “members of the public” and there are no sophisticated investor exemptions.

**“ Under local rules and regulations, even institutional investors would qualify as “members of the public” and there are no sophisticated investor exemptions. ”**

Specific conditions relating to foreign collective investment schemes have been promulgated which regulate the marketing and investment of foreign collective investment schemes in South Africa.

Exchange traded funds are unleveraged securities listed on the Johannesburg Stock Exchange (JSE) that track the performance of a basket of shares, bonds or commodities. They are subject to the CISC Act (in that they are usually structured as collective investment schemes) as well as the JSE's listing requirements.

Hedge funds are as yet unregulated in South Africa. The National Treasury and Financial Services Board have, however, released draft Regulations for regulating hedge funds as collective investment schemes under the CISC Act. While hedge funds themselves are currently not regulated, the conduct of hedge fund financial services providers is regulated by the Financial Advisory and Intermediary Services Act, No. 37 of 2002.





# TRADE RELATIONS & TRADE REMEDIES

Stephen Meltzer, Meluleki Nzimande, Sizwe Gcayi,  
Daryl Dingley and Kerri Ellerbeck

South Africa's trade policy provides the key principles for its global integration strategy with respect to engagements at regional, bilateral and multilateral levels. It is designed to define the contribution that trade policy can make to the country's broad economic development and how it will support the National Industrial Policy Framework.

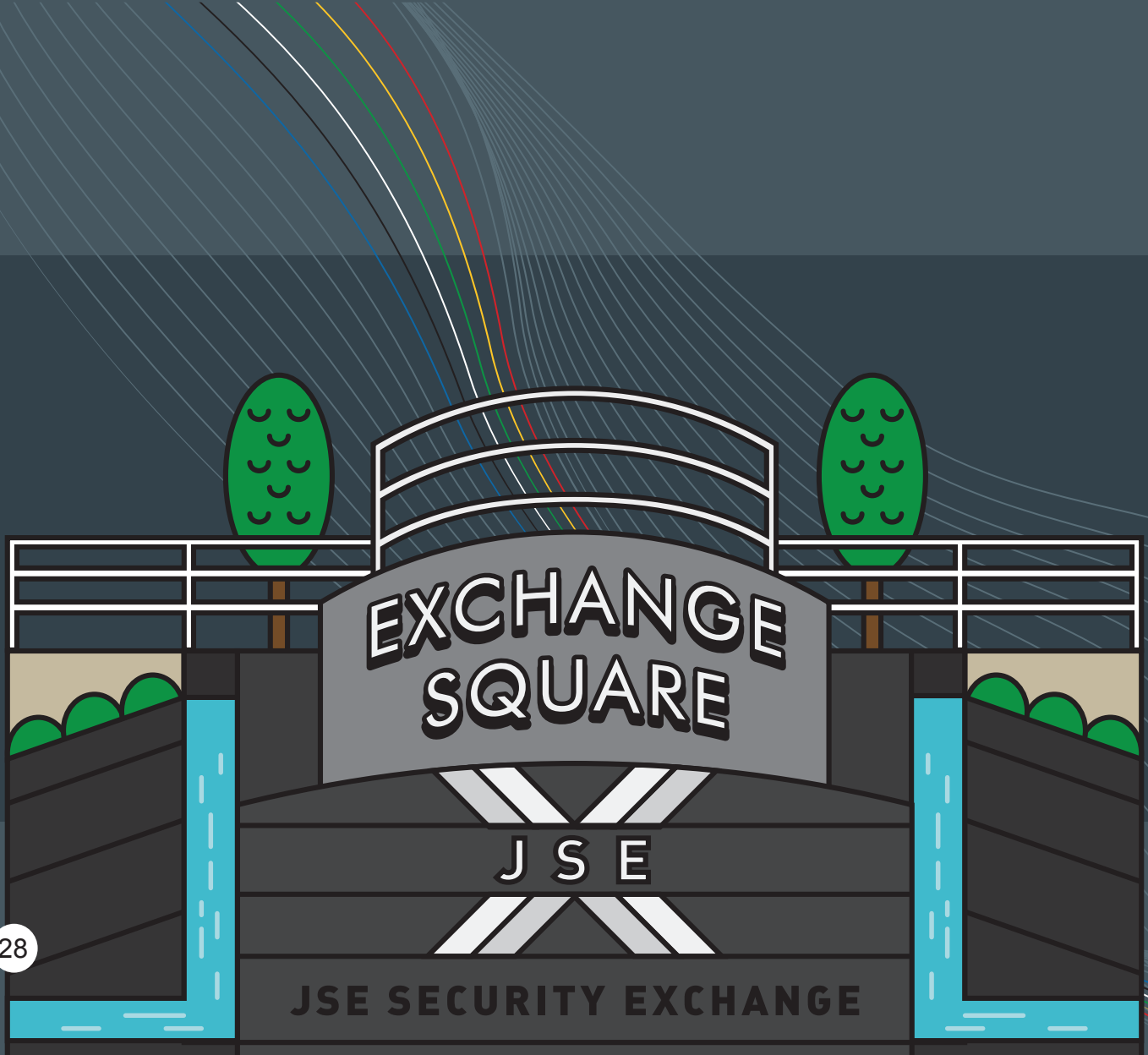
Since becoming a democracy, South Africa has opened up its economy on various levels and liberalised its trade regime substantially. It has also normalised its trade environment by removing the dual exchange rate and opening up its capital account. The country became a founding member of the World Trade Organisation in 1995; negotiated bilateral agreements with the EU, Mercosur and the European Free Trade Association; and committed to some unilateral liberalisation.

South Africa is strategically aligning itself to partner with important emerging economies. It is doing this both at a multilateral level through, for example, the G-20 and, more recently, through its membership of the Brazil, Russia, India, China and South Africa network; and at a trilateral level through the arrangement among the India, Brazil and South Africa group of countries.



As the South African economy faces slow recovery from the aftermath of the global economic crisis, Government is expected to use more trade policy measures to encourage growth. South Africa is also diversifying its trade relations by increasing trade with emerging economies while maintaining relations with its traditional trading partners, which will benefit the country in the long term.

“**South Africa is strategically aligning itself to partner with important emerging economies.**”





# FINANCIAL SERVICES, FINANCIAL MARKETS & MARKET ABUSE

Johann Scholtz, Dawid de Villiers and Lerato Lamola

South Africa has a vibrant and well-regulated financial services industry that is backed by legislation, regulation and specific rules. The provision of financial services in South Africa is regulated mainly by the Financial Markets Act, No. 19 of 2012 (FM Act) and the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS Act).

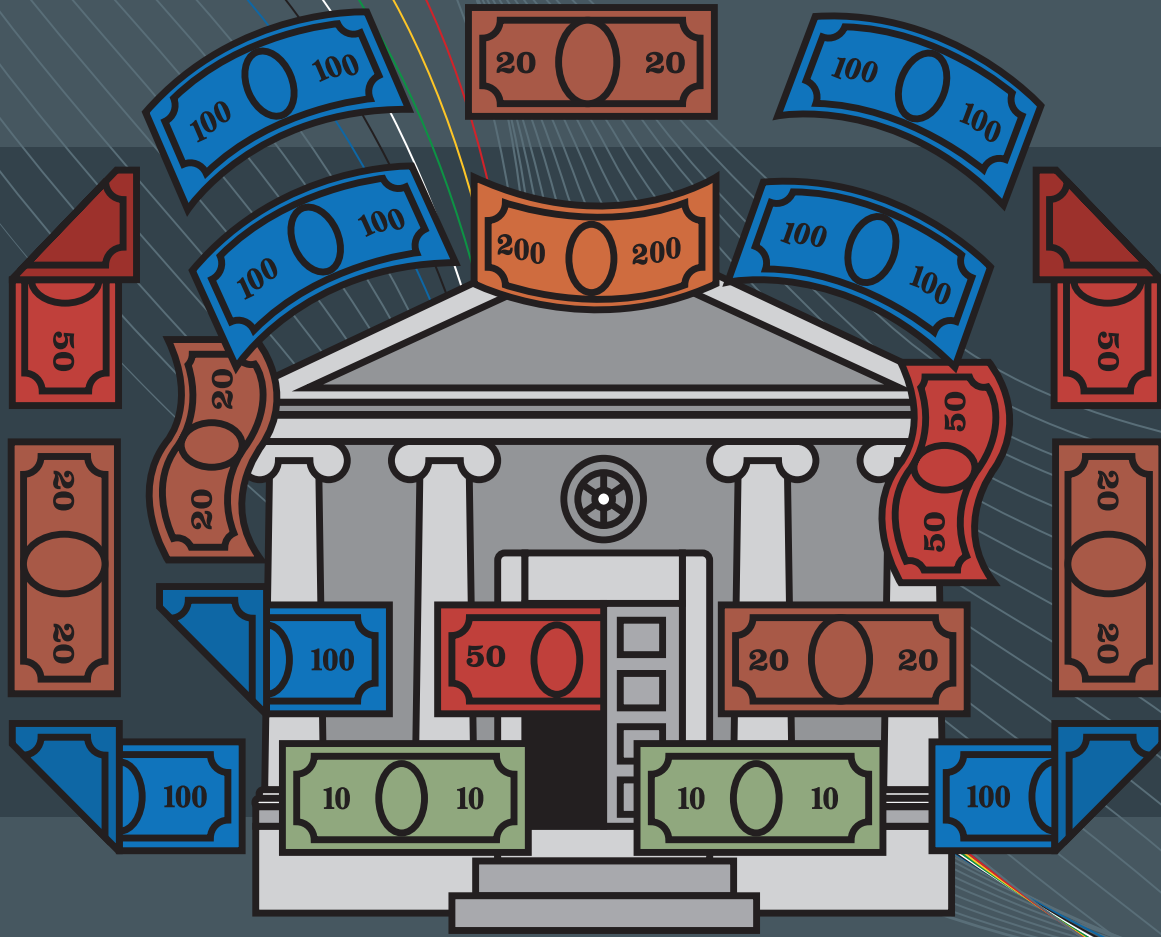
The FM Act regulates and controls exchanges and the trading of securities. It aims to reduce systemic risk while promoting international competitiveness and requires that only licensed persons operate as exchanges, central securities depositories or clearing houses. The only licensed exchange in South Africa, the Johannesburg Stock Exchange (JSE), currently operates three markets each with their own listings, membership requirements and rules. They are the Equities Market, the Derivatives Market, and the Interest Rate Market.

“ **The effectiveness of insider trading legislation in South Africa has seen significant improvements in the last few years.** ”

The effectiveness of insider trading legislation in South Africa has seen significant improvements in the last few years. Besides outlining offences and prohibiting various actions it also allows for the imposition of administrative penalties on those who contravene or fail to comply with its provisions, thereby curbing the occurrence of market abuse.

