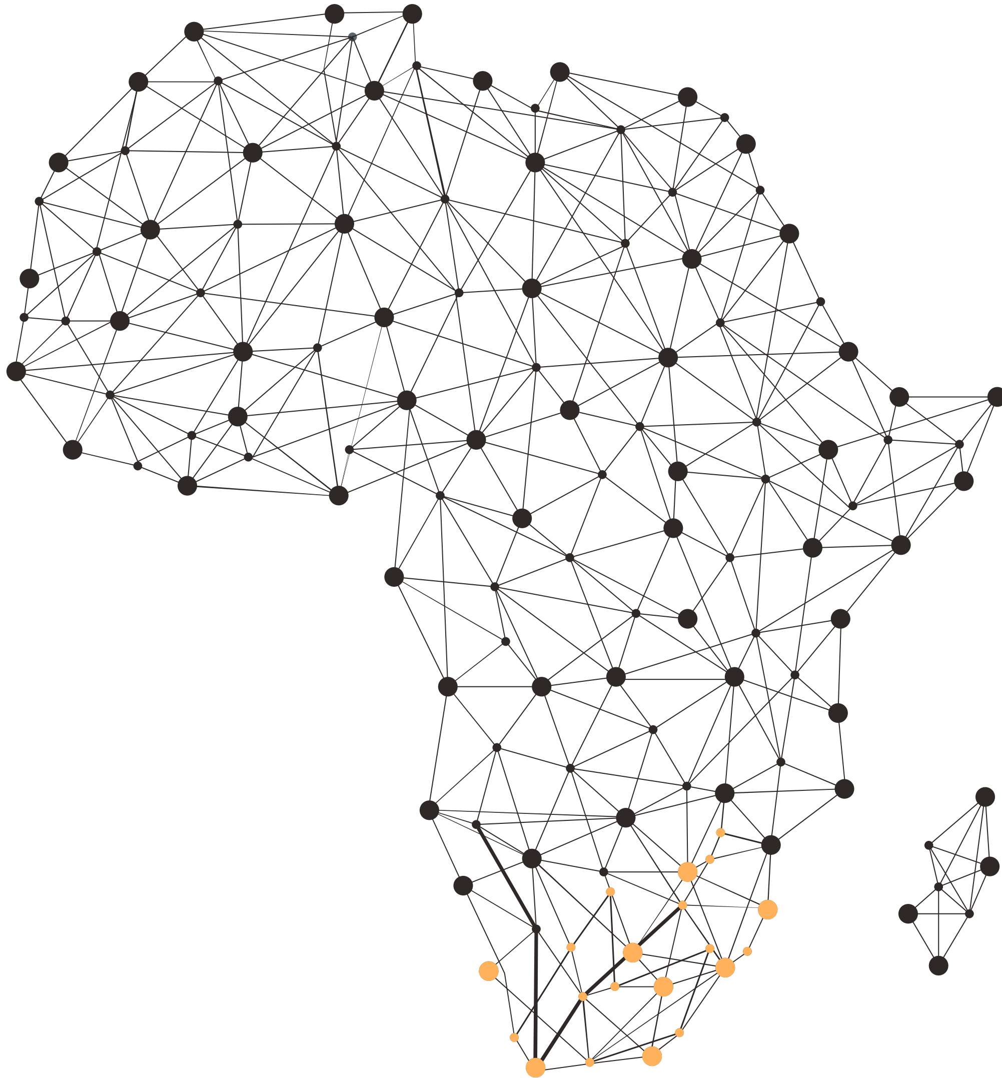
INTERGEST®
SOUTH AFRICA



# INVESTMENT GUIDE

## SOUTH AFRICA

Brochure

THE ART OF BEING LOCAL WORLDWIDE

A GUIDE FOR OVERSEAS INVESTORS SETTING UP BUSINESS IN THE REPUBLIC OF SOUTH AFRICA

inp.

ROWE

MANN+HUMMEL

Wood-Mizer
*from forest to final form*

VULKAN

# Navigating the risks of global supply chain disruptions

According to the World Economic Forum, South African exports are expected to continue to rise at least until the end of 2023, after having lost nearly USD15 billion in 2020 versus 2019. Services, metals and automotives are expected to show the highest gains, while South Africa expects to expand its target markets in China, the United States and Germany.