The FAIS Act regulates the rendering of financial advisory and intermediary services. It outlines strict standards that financial advisers are required to adhere to. Under this Act no person may offer financial services without a licence. Furthermore, licensed financial service providers must meet various obligations including prescribed fit and proper behaviour and codes of conduct.

The Financial Services Board and the various registrars that operate under its auspices, together with the JSE, play an important role in administering and enforcing the financial services legislation that underlies South Africa's financial services sector.





# **BANKING REGULATION & SUPERVISION**

Johann Scholtz, Dawid de Villiers and Lerato Lamola

South Africa's banking sector is mainly governed by the Banks Act, No. 94 of 1990 (Banks Act), while the South African Reserve Bank (SARB) and the Registrar of Banks are responsible for the majority of the regulatory activities in the banking landscape.

The primary objective of the SARB is to protect the value of the South African currency in the interests of balance and sustainable economic growth. The legislation pertaining to the banking sector aims to create credibility, stability and economic growth within the country. It also creates the legal framework for the regulation and supervision of the business of accepting deposits from the South African public.

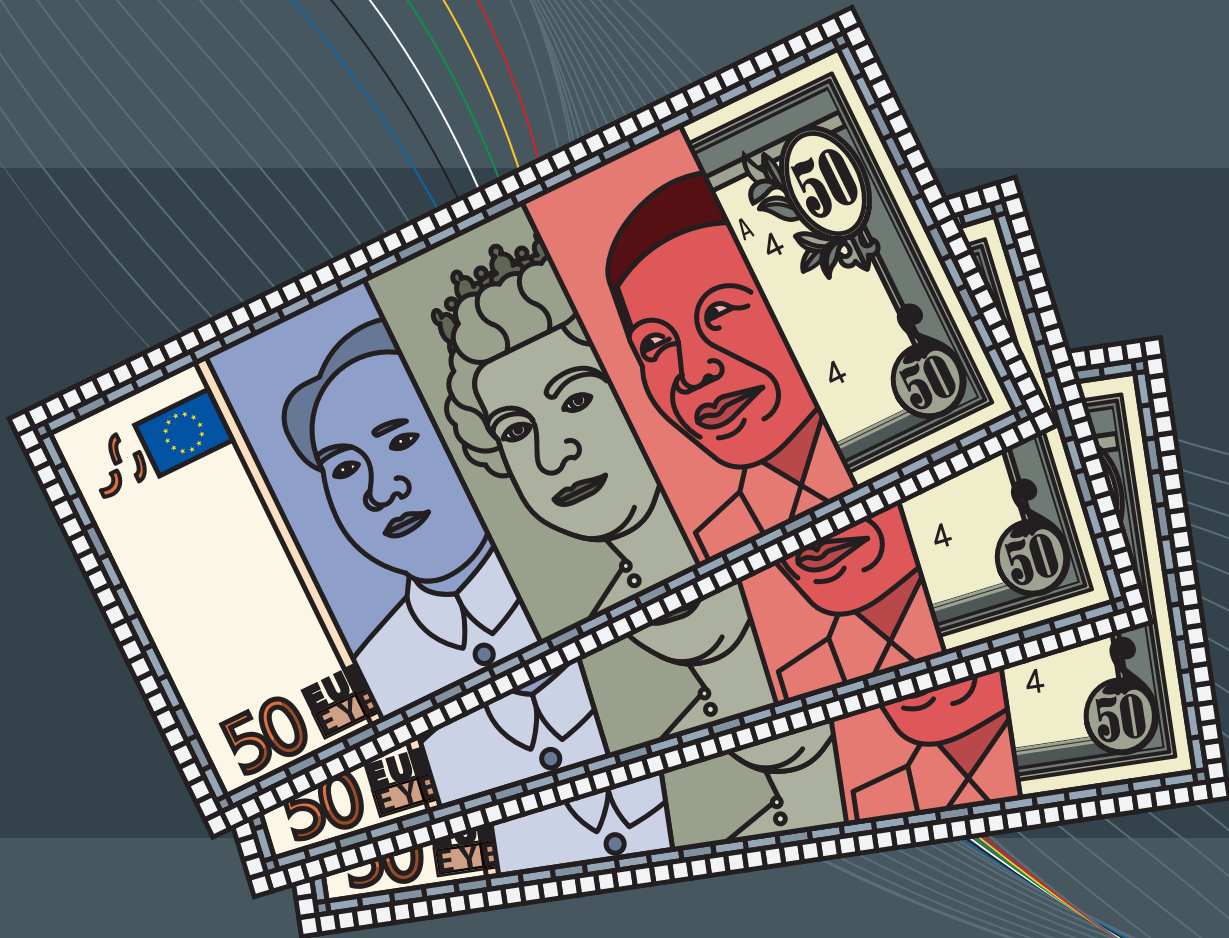
The Banks Act governs the establishment of banks, the security of depositors' investments, and the protection of banks' integrity. It also regulates the functioning of foreign banking institutions in South Africa.

On a global front, the regulatory measures developed by the Basel Committee on Banking Supervision, Basel I and Basel II, were insufficient to address certain risks as was evidenced from lessons learnt in the wake of the global economic crisis of 2008.



In response to this global economic crisis, and due to the continuous refinement that Basel I and Basel II have been subjected to, a comprehensive set of reform measures was developed in Basel III. The South African banking industry is currently implementing the Basel III framework using a phased-in approach, which will be an ongoing process until its planned completion in 2019.

“ **The legislation pertaining to the banking sector aims to create credibility, stability and economic growth within the country.** ”





# EXCHANGE CONTROL

Keith Veitch

Exchange controls were implemented to regulate the flow of capital into and out of South Africa. The legal framework is based on the premise of a total prohibition to dealing in foreign exchange, except with permission and on the conditions set out by National Treasury.

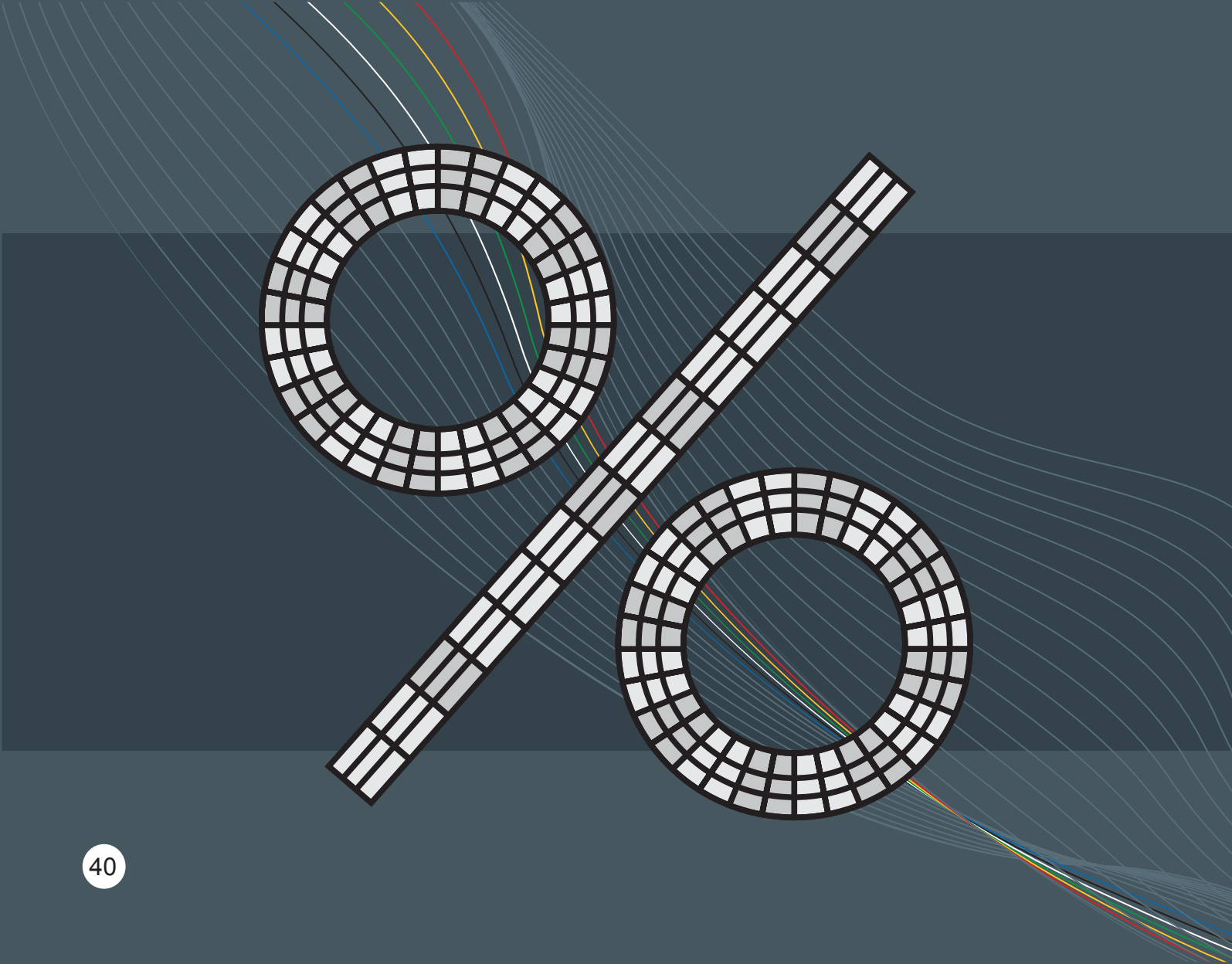
Because of its obvious impact on the conduct of normal international trade and payments, the underlying economic policy is not totally prohibitive. The purpose of exchange control in this context is to ensure the timeous repatriation into the South African banking system of foreign currency acquired by South African residents, and to prevent the loss of foreign currency resources through the transfer abroad of real or financial capital assets held in South Africa.

“ Exchange controls were implemented to regulate the flow of capital into and out of South Africa. ”

The administration of exchange control in South Africa has been delegated to the South African Reserve Bank and administratively performed by its Financial Surveillance Department. Certain powers, set out in the Exchange Control Rulings, have been delegated to authorised dealers (banks licensed to deal in foreign exchange).

The distinction between residents and non-residents of the Common Monetary Area (which comprises Lesotho, Namibia, South Africa and Swaziland) is important for exchange control purposes. Non-residents are not directly subject to exchange control.

Exchange controls affect all cross-border transactions, which are subject to approval. Investors and parties to cross-border transactions should consult with an adviser or authorised dealer prior to entering into any transaction, to ensure compliance with exchange controls.





# TAXATION & DOUBLE TAXATION AGREEMENTS

Graham Viljoen, Nina Keyser and Nola Brown

South Africa imposes tax (subject to certain exemptions) on all forms of corporate entities as well as on individuals and trusts. Types of taxes include, among other things: normal tax, withholding tax, donations tax, value-added tax, estate duty, securities transfer tax and transfer duty.

The country's tax laws are contained in various pieces of legislation, which are amended annually. Tax and fiscal policy is set by the Minister of Finance, who presents an annual budget to Parliament. The annual budget sets out revenue trends and tax proposals and provides valuable insights into the tax laws that are likely to be proposed by Government in the future.

The collection of tax is administered by the South African Revenue Service (SARS). SARS issues interpretation notes, practice notes and rulings which may be of assistance in interpreting the complex laws (even though these sources in most instances do not have a legally binding effect).

It is important, when applying South African tax laws, to ascertain whether a taxpayer is a South African resident or non-resident (for tax purposes) as this impacts the extent of the tax levied.



Given the extensive and constantly changing tax laws, it is imperative that local and foreign investors consider the South African tax consequences of investing in the country carefully. When obtaining advice regarding South African tax laws, it is also important to note that no person may provide tax advice to another person or assist a person in completing a tax return without being registered as a tax practitioner with SARS.

“ Tax and Fiscal policy is set by the Minister of Finance, who presents an annual budget to parliament. ”





# **MONEY LAUNDERING & ANTI-CORRUPTION**

Johann Scholtz, Dawid de Villiers and Lerato Lamola

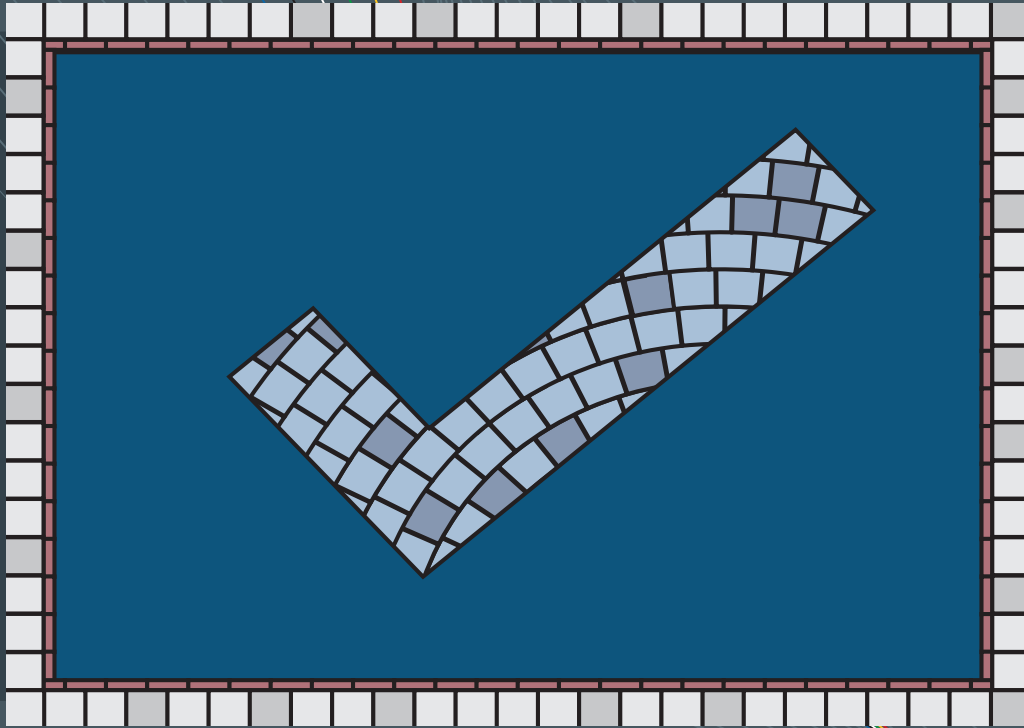
South Africa is a member of the Financial Action Task Force on Money Laundering and has taken significant steps to comply with this organisation's international obligations. The South African Government has also passed several pieces of legislation aimed at maintaining the integrity of the financial system and combating crime.

“ **Corruption in both the public and private sectors is curtailed by the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004.** ”

Money laundering in the country is addressed in part by the Prevention of Organised Crime Act, No. 121 of 1998, which provides for offences relating to the proceeds of unlawful activities. In addition, the Financial Intelligence Centre Act, No. 38 of 2001, places money laundering control obligations on all major financial institutions and encourages self-regulation by institutions that are most likely to be exploited for money-laundering purposes.

The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004, criminalises the offence of terrorism and provides for measures to prevent and combat terrorist and related activities.

Corruption in both the public and private sectors is curtailed by the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004. This Act allows for international reach in that it criminalises corrupt actions undertaken outside South Africa by any South African citizen, anyone domiciled in South Africa, or any foreigner, if: (a) the act concerned is an offence under that country's law; (b) the foreigner is present in South Africa; or (c) the foreigner is not extradited. It also criminalises the act of not reporting attempted or actual corrupt transactions.





# 13

## COMPETITION

Martin Versfeld and Janine Simpson

Competition law in South Africa is governed by the Competition Act, No. 89 of 1998 (Competition Act). The Competition Act applies to all economic activity within, or having an effect within, South Africa. The Competition Act regulates restrictive horizontal and vertical practices, abuses of dominance and merger control. The competition authorities have, since April 2013, had the authority to conduct market inquiries and have in fact already initiated market enquiries into the Health and Liquefied Petroleum Gas markets.

No firm may engage in cartel conduct (price-fixing, market allocation or collusive tendering) and minimum resale price maintenance. Any other horizontal or vertical practices may be prohibited if their anti-competitive effect outweighs any pro-competitive gain.

South Africa has a Corporate Leniency Policy where a cartel member may be given immunity for its participation in a cartel upon fulfilling certain requirements. This policy applies to firms and not individuals involved in cartel conduct. Civil and criminal sanctions for individuals involved in cartel conduct have been introduced by the Amendment Act, No. 1 of 2009 (Amendment Act). The Amendment Act is signed, but not yet in force.



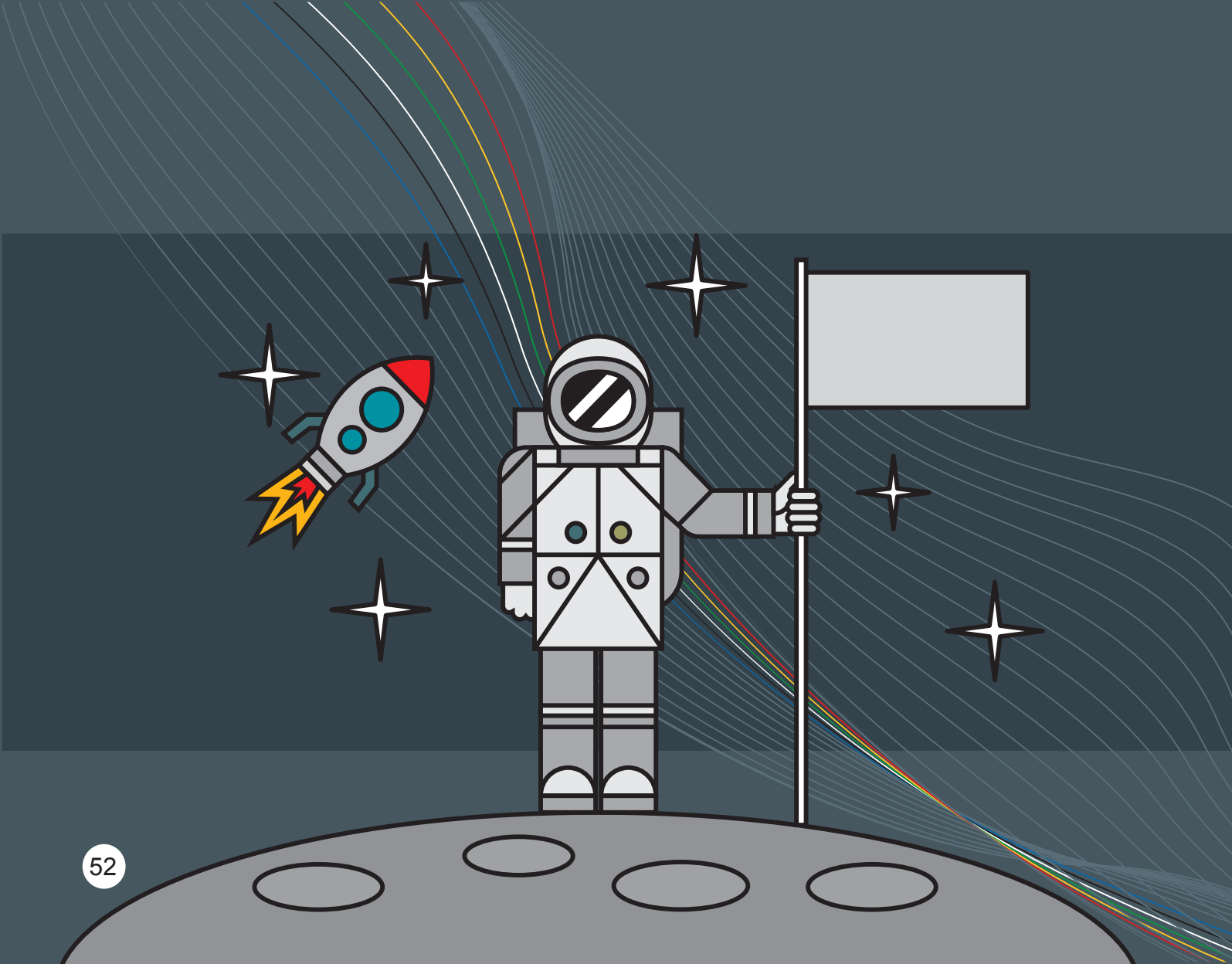
Dominant firms may not charge an excessive price, refuse to give a competitor access to an essential facility or engage in any other exclusionary act where the anti-competitive effect of that act outweighs any pro-competitive gain. Dominant firms may also not engage in prohibited price discrimination.

Exemptions from the Competition Act may be granted in limited circumstances. Parties need to apply for an exemption.

Firms that contravene the Competition Act may face administrative penalties of up to 10% of turnover in South Africa and exports from South Africa for the firm's preceding financial year.

A merger (as defined) may require mandatory notification to the competition authorities if the merger meets prescribed financial thresholds. The South African merger assessment has unique public interest considerations. These look at many factors including: particular sectors or regions, employment, small businesses and historically disadvantaged persons.