However, since the start of the Covid-19 pandemic, supply chain disruptions have wreaked havoc across the globe. Delays in shipments, congestion at ports, travel restrictions, cancelled orders, delayed export proceeds and forward exchange contract (FEC) exposures have had negative impacts on cash flows and made global trade increasingly unpredictable and difficult to navigate.

Unfortunately, these disruptions are expected to remain high well into 2023 amid ongoing Covid-19 restrictions around the world, China's sustained zero-Covid-19 policy causing tighter border restrictions, supply chain pressures caused by Brexit, and a harder push to develop more sustainable supply chain practices.

But uncertainty is a characteristic of the international business landscape in which supply chains operate and businesses looking to trade globally must be prepared to manage increased global-trade risks.

## Commercial or counterparty risk

Commercial or counterparty risk covers the party with whom our client is dealing and risks that would affect several areas, such as the company profile, financial standing, years of trading, ethics, quality of products and serviceability, exchange control and sanctions.

To mitigate this risk, it is important to do enhanced research, including site visits. If you are an importer, it is advisable to have a letter of credit to cover the quality of goods and payment obligation or import collections. If you are an exporter, advance payment or letters of credit and credit guarantee insurance for debtors are vital. Always do quality and quantity inspections and ensure you adhere to exchange control regulations.

## Sovereign or country risk

Sovereign or country risk comes in many forms. Anyone who faces sovereign or country risk is inevitably exposed to a foreign country in some way, and these risks may include sanctions, embargoes, liquidity challenges, social issues, transport or logistics, exchange control, the economy and products.

Manage risks by finding out as much as you can about the opportunity. Get feedback from international financial institutions about the respective country and have confirmed letters of credit for exporters or advance payments. Also do research on other payment methods, such as trade instruments, and consider how exchange control regulations will impact the opportunity.

## Bank risk

Banks play a critical role in international trade by providing trade finance products that reduce the associated risks. However, you must be informed fully of the bank's financial standing and country restrictions before you make a choice.

One can look to mitigate these risks by getting feedback about preferred banks from international financial institutions and transacting under confirmed letters of credit.

## Foreign exchange risk management

Foreign exchange risk management is a vital consideration for all cross-border transactions and activities. The extreme volatility in the rand since Covid-19 has highlighted the need for companies engaged in import and export markets to be aware of and manage and hedge their exposure to the foreign exchange market effectively. The traditional tool available to corporate risk managers who may want to limit the risk of currency volatility is an FEC, which is an agreement between two parties, usually a bank and the hedging entity, to exchange one currency for another at a predetermined rate in the future. The continued development of the currency derivatives market has also led to a multitude of option-based hedging strategies that offer companies alternative risk management tools. These strategies range from simple call or put options that allow full certainty and participation in favourable movements to a variety of combinations of varying degrees of complexity in exchange for an upfront premium. Hedging activities should be done within the framework of a clear hedging strategy and the company should understand these implications well.

As The Economist put it recently, 'the era of predictable unpredictability is not going away', so clients should, as their first point of contact, always consult their global specialists before entering new markets and territories.

To find how the Nedbank Business Banking Global Trade Team's expertise and wide-ranging portfolio of solutions can benefit your business, email Henry van Rooyen at HenryVa@Nedbank.co.za.

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# A GUIDE FOR OVERSEAS INVESTORS SETTING UP BUSINESS IN THE REPUBLIC OF SOUTH AFRICA

YEARS IN SOUTH AFRICA

**2003-2023**

INTERGEST SOUTH AFRICA (PTY) LIMITED
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# ABOUT US

## InterGest South Africa

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The InterGest organisation offers the most up-to date, cost effective and efficient method currently available for developing foreign markets.

InterGest services and systems are designed to assist the exporting company in the establishment and administration of a foreign branch, subsidiary or a direct selling organisation.

InterGest is an international coordinated system operating around the world through independent local offices, each having in-depth knowledge of the commercial and legal environment of their individual country as well as a clear understanding of the requirements and complexities of international trade.

The links between the InterGest local organisations ensure that the InterGest partner in the foreign country also has access to expert local advice in the exporter's own country.

This booklet contains a general guide to a number of aspects of South African law which are of interest to those abroad who wish to commence business or invest in South Africa. It should be appreciated that the topics covered by this booklet are so wide that the booklet itself can only provide a general indication of the issues raised by these topics. Anyone contemplating setting up business in South Africa should seek professional advice.

We hope you find this booklet informative and interesting and that it will provide you with sufficient information to identify the principal criteria that you should have in mind if you wish to set up business in South Africa.