**“ The Competition Act regulates restrictive horizontal and vertical practices, abuses of dominance and merger control. ”**





# INTELLECTUAL PROPERTY

Bernadette Versfeld

The identification, protection, enforcement and commercialisation of intellectual property require effective management. Intellectual property, as it operates within the South African context, is of particular importance to the success of any business.

South Africa is a signatory to various international conventions that pertain to intellectual property. These conventions provide a blueprint for legislation and practices for the safeguarding of intellectual property both locally and internationally.

**“ Intellectual property, as it operates within the South African context, is of particular importance to the success of any business. ”**

Fundamental to the discussion of intellectual property is the analysis of its various forms, including trademarks, registered designs, copyright and patents. It is also important to know what steps are required to protect each of these forms of intellectual property. Registration is recommended, particularly in those territories which do not protect common law rights.

Recent changes to the Consumer Protection Act, No. 68 of 2008, the Companies Act, No. 71 of 2008, and the Exchange Regulations impact intellectual property significantly. For example, prior approval from the Reserve Bank is required for all transfers of ownership in intellectual property off-shore.

Also at issue are counterfeiting and copyright piracy, two of the biggest threats posed to intellectual property with significant implications on international relations. With the advancement in technology, the proliferation of piracy and infringement of intellectual property rights remain a challenge.



**\*Terms and conditions apply.**



# 15 CONSUMER PROTECTION

Candice Meyer

The Consumer Protection Act, No. 68 of 2008 (CPA), aims to create a fair, accessible and sustainable marketplace by prohibiting unfair market and business practices; promoting responsible consumer behaviour; and harmonising the laws governing the protection of consumers. It applies, except in limited instances, to all transactions involved in the supply and promotion of goods or services in South Africa, entered into in the ordinary course of business, for consideration.

The CPA is principally directed at protecting vulnerable consumers. The term “consumer” includes natural and juristic persons provided the juristic person’s asset value or annual turnover, at the time of the transaction, does not equal or exceed ZAR2 million. An exception exists in the case of franchises and no-fault liability for harm caused by goods, the provisions relating to which also apply to consumers above the threshold.

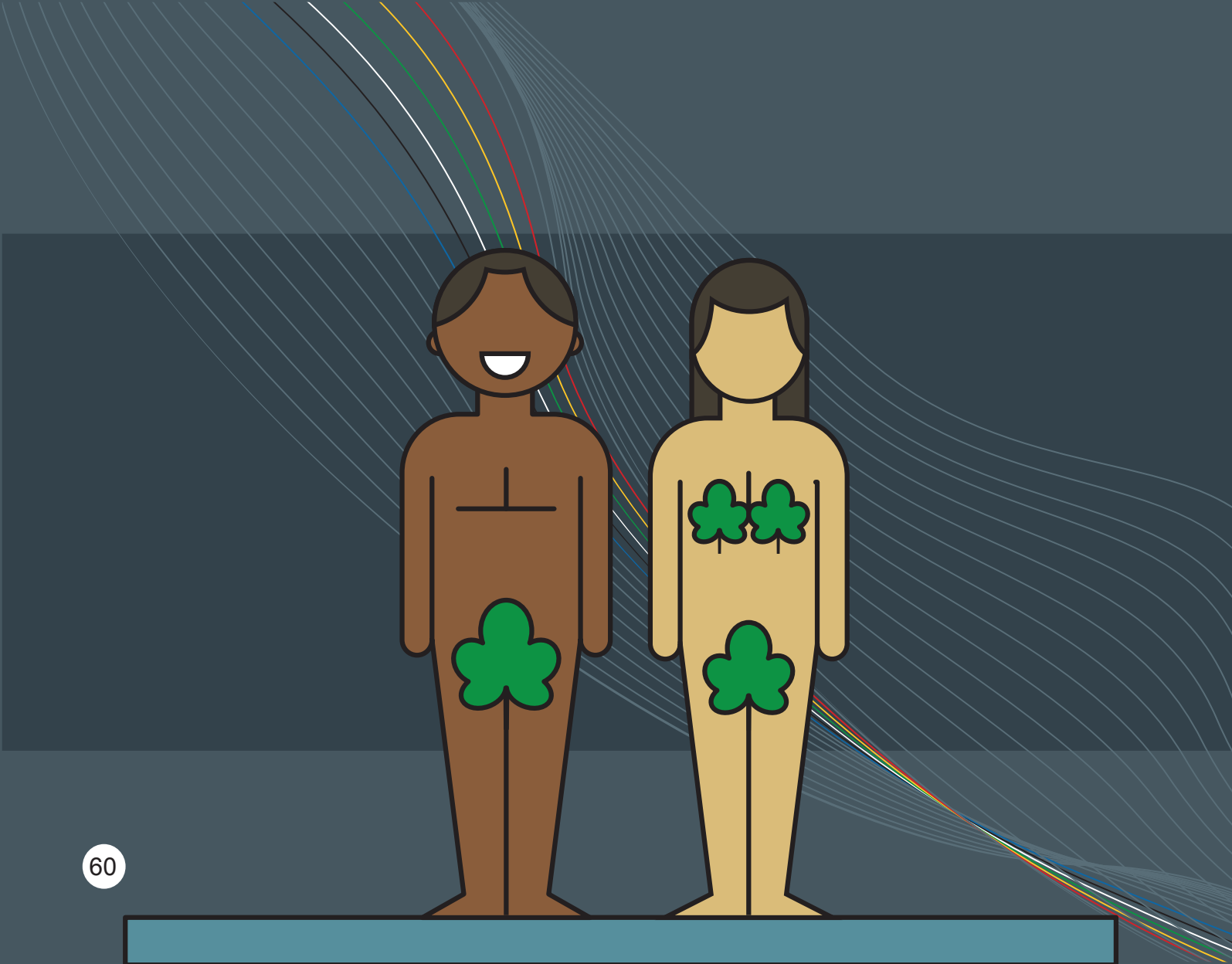
The rights entrenched by the CPA include the rights to equality; privacy; disclosure and information; fair and responsible marketing; fair and honest dealing; fair, just and reasonable terms and conditions; and fair value, good quality and safety.



It provides for the imposition of no-fault liability on a producer, importer, distributor and retailer, who will be liable for any harm caused by unsafe goods; failure, defect or hazard in any goods; or inadequate warnings or instructions relating to hazards associated with goods, unless such person or entity can successfully prove one of the statutory defences.

The CPA is enforced by the National Consumer Commission. The National Consumer Tribunal has jurisdiction to deal with complaints. Contraventions may, in certain instances, result in a conviction or the imposition of a fine, or both. This does not exclude the possibility of liability for civil damages.

“ **The term “consumer” includes natural and juristic persons provided the juristic person’s asset value or annual turnover, at the time of the transaction, does not equal or exceed ZAR2 million.** ”





# PROTECTION OF PERSONAL INFORMATION

Pamela Stein and Candice Meyer

South Africa's first comprehensive data protection law, the Protection of Personal Information Act (POPI), was assented to on 19 November 2013 and its commencement date is to be proclaimed. Based on European data protection law, POPI regulates every aspect of the processing of personal information, from its collection to its destruction.

“ POPI renders non-compliant processing of personal information unlawful and subject to a fine, criminal prosecution and/or imprisonment. ”

POPI aims to give full effect to the right to informational privacy which is a distinct element of the right to privacy protected in the Constitution of the Republic of South Africa, 1996. It provides substantive content to this right by establishing a threshold of minimum conditions for the processing of personal information and providing individuals with rights and remedies to protect their personal information.

Another reason for POPI is to bring South Africa's data protection law in line with those of its major trading partners who have had data protection laws for many years. It applies to all kinds of processing in both the private and public sectors and recognises a limited number of exceptions. POPI renders non-compliant processing of personal information unlawful and subject to a fine, criminal prosecution and/or imprisonment.

The lengthy and detailed deliberations on POPI have allowed the drafters to draw on the experience of data protection regulators in the European Union. This includes the comprehensive review of data protection law which resulted in the European Union Draft Regulation on Data Protection. A number of proposals in this draft regulation are included in POPI.





# BROAD-BASED BLACK ECONOMIC EMPOWERMENT

Safiyya Patel

Black Economic Empowerment (BEE) is a process driven by Government through legislation and policy, which aims to remedy historical racial imbalances and achieve economic transformation by increasing the number of black people who participate in the mainstream South African economy.

BEE is fundamental to economic activity in South Africa and encourages the opening up of the economy to those previously excluded by the system of apartheid through a mix of economic persuasion and incentive.

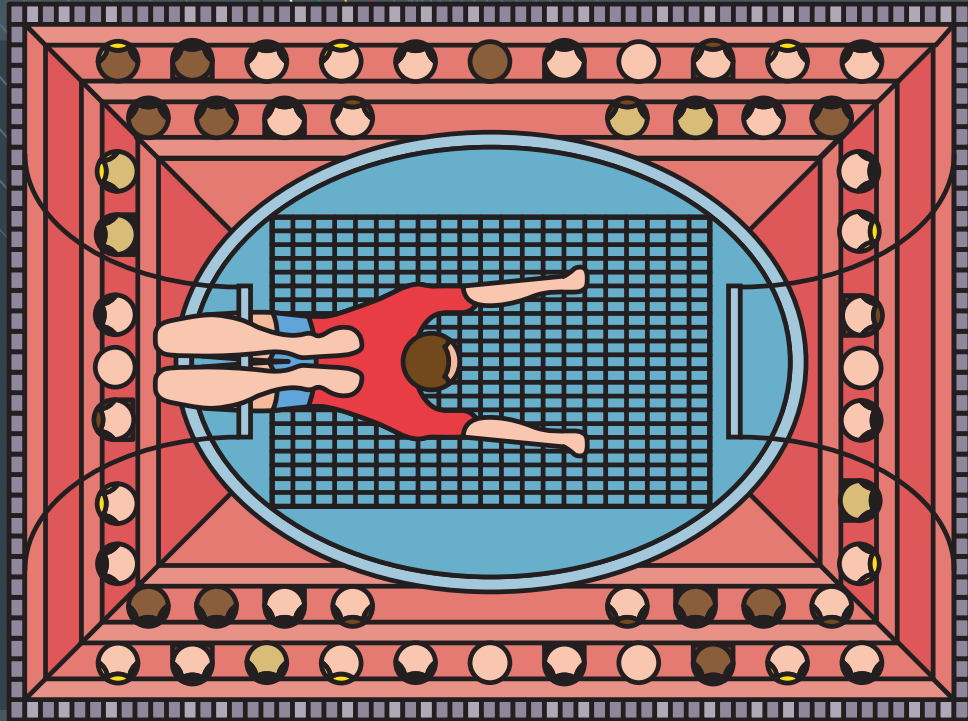
The Constitution of the Republic of South Africa, 1996 (Constitution), provides a constitutional mandate for BEE, as it authorises measures aimed at advancing categories of persons disadvantaged by unfair discrimination.



The Broad-Based Black Economic Empowerment Act, No. 53 of 2003 (B-BBEE Act), was promulgated in April 2004. It does not set any targets for BEE but rather provides a framework for the implementation of BEE initiatives and for the Minister of Trade and Industry to publish Codes of Good Practice (Generic Codes).

Enterprises that require licences, concessions or authorisations from the State; wish to provide goods and services to organs of State or public entities; wish to acquire State-owned enterprises; or wish to enter into partnerships with the State, must provide evidence of their B-BBEE status as measured under the Generic Codes.

**“ BEE is fundamental to economic activity in South Africa and encourages the opening up of the economy to those previously excluded by the system of apartheid through a mix of economic persuasion and incentive. ”**





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## INSURANCE

Johan Henning and Ernie van der Vyver

The South African insurance industry boasts a high level of development and sophistication and is characterised by strong competition that is enlivened by the presence of a large number of major insurers, reinsurers, brokers and intermediaries.

“ **South African insurance law has its roots in Europe’s commercial law and, due to its history, both Roman-Dutch and English law are considered to be the primary common law sources of South African insurance law.** ”

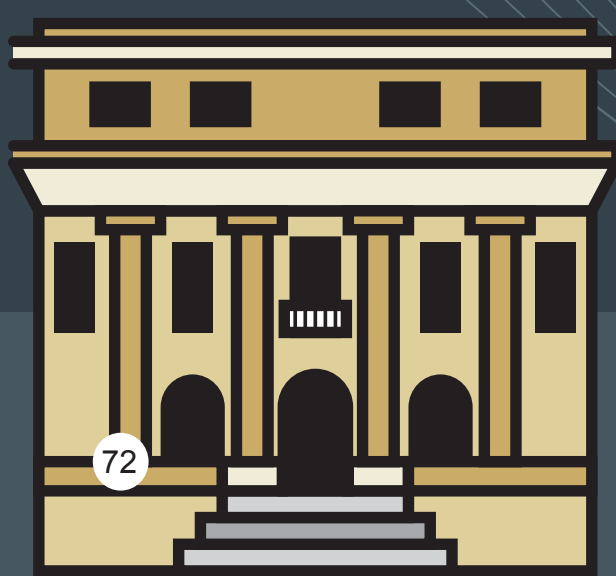
Both the long- and short-term insurance industries are comprehensively and firmly regulated and have good links with the major insurance markets of the United States, the United Kingdom and Europe. Certain major European and US insurance and reinsurance companies (notably Lloyd's of London) maintain domestic offices in South Africa.

The South African long-term insurance industry, in particular, enjoys international recognition for its pioneering product development and innovative product marketing strategies.

South African insurance law has its roots in Europe's commercial law and, due to its history, both Roman-Dutch and English law are considered to be the primary common law sources of South African insurance law.

Various Acts of Parliament apply specifically to the insurance industry. The most important of these is the Long-term Insurance Act, No. 52 of 1998 (LTI Act), and the Short-term Insurance Act, No. 53 of 1998 (STI Act).

Significant changes to the insurance landscape will be taking place over the next few years and insurers, brokers and intermediaries will be significantly affected. The interpretation of inter-relating acts will require special attention to avoid transgression.



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# DISPUTE RESOLUTION

David Scholtz, Vlad Movshovich, Sarah McKenzie,  
Matthew Kruger and Jasmine Coyle

South Africa's relatively stable political environment and adherence to the rule of law make it an attractive destination for foreign investment.

Under the Constitution of the Republic of South Africa, 1996 (Constitution), the judicial authority of South Africa vests in the courts, which are independent from the executive and the legislative arms of Government. The Constitution makes provision for the Constitutional Court, the Supreme Court of Appeal, the High Court (which has different divisions), Magistrate's Courts (which are lower courts) and any other court recognised or established in terms of an Act of Parliament. These courts all differ in structure, jurisdiction and function. South Africa's legal system also allows parties to institute and defend claims before independent courts, arbitral tribunals, mediators and conciliators.

The civil dispute resolution procedure in general, and the application and action proceedings in particular, differ with regard to the nature and scope of the cases brought before the various South African courts. These aspects also influence the duration of the different proceedings, the nature of the pre-trial procedures and the handing down of judgments.



Alternative dispute resolution mechanisms such as arbitration may also be followed. Arbitration, if managed correctly, may present many advantages over court proceedings. Principally, arbitration may provide confidentiality; the ability for the parties to tailor the procedure to their own needs; country neutrality; and relative cost-effectiveness since litigation is fairly costly.

The enforceability of South African judgments in foreign countries is governed by the laws of those countries. Similarly, foreign judgments are not directly enforceable in South Africa but constitute a cause of action which can be pursued in South African courts.

**“ South Africa’s legal system also allows parties to institute and defend claims before independent courts, arbitral tribunals, mediators and conciliators. ”**





# PUBLIC LAW

Glenn Penfold and Kerry Williams

The exercise of a public power or the performance of a public function is governed by, and judicially reviewable in accordance with, the rule of law. Administrative action is also judicially reviewable if it is not lawful, reasonable and/or procedurally fair. This ensures significant accountability and transparency vis-à-vis the State in South Africa.

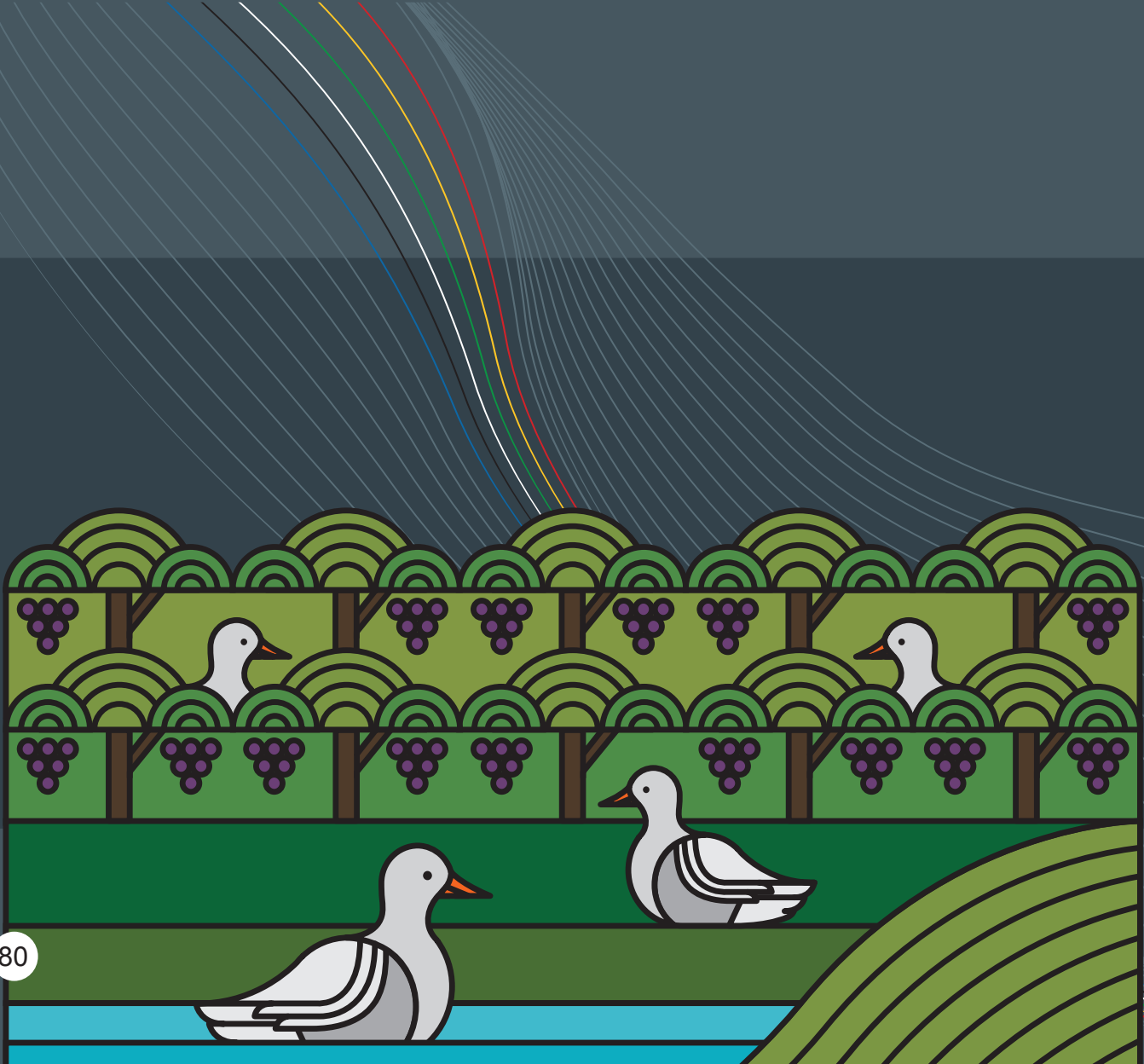
In addition to the possibility of approaching a court for judicial review there are other legislative protections offered to the public, including the rights to written reasons, access to information and sound public financial management.

**“ Organs of State are required to conduct their procurement processes by allocating certain preference points to bidders, ensuring that tenders are evaluated on price and the bidders’ black economic empowerment status. ”**

The way that the State procures goods and services is particularly well regulated. This must be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. These principles hold the State to high standards which ensures competitive bidding processes; fair treatment of tenderers; and value for money.

The South African legal system also makes allowance for a form of preferential procurement. Organs of State are required to conduct their procurement processes by allocating certain preference points to bidders, ensuring that tenders are evaluated on price and the bidders' black economic empowerment status. There is also the possibility that preference is given to bidders who meet certain local production and local content requirements.

Public-private partnerships have become relatively common in South Africa. The procurement procedure for public-private partnerships must include a transparent, competitive bidding process and an evaluation of bids which ensures that they offer value for money.





# ENVIRONMENTAL LAW

Marius Diemont, Garyn Rapson and Kirsty Kilner

South Africa's considerable and diverse natural resources provide a wide array of investment possibilities, from alternative energy to fishing and eco-tourism.

South Africa is concerned about protecting its rich natural resources and promoting their sustainable use. To this end, the country is a signatory to various international conventions and treaties. In addition, the Constitution of the Republic of South Africa, 1996, includes the right to a healthy environment and promotes sustainable development. Activities that have an impact on the environment are, as a result, regulated.