InterGest is able to advise you in detail on all matters which are included in this booklet and to provide you with all the services which you may require in relation to operating a business in South Africa.

**The content of this brochure**

Is based upon the laws of South Africa unless otherwise expressly stated and is intended to provide general guidance only and should not be regarded as a substitute for taking legal advice.

**Although InterGest makes every reasonable effort to ensure the accuracy of this information**

We cannot accept responsibility for any loss or damage which might arise from reliance on the information contained herein. The information in this booklet is correct as at February 2022.

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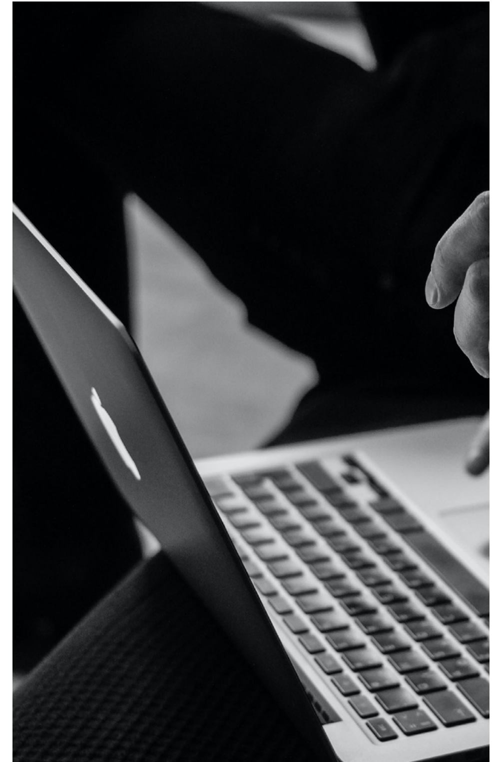
# INTRODUCTION

**There are many reasons why South Africa is a sought-after location in which to carry on business, make investments and to use as a base for strategic business activities on the African continent;**

## Accessibility

There are direct international flights into South Africa's International airports than of any other country in Africa.



## Currency Regulations

South Africa has minor exchange control or currency regulations. Capital can be freely imported into South Africa and repatriated together with profits and interest. The Reserve Bank's approval is required.

## No foreign investor rules or controls

South African law does not require shareholders or directors of companies incorporated in South Africa to be citizens or residents of South Africa.  A South African company can be incorporated and operate entirely with overseas shareholders and directors. There are no special regulations or controls affecting the ability of foreigners to acquire South African businesses, property or assets.

## Share Capital

The minimum share capital of a South African company is not prescribed.

## Taxation

South Africa has reasonable rates of corporate and personal tax and offers a worldwide network of double taxation treaties.

## Financial Services

South African banks have a long history of providing structured and inventive corporate credit. Money transfer mechanisms both domestically and internationally are quick and efficient. In some circumstances, substantial long-term financing is available.

## Language

The English language is generally recognised as the business language of the world and is widely used in South Africa and its neighbouring countries.

## Gateway to Africa

South Africa is a full member of the SADC (Southern African Development Community) and a member of the SADC customs union and the AfCFTA (African Continental Free Trade Area).

For a foreign company to be truly competitive in African markets, it is highly advisable to use a local organisation that has the required knowledge of how the African business structure functions.

InterGest can assist with all the necessary administrative services that an exporter needs to manage and control sales from abroad. Many foreign companies use South Africa as the gateway to Africa. South Africa offers a highly sophisticated infrastructure, which is on par with the majority of European countries.

# BUSINESS STRUCTURE
## IN SOUTH AFRICA

**No general permission is required to conduct business in South Africa. There are however certain filing requirements, which have to be met, the nature of which depend upon how the South African entity is set up. Certain specific permissions or licences may also be required in order to carry on particular kinds of business.**

There are three principal ways in which a foreign company might conduct its business operations in South Africa:

- Direct selling
- South African Branch
- Separate subsidiary company incorporated in South Africa

## LEGISLATION

As of the 1st May 2011, all companies in South Africa are regulated in terms of the new Companies Act 71 of 2008.