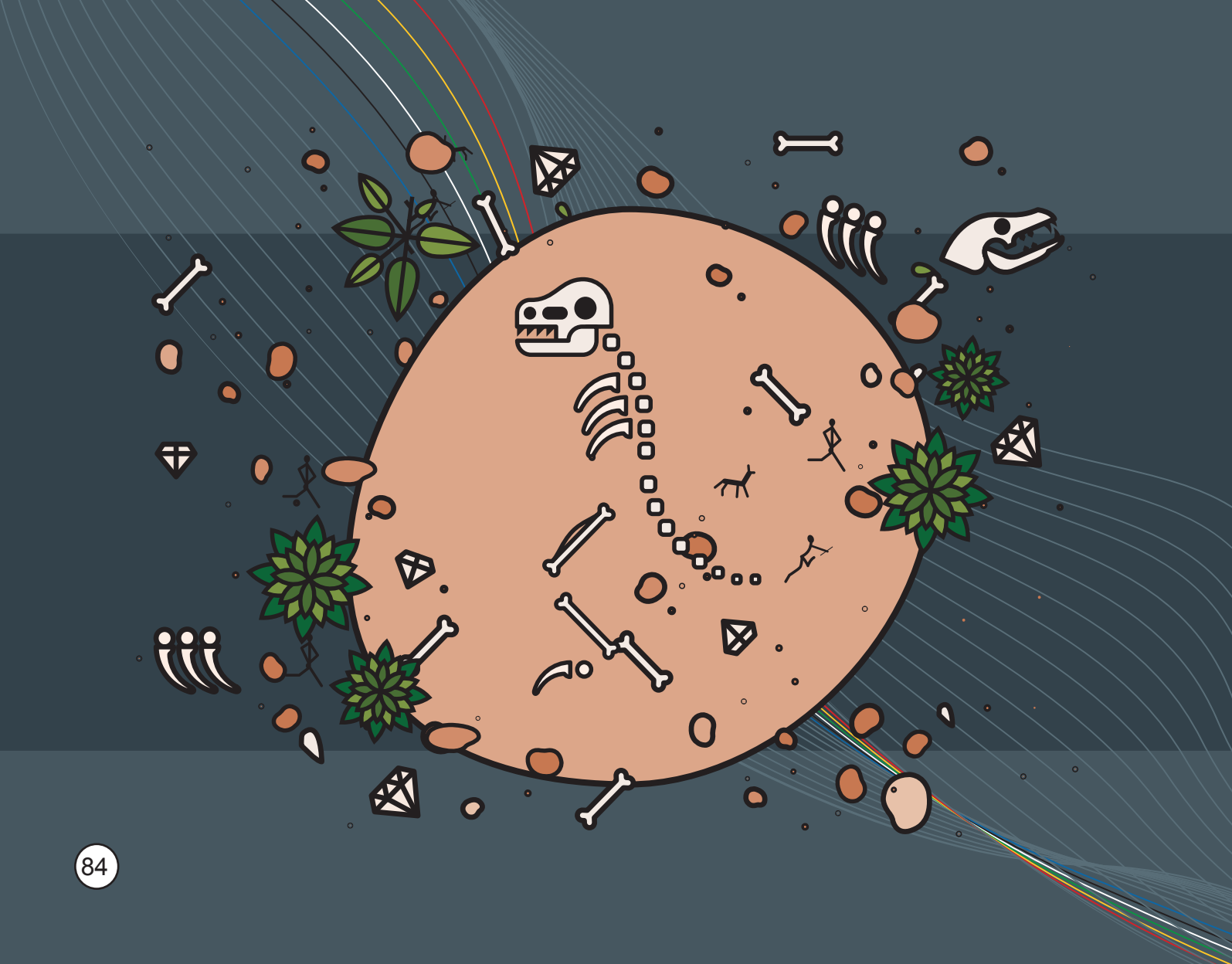
Over the course of the last two decades, a plethora of progressive environmental legislation has been promulgated in South Africa. This legislation attempts to strike a balance between encouraging investment and growth, and the need to protect the environment for present and future generations.

In addition, recent legislative amendments implementing the "one Environmental System" are aimed at ensuring a streamlined approach to the application and granting of environmental authorisations. The Department of Environmental Affairs is currently the lead agent for environmental management and is increasing its efforts to ensure compliance, while undertaking enforcement measures.



As many business activities have some degree of environmental impact, whether positive or negative, it is imperative to be aware of one's environmental obligations when conducting business in South Africa.

**“ This legislation attempts to strike a balance between encouraging investment and growth, and the need to protect the environment for present and future generations. ”**





# **MINING & MINERAL LAW**

Manus Booysen, Rita Spalding, Kenneth Coster, Kate Collier  
Garyn Rapson and Beatrix Hugo

South Africa boasts an abundance of mineral wealth and offers considerable investment opportunities.

Prior to 2004 the right to mine was associated with land ownership rights. The legislation has since been revised and now the State exercises sovereignty over all mineral and petroleum resources within the country as they are considered the common heritage of all South Africans.

The current legislation endeavours to promote economic growth, equitable access, employment and social and economic advancement for all citizens. Under the custodianship of the State, the Minister of Mineral Resources may grant or refuse any application for prospecting and mining rights.

**“ As a prerequisite to renewal, the holder of a prospecting or mining right must fulfil several obligations. Failure to comply with a variety of obligations could result in cancellation or suspension of the right. ”**

The application process is strict and reflects the Government's policy to enforce black economic empowerment requiring at least 26% ownership by historically disadvantaged South Africans. Applicants must comply with environmental and rehabilitation legislation and adhere to various health and safety regulations. It is also imperative that the applicant gives due consideration to the rights, interests and socio-economic development of the area in which it expects to operate.

Current legislation allows for the renewal of prospecting and mining rights. In the case of prospecting rights, they may not extend beyond five years and may be renewed once for up to three years, and in the case of mining rights, they may not extend beyond 30 years and may be renewed for further periods of up to 30 years each. As a prerequisite to renewal, the holder of a prospecting or mining right must fulfil several obligations. Failure to comply with a variety of obligations could result in cancellation or suspension of the right.

Occupational health and safety on mines is governed by the Mine Health and Safety Act, No. 29 of 1996, which requires that employers ensure that persons on mines are able to work safely and without risk to their health. Failure to comply with this Act could result in the imposition of fines by the regulator or criminal prosecution.



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# REAL ESTATE LAW

Mark McIntosh

South African property law provides for various types of registered land title including freehold title, sectional title, and long lease. Ownership may be held by a natural person, partnership, company, close corporation, trust, association, or any other recognised entity. The country has one of the finest land registration systems in the world. The precise location, status and identity of any given surveyed land parcel are unquestionable, contributing to secure land ownership.

Ownership by foreign legal entities is subject to certain restrictions, notably those contained in the Companies Act, No. 71 of 2008.

Save for some formalities contained in various laws, including the Alienation of Land Act, No. 68 of 1969, and the Occupational Health and Safety Act, No. 85 of 1993, South African law does not prescribe the form or content of an agreement of sale of land. All disposals of immovable property are subject to transfer duty or VAT. Real security may be gained from encumbering land with a mortgage bond(s).

Transferring ownership or limited real rights over land requires the registration of a deed under the Deeds Registries Act, No. 47 of 1937. The registration process is driven by attorneys who have qualified as conveyancers. The average time to register a transaction once a deed of sale has been signed and has become unconditional is between two to four weeks.



Pertinent developments in real estate law include the:

- new Real Estate Investment Trusts tax dispensation, which aims to align the country's listed property sector with international standards;
- Expropriation Bill, which seeks to expedite land reform in South Africa;
- Property Valuation Bill which provides for the appointment of a valuer-general and the valuation of land identified for land reform, for expropriation, or for acquisition by the State; and
- proposed amendment to the Restitution of Land Rights Amendment Bill, which will extend the time frame within which claims for restitution can be made.

“ **South African property law provides for various types of registered land title including freehold title, sectional title, and long lease.** ”

ON AIR





# **MEDIA & COMMUNICATIONS, TELECOMMUNICATIONS & BROADCASTING LAW**

Dario Milo, Nozipho Mngomezulu and Okyerebea Ampofo-Anti

Broadly speaking, the communications industry in South Africa includes media, telecommunications, broadcasting and e-commerce.

The legislation and common law that regulates media in South Africa is subject to the Constitution of the Republic of South Africa, 1996, and the rights it upholds. The most salient of these are the rights to freedom of expression, dignity and the right to privacy.

While the law seeks to uphold these rights, they are not absolute rights. Therefore, in certain cases, an infringement of one or other right may be justified if it involves the protection of another more important right or is for a legitimate cause.

**“ Except for services that are exempted, no person may provide a broadcasting service, electronic communications service or electronic communications network service without a licence. ”**

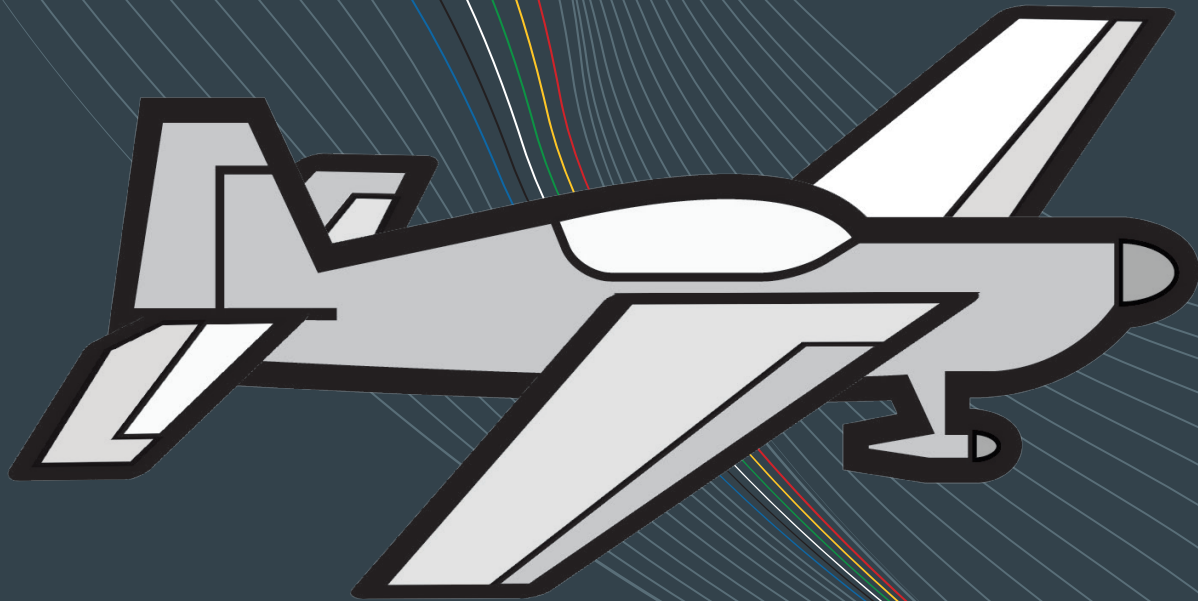
Further legislation pertaining to the protection of privacy includes: the Protection of Personal Information Act, which addresses South Africa's need for data protection; and the Regulation of Interception of Communications and Provision of Communication-Related Information Act, No. 70 of 2002, which seeks to regulate the interception of certain communications and the provision of certain communication-related information.

Telecommunications and broadcasting services in South Africa are regulated by the Electronic Communications Act, No. 36 of 2005 (ECA). Except for services that are exempted, no person may provide a broadcasting service, electronic communications service or electronic communications network service without a licence.

The ECA makes provision for the licensing of three categories of services:

- electronic communications network services, which involve the roll out and operation of electronic communications networks and the provision of electronic communications network services;
- electronic communications services, which involve the provision of electronic communications services to customers over a network; and
- broadcasting services, which involve the provision of broadcasting services.

There are also legislative measures to ensure the safe practice of e-commerce and promote meaningful black participation in the information communications technology sector.





# AVIATION LAW

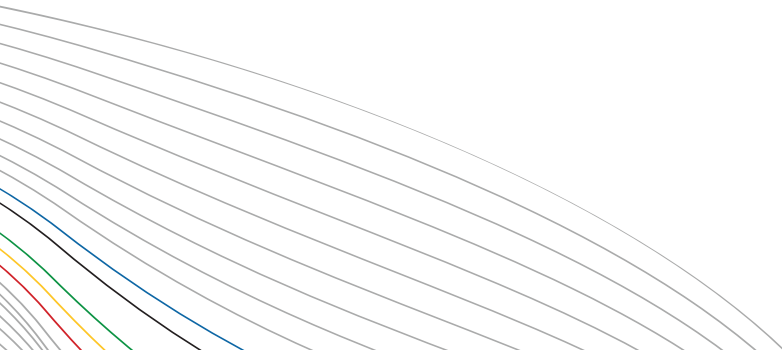
Haydn Davies and Neerasha Singh

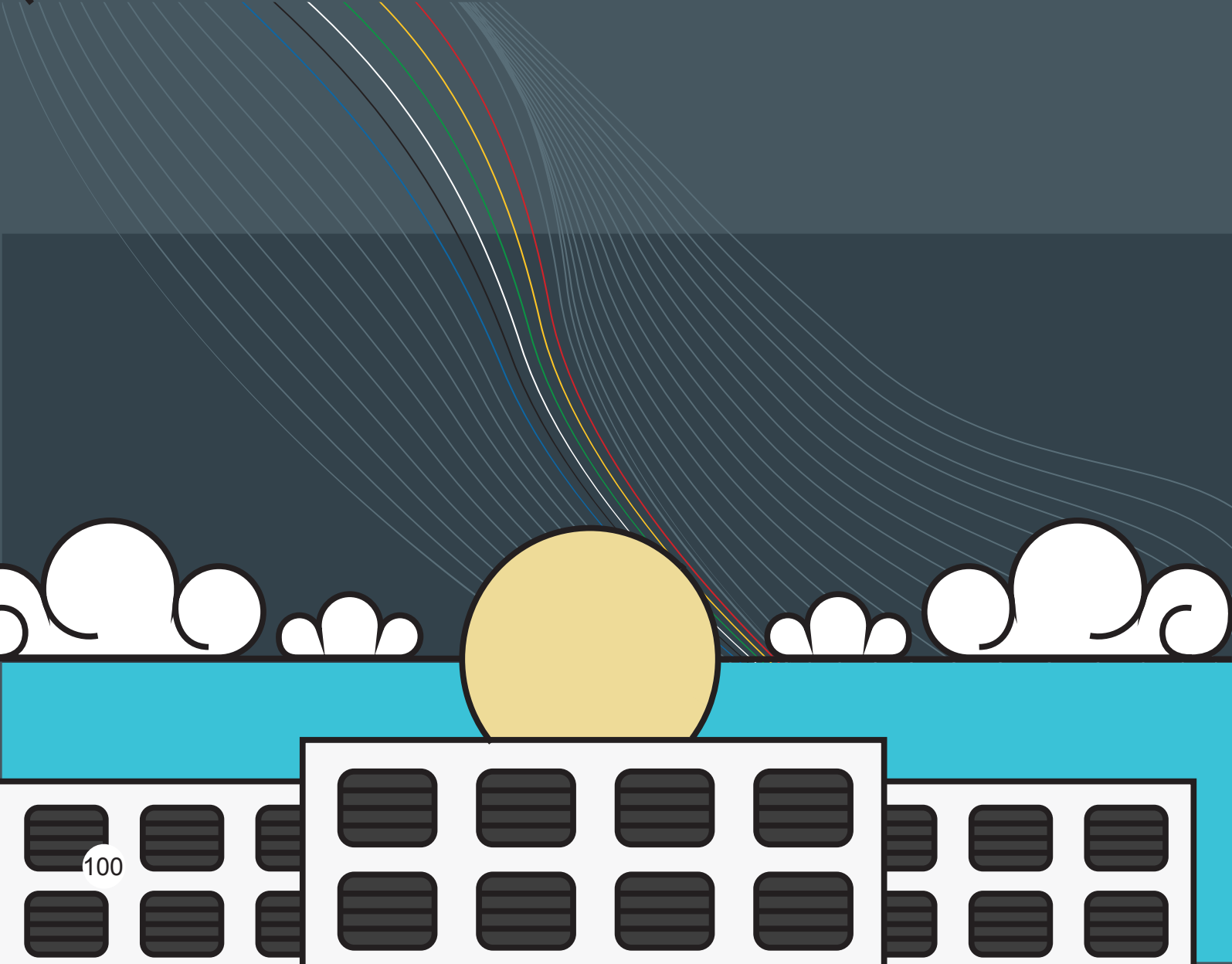
South Africa has a well-developed body of aviation law that is continually updated in keeping with international standards and recommended practices. As such it provides a solid framework for a vibrant local aviation community.

Aviation law comprises fields of public and private international law, as well as, in the narrower sense, the national law of South Africa. It includes parliamentary and subordinate legislation on aviation matters, multilateral international conventions and recommendations of international bodies on aviation matters (some of which have the force of law in South Africa), as well as the common law as applied to situations particular to aviation.



“ South Africa has a well-developed body of aviation law that is continually updated in keeping with international standards and recommended practices. ”







# PROJECT DEVELOPMENT & FINANCE

Brigette Baillie

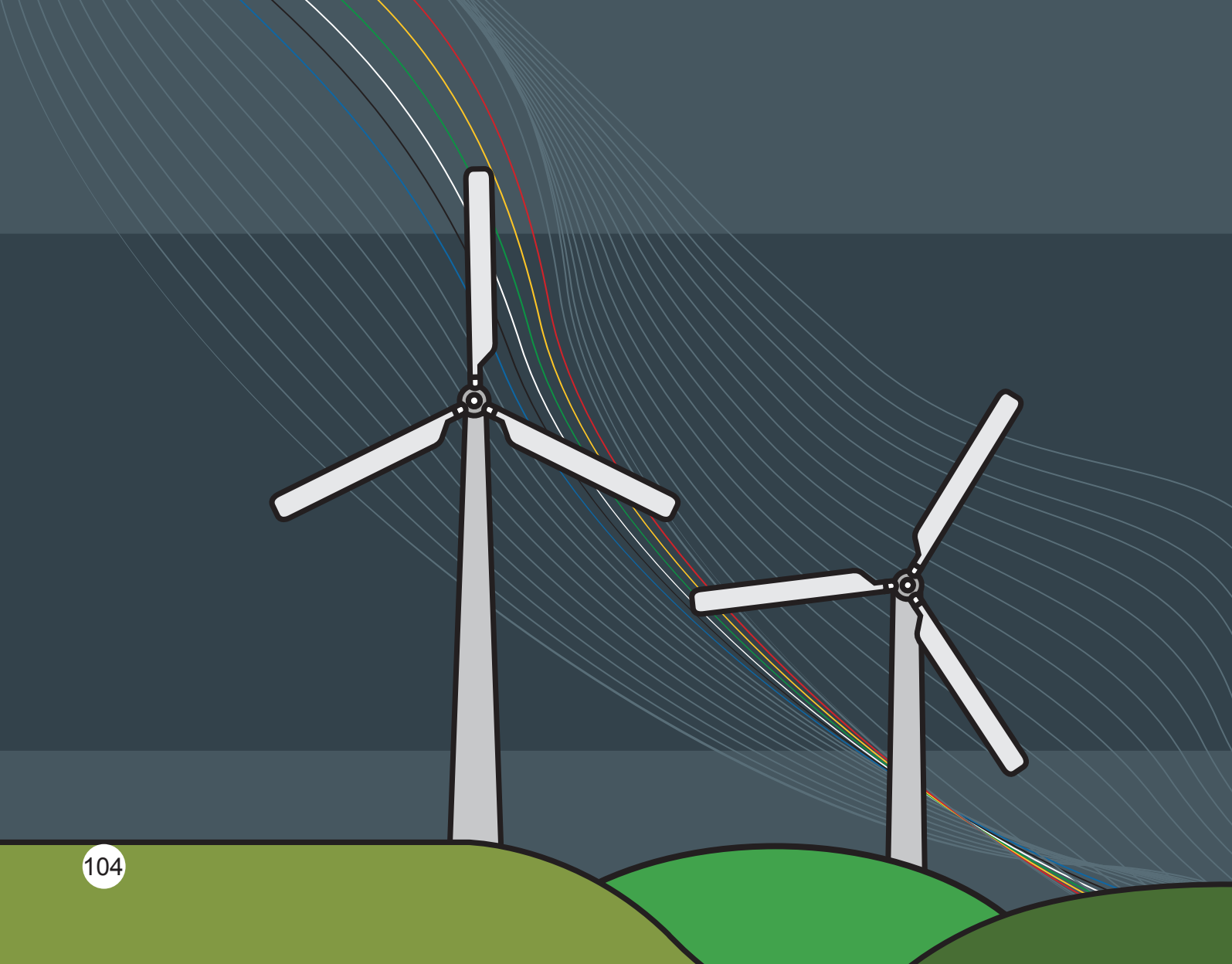
Project financing involves raising finance for the design, construction and development of a project's infrastructure and the procurement of any equipment and assets required for the operation of the project. This is done in a way that the debt and equity capital and interest, as well as all returns on the share capital, are repaid from future cash flows of the project.