## DIRECT SELLING

**No formal registration is required if an international Company plans to sell directly into South Africa.**

However, under the 2008 Companies Act, every foreign corporation that does business activities or non-profit activities in South Africa must thereby fulfil the requirements of the “permanent establishment test” (as determined by both the Companies Act and the Income Tax Act), must register in South Africa as an external company. However, it is not necessary for a foreign company to register as an external company simply by reason of the company conducting certain listed activities in the Republic of South Africa, such as convening a shareholders meeting or purchasing immovable property within the Republic.

Other types of commercial enterprises (for instance partnerships, unincorporated bodies or government agencies) cannot register in South Africa as a foreign company.

With the registration of an external company with the Companies and Intellectual Property Commission (CIPC), the external company will become obliged to:

- Pay taxes in South Africa;
- Maintain a registered office;
- Maintain all documents pertaining to the South African operations according to South African law.
- Determine a financial year end;
- Compile annual financial statements;
- Submit an “Annual Return” with the CIPC;
- Maintain a PAIA (Promotion of Access to Information Act) Manual.

If the company has failed to register within 3 months of operation, the Companies and Intellectual Property Commission (CIPC) may issue a request for registration, requiring the firm to register within 20 working days. If the foreign company fails to register within this time frame, the Commission may order it to halt operations within the Republic.

# SOUTH AFRICAN BRANCH

**A company incorporated outside South Africa, which wishes to conduct business operations within South Africa through a branch is required to comply with the following:**

**Initial formalities: According to the current Companies Act**

An external company is required to lodge the following information with the Companies and Intellectual Property Commission (CIPC) within 20 days after it first conducts business within South Africa:

**The name and registration number of the overseas company and its country of incorporation**

- A certificed copy of the company's founding documents, a certificate of incorporation or comparable document, and current certificate of registration

- A name and address of the person in the Republic who has consented to accept service of documents on behalf of the external company;

- Details of the company's directors. All overseas directors must be registered as directors in the local branch.

- Address of the principal office in South Africa at which Legal Notices may be served.

**Every external company must verify their name and registration number on all notices and other official publications of the company**

- This includes other means of exchange such as all bills of exchange, promissory notes, cheques, order forms and in all letters, delivery notes, invoices, reciepts and letters of credit of the company.

- There are provisions regulating the corporate name under which an external company may carry on business in South Africa. This is to ensure that the corporate name is not too similar to the name of a South African company or any other external company with a place of business in South Africa and that the name of the company does not contain words for which special approval is required.

**Accounting formalities. In addition to the initial requirements on setting up a business in South Africa**

- An external company is required to keep financial reports/ statements according to South African legislation.

- In certain circumstances the external company is required to provide audited financial accounts to the CIPC. The external company's financial year is 12 months long. An external corporation can set its own financial year end.

- The initial accounting term of an external company must not exceed 15 months from the registration date. The following accounting periods will be 12 months (subject to the overseas company's right to change it).

**If there is a subsequent alteration to any of the above particulars (eg: change of directors), or any change is made in the corporate name of the company, details of the alterations or name change must be filed with CIPC.**

# SOUTH AFRICAN | SUBSIDIARY COMPANY

## (PROPRIETARY LIMITED)

**Should the overseas company choose to establish its business in South Africa by means of the incorporation of a subsidiary company, such a company (commonly referred to as an "external" company, since the majority of shareholding is held "offshore") will be incorporated under the Companies Act 71 of 2008. The external company will be bound by all South African company law.**

The most common business corporation is a "Pty Ltd" (Proprietary Limited) with a share capital and limited liability of its shareholders. New Companies Act no longer enables Close Corporations.

**The category of companies under the new Companies Act, only incorporates two forms of companies**

- A company can either be a profit company or a non-profit company. Non-profit companies are created for charitable and similar causes, whereas for-profit organisations are created for general commercial purposes.

Profit companies are further divided in (a) Public companies (Ltd), (b) Private companies (Pty) Ltd, (c) Personal liability companies (Inc) and (d) state-owned companies.

- A private company's name must end in "Proprietary Limited" or "(Pty) Ltd". Private firms are no longer limited to a maximum of 50 shareholders.

**A company is private if its Memorandum of Incorporation (MOI) prohibits it from issuing its securities to the public and restricts their transferability**

-A company may be incorporated as a personal liability company if it meets the criteria for a private company and the Memorandum of Incorporation states that it is a personal liability company. Such companies are commonly utilised by professional service companies, such as law firms, accountants, etc.

- A public company is a profit company, which is not a state-owned company, a private company or a personal liability company.

**Under the new Companies Act, close corporations (CCs) cannot be registered**

- Current CCs can choose to change to a (Pty) Ltd or remain in that form until deregistered or dissolution under the Close Corporations Act (CC Act). No automatic conversion or dissolution is allowed.

### Memorandum of incorporation

In place of the Memorandum and Articles of Association required in terms of the old Companies Act, all companies are now required to have only a single document entitled "The Memorandum of Incorporation" (MOI).

### Duties and liabilities of the directors

The 2008 Companies Act for the first time partly codifies the general duties of directors, mainly affecting the duties of directors to avoid the creation of conflict of interest situations and the disclosure and use of information.

The liability of directors will be extended under the new Act: Directors will be liable for losses suffered by the company as a result of the director having taken certain unauthorised or unlawful actions, or where the director has failed to act against them. Furthermore, the new Act clarifies that the company may purchase insurance to protect a director against liability or expenses where he has not breached his duties intentionally.

## Requirement For Audit

The Annual Financial Statements of public companies will continue to require an annual audit. Other companies may be either audited voluntarily or require an independent review. The option for a voluntary audit will evoke all the additional transparency regulations and requirements in terms of the new Companies Act. Companies where all shareholders are also directors are exempt from both audit and review.

## Annual financial statements and annual return

All companies, including external companies, will be required to compile their annual financial statements within 6 months (previously 9 months) after the end of its financial year.

In addition, all companies must submit an annual return containing prescribed information to CIPC. With the annual return, entities are required to file annual financial statements or Financial Accountability Supplements.

## Shareholders' agreements

A shareholders' agreement must be consistent with the provisions of a company's Memorandum of Incorporation (MOI), and will be void to the extent that it conflicts with the provisions of the Memorandum of Incorporation.

## Transparency and protection of the shareholders

The new Act affords increased transparency requirements and increased protection of the shareholders, for example, in the form of information rights, derivative actions and shareholder appraisal rights.

**Company Formation. To incorporate a new company, the CIPC requires several documents.**

- The Memorandum of Incorporation will include items such as the name of the company, the place within South Africa where its registered office is situated, and the number of shares it is authorised to issue.

A statement listing the company's founding directors and its intended registered office (formal address for official communications) is also required.

**A prescribed Notice of Incorporation, as issued by CIPC, which must accompany the MOI**

- Having received the above documents (and the appropriate fee) the Companies Registry will issue a Certificate of Incorporation. The life of the new company commences on the date of the incorporation as shown on the certificate and the company has no legal existence prior to that date.

**Convenience companies (Shelf Companies)**

- A "pre-established" corporation can be purchased for a nominal fee. This company will have been incorporated by ourselves or a company registration agent, but will have carried out no business activity.

Necessary changes will need to be made to the Memorandum of Incorporation, the corporate name, directors, auditors, Secretary, and registered office. The benefit is that the company is immediately accessible for business without the delay of incorporating a new company.

## Company name

The company name must end with the word "Proprietary Limited" or "(Pty) Ltd" to denote the limited liability of its shareholders. It is possible to reserve a particular name before incorporating the company. We are able to search the Companies Index to establish whether the particular name is available at the time of application. Certain words are prohibited from use, while others require the company to fulfill certain conditions.

## Directors

Directors of a company are ultimately responsible for the management of the company and have the power to manage the company's business and exercise its powers.

The Director's powers are not limited to the day-to-day conduct of a company's business; they extend to taking major policy decisions and entering into substantial contracts. Directors, themselves, are required by company law to exercise reasonable care and skill in carrying out their duties. Further they owe a fiduciary duty and must act in good faith and in the best interest of the company. Breach of duty may result in personal liability of the Director. The Directors are required to seek the approval of the shareholders only where this is specifically required by statute (e.g. the amendment of MOI) or by the company's Memorandum of Incorporation.

## Officers of the Company

Every company should have formally appointed company officers at all times. A private company must have at least one Director and a **Public Officer.** The appointment of a Company Secretary is optional.

### Company Secretary

**A private company's Secretary must be a permanent resident of South Africa and must have the relevant experience or knowledge of the appropriate laws and procedures.**

- The appointment of a company secretary is highly recommended as the company secretary has the legal responsibility for ensuring compliance with the provisions of the Companies Act; in particular the maintaining of various registers, such as the register of directors and shareholders and ensuring all appropriate documents are submitted to the CIPC.

The company secretary advises the directors of their duties and obligations under the Companies Act. These services are offered by InterGest.

### Share Capital

**Currently, most private companies have 1.000 shares authorised. The difference between authorised and issued shares in South African law is:**

-Authorised shares is the maximum number of shares which a company may issue at a particular time (without further sanction from shareholders). Issued shares is the number of shares presently issued and held by the shareholders.

- It is common for a company to have a relatively small share capital. More substantial capital is usually used if there is a commercial requirement. However, the taxation regime of the country of the parent company may affect the decision on the size of the subsidiary's share capital.

### Shareholder Meeting

**Simple majority (51%) of voting rights exercised on the resolution is required for approval.**

- Several special resolutions require the approval of at least 75 % of the shareholders, e.g. changing the name of the company, amendments of the Memorandum of Incorporation, the voluntary liquidation of the company.

It is possible to amend the Memorandum of Incorporation and to increase the percentage of votes required for the passing of an ordinary resolution, and to alter the required majority for the passing of a special resolution, provided the majority required for a special resolution is at least 10% higher than that for an ordinary resolution.

There is no prescribed minimum share capital. Shareholders' liability is restricted to their holdings. Furthermore, South African companies can issue multiple classes (or types) of securities, each with its own set of rights, such as voting rights, rights to income, redemption rights or return of assets on a winding up, associated with them. The company's Memorandum of Incorporation must specify these classes of shares.

## Accounts

All companies are required to file an annual return with the CIPC and possibly to be audited by a firm of qualified South African auditors. The first accounts of a private company can cover a period of up to 15 months.

The company has the right to choose the date on which its accounting period ends (its financial year end). Initially an accounting reference date of the end of the month of incorporation is assigned to the company automatically but this can be changed provided notification to the CIPC is made. The financial year end can only be changed once per financial year. Further, companies in a group should have the same financial year end.

## Letterhead and Company Stationery

The company must display its full company name and registration number on its letterhead, invoices and other official publications.

## Continuing filing requirements

The law requires a company to file certain information continuously with the CIPC, such as the appointment and removal of directors, changes in the Company Secretary or Registered Office. The documents and all other documents filed with the CIPC become public documents.

## Annual General Meeting

A new private company is no longer required to hold an Annual General Meeting. However, it is highly recommended and sound corporate governance practice to provide for an Annual General Meeting in the company's Memorandum of Incorporation.

### Director and Shareholders liability

A company has a separate legal existence to the shareholders and directors and the company's liabilities do not normally attach to the directors or to the shareholders personally.

They are only recoverable against the assets of the company itself.

### In the event of the company being wound-up, shareholders will have no liability for the company's debts.

- The liability of shareholders is limited to any amount which is unpaid on their shares. Shareholders will only be entitled to a return in respect of their shares in a winding up once the company's creditors have been satisfied in full.

### In certain cases

For example, where directors are guilty of a breach of duty or have allowed the company to trade whilst it is insolvent, some or all of the company's liabilities (or the shortfall of the assets compared to those liabilities) may attach to individual directors personally.

# CORPORATION TAX

## South African companies

Corporate Income Tax (CIT) is a tax imposed on companies resident in the Republic of South Africa i.e. incorporated under the laws of, or which are effectively managed in, the Republic, and which derive income from within or outside the Republic.

Non-resident companies which operate through a branch or which have a permanent establishment within the Republic are subject to tax on all income from a source within the Republic.

For years of assessment ending on any date between 1 April 2022 and 30 March 2023, the rate of corporate income tax will remain at 28%. For years of assessment ending on any date on or after 31 March 2023, the rate of corporate income tax will drop to 27%.

To minimise the tax collection impact, corporates will only be able to deduct previous tax losses against a maximum of 80% of the current year's profits. This will result in at least 20% of a company's income being taxable irrespective of previous assessed losses

There is also a Small Business Corporations ("SBC") rate which applies to annual profits. The first R91 250 of taxable income is tax at 0%. Taxable income from R91 251- R365 000 is taxed at 7% of the amount above R 9 1250. Taxable income from R365 001 to R550 000 is taxed with R19 163 plus 21% of the amount above R365 000. The excess over R550 001 is taxed with R58 013 plus at 27% of the amount above R550 000. (Tax year 1 April 2022 - 31 March 2023).

Secondary Tax on Companies (STC) has been replaced with a Dividends Withholding Tax from 1 April 2012. The company is liable for this tax, which is currently is set at 20%.

## Dividends Tax

Dividends Tax is a tax on shareholders (beneficial owners) when dividends are paid to them, and, under normal circumstances, is withheld from their dividend payment by a withholding agent (either the company paying the dividend or, where a regulated intermediary is involved, by the latter).

The rate of Dividends Tax is 20% which can be reduced based on the applicable DTA.

South African resident companies, the State, provincial and local authorities, parastatal organisations, retirement and benefit funds, public benefit organisations (PBOs) and mining rehabilitation funds are exempt from the Dividends Tax.

## External companies and non-residents

Foreign companies operating through a South African branch are taxed the same as subsidiaries at a flat rate of 28%. However, the external company will only be subject to corporation tax in respect of the profits and gain of the branch. Non-residents are taxed on South African-source income and capital gains on immovable property in South Africa.

## Payment of corporate tax

Every company (excluding Body Corporates, Share Block Companies and Public Benefit Companies) is required to submit provisional tax returns (IRP6). The first of these returns is required to be submitted six months from the start of the year, and the second at year end, and must contain an estimate of the total taxable income earned or to be earned for that period. Payment of the tax must accompany the return. A third “top-up” payment may be made six months after year-end.

## Registration of a Public Officer

**The register of Companies advises the Commissioner for Inland Revenue of the registration of new companies.**

A public officer is an individual who is residing in South Africa and must be a registered taxpayer with SARS. The individual representative who is approved by SARS must be a senior official of the company. Should the company not have a senior official residing in South Africa, then any suitable person can fulfill this role.

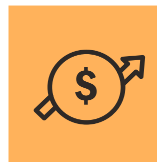
## Foreign Loans

Although the South African Reserve Bank prefers foreign owned investments to be funded by means of share capital,
it is possible to introduce loan capital.

The introduction of loan capital is advantageous in that interest paid would usually be allowed as a deduction in calculating the taxable income of the South African debtor and interest can be remitted (subject to WTI Withholding tax on interest) to the foreign creditor.

**An exemption is made if the thin capitalisation rules apply (see below).**

In addition, an external company and a South African subsidiary requires prior approval from Exchange Control for both the advance of loan capital from outside of South Africa, and for the repatriation of funds brought into South Africa as loan capital.



**Thin Capitalisation**
**South Africa used to have thin capitalisation rules for income tax purposes**

Which limited the deduction of interest payable by South African companies. With effect from years of assessment commencing on or after 1 April 2018, the South African Revenue Service (SARS) has adopted a new arm’s length test for the purposes of determining thin capitalisation.

This means that the former 3:1 debt to equity ratio safe harbour will fall away and will be replaced with the arm's length test.

In terms of the new regime, the test, with regard to foreign loan funding, will be based on the level of finance the borrower could have secured under the same terms and conditions had the borrower (the local company) and the lender (the foreign company) been independent parties dealing at arm's length, and, whether as a result of the transaction, a tax benefit is derived by the parties to the transaction.

The intent is to limit the deductible interest incurred in a transaction between independent parties dealing at arm's-length.

### Double taxation agreements

Subsidiaries in South Africa normally benefit from double taxation agreements to avoid a double taxation of income, gains and profits.

### Value Added Tax (VAT)

VAT is levied on the sale of goods and provision of services as well as the importation of goods and some services. Companies which carry on an enterprise in South Africa with annual turnover of more than R1 million must register for Value Added Tax.

As far as the turnover in respect of taxable supplies is less than R1 million, but more than R50 000 per annum, the company may apply for voluntary registration. The VAT rate is 15%.

| **South Africa Revenue Service Tax Deduction Table**<br>Years of assessment ending on or after 31 March 2023 | |
|---|---|
| **Taxable Income (ZAR)** | **Rate of Tax (ZAR)** |
| 1 - 91 250 | 0% of taxable income |
| 91 251 - 365 000 | 7% of taxable income above 91 250 |
| 365 001 - 550 000 | 19 439 + 21% of taxable income above 365 000 |
| 550 001 and above | 58 013 + 27% of the amount above 550 000 |

# THE HEADQUARTER COMPANY REGIME

**In January 2011, the headquarter company regime tax legislation, which legislation provides a special tax framework for foreign investment in South Africa. This Taxation Law regulates important changes in regard of the controlled foreign company rules, dividend tax and thin capitalization rules which aims to encourage foreign companies to establish their African headquarters in South Africa.**

A headquarter company is specifically defined