The introduction of public-private partnership (PPP) transactions in 2001 caused project financing to come of age in South Africa. The Public Finance Management Act, No. 1 of 1999, and the regulations that the National Treasury published thereunder govern PPPs. Through PPPs, public and commercial interests look to banks to fund infrastructure development.

PPPs were initially introduced to fund prisons and toll roads, which depended on State occupancy payments or traffic volumes with concomitant toll fees, to service and repay debt over periods of 20 to 30 years. However, the use of project financing has recently been extended to greenfields mining, oil and gas, and energy projects.

In the absence of large corporate guarantees or corporate assets, a combination of debt and equity is used instead of solely relying on project cash flows that may be subject to market fluctuations. Banks' risk may be mitigated through a variety of mechanisms including the introduction of a strategic equity partner who has interest in the development and exploitation of the resource. Project companies may also consider raising junior or mezzanine debt to improve returns to equity shareholders and to reduce the risk to senior debt providers.

“ “ **Project financing involves raising finance for the design, construction and development of a project's infrastructure and the procurement of any equipment and assets required for the operation of the project.** ” ”





# RENEWABLE ENERGY

Marius Diemont and Rainer Nowak

South Africa is rich in alternative forms of energy. They include solar, biomass, hydro-power, biogas, landfill gas and wind energy. In line with South Africa's commitment to sustainable development, there has been a strong shift in focus from primary energy resources, such as coal and oil, to alternative energy resources.

In August 2011, the South African Government launched its Renewable Energy Independent Power Producers (RE-IPP) Procurement Programme by issuing a Request for Qualifications and Proposals. Prospective participants need to navigate the policy, legal and regulatory framework applicable to the programme. Government's objectives for the programme go beyond electricity generation and include social and economic development and empowerment, with a particular emphasis on local content and job creation.

The key role players in this programme include the Minister of Energy and the Department of Energy who fulfil the role of custodians of energy resources in South Africa. The role of buyer of the electricity generated by independent power producers falls to Eskom, which also acts as National Transmission Company and Distributor. The National Energy Regulator of South Africa acts as licensing authority.

**“ The role of buyer of the electricity generated by independent power producers falls to Eskom, which also acts as National Transmission Company and Distributor. ”**



Investors in renewable energy have to comply with procurement legislation as well as company, environmental, land and exchange control legislation.

There have been four procurement rounds in the process thus far. The first involved 28 projects generating 1 415 MW of electricity, the second involved 19 projects generating 1 044 MW of electricity, and the third involved 17 projects generating 1 472 MW of electricity. Seventy-seven bids were submitted in the fourth round and 13 successful projects were announced during April 2015. Following the success of the RE-IPP Procurement Programme, the Government is looking to commence the procurement of power from cogeneration (paper and pulp; sugar bagasse; waste heat), natural gas and coal sources in the coming year.

While the renewable energy industry in South Africa is highly regulated, it offers an array of investment possibilities. A study undertaken by a top US-based research body lauded South Africa as breaking new ground in clean energy development for the entire African continent. The study ranked South Africa as the ninth-leading destination for clean energy investment and the fastest-growing green energy market among the G20 economies.





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## **BUSINESS RESCUE**

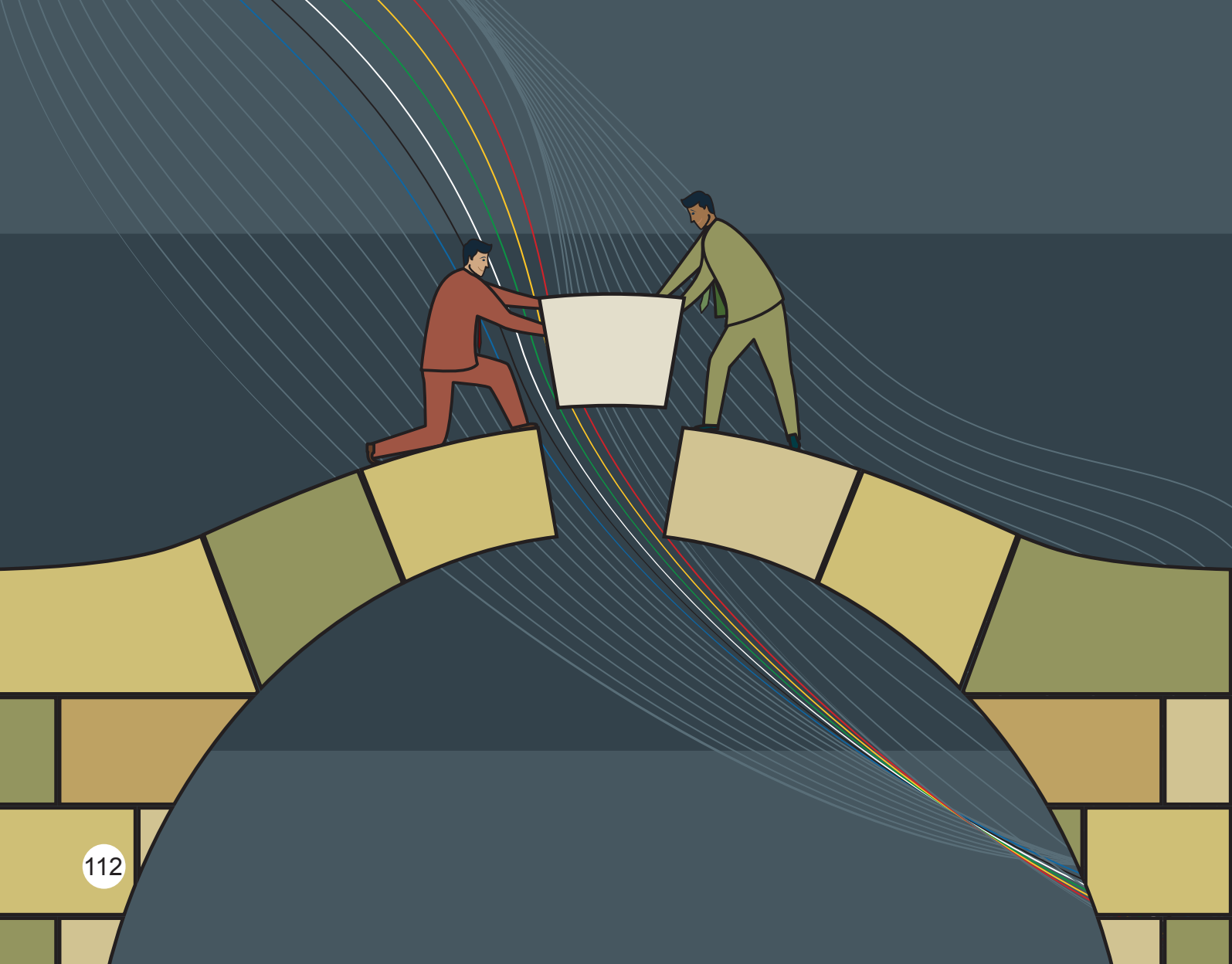
Etienne Swanepoel

Liquidation or winding up, compromise with creditors and business rescue are mechanisms available to financially ailing companies in South Africa. However, the business rescue process is a relatively new mechanism in South African law.

“ **Liquidation or winding up, compromise with creditors and business rescue are mechanisms available to financially ailing companies in South Africa.** ”

The Companies Act 71 of 2008 (the “Act”) introduced a new “business rescue” process based on Chapter 11 of the US Bankruptcy Code, Bankruptcy Reform Act 1978, aimed at facilitating the corporate rescue and rehabilitation of companies that are financially distressed. Previously, the Companies Act 61 of 1973 provided for judicial management, a regime which proved unpopular and was infrequently used.

Business rescue broadly involves the temporary supervision of the company and of the management of its affairs, business and property, and a temporary moratorium on the rights of claimants against the company or against property in the company’s possession while a plan to rescue the company is approved and implemented.





# GOOD CORPORATE CITIZENSHIP

Odette Geldenhuys

Investing and doing business in South Africa take place in a human rights context. The term “human rights” is a shorthand description for the relatively complex sets of laws, codes, approaches and lived experience which inform doing business in South Africa. Business is part of society, not apart from it, and as such it needs to be seen as part of the solution to social obstacles. The social responsibility of business is thus not optional but mandatory.

“ Investing and doing business  
in South Africa take place in  
a human rights context. ”



The overarching framework for the human rights context is the South African Constitution, Act 108 of 1996, the highest applicable law in South Africa. All other laws and best practice guidelines must adhere to it. The Constitution guarantees a number of rights, relevant within the environment of doing business. Moreover, the Constitution recognises that corporations as juridical persons are bound by fundamental rights.

Various laws contain detailed provisions on these constitutional rights and there is also legislation that governs corporate social responsibility. Additionally, the King Code of Corporate Governance, which integrates governance, strategy and sustainability, reflects a value system based on the social responsibility of business.

It is against this background that the relevance of the Guiding Principles on Business and Human Rights must be understood in the South African context. While the Guiding Principles provide guidelines for both states and business, the focus here is on the guidelines pertaining to business. The Guiding Principles for the first time provide a language and an analytic framework to understand the scope of business responsibility for human rights as distinct from the state responsibility for rights. Understanding, implementing and embracing the Guiding Principles is a human rights opportunity for business.





# OIL & GAS

John Smelcer and Jonathan Veeran

Although historically a mining country, South Africa is poised to transform into a petroleum jurisdiction. This is due to the relative recent discovery of potentially large-scale onshore unconventional gas reserves and the expectations of substantial near-term offshore crude oil and gas discoveries.

This change presents substantial investment opportunities across the value chain, including in the upstream, for oil and gas investors in South Africa. To foster and enable this investment and the development of the oil and gas industry, South Africa's government has embarked on a series of legislative and regulatory amendments and changes in recent months.

The South African petroleum industry is primarily regulated under the Mineral and Petroleum Resources Development Act, 2002 (the "MPRDA"). Chapter 6 of the MPRDA governs the granting of exploration and production rights, and the issuing of technical co-operation and reconnaissance permits.

The Liquid Fuels Charter subjects all licences for exploration and production in the country's offshore area reserve to a minimum nine per cent buy-in by HDSAs (historically disadvantaged South Africans). This measure aims to ensure a fair distribution of the wealth typically generated by oil and gas exploration.

The recent passing of the Mineral and Petroleum Resources Development Amendment Bill, 2013, amends a number of key provisions of the MPRDA. These recent developments should be seen as an attempt by the South African state to foster the rapidly growing oil and gas industry in South Africa.

**“ This change presents substantial investment opportunities across the value chain, including in the upstream, for oil and gas investors in South Africa. ”**

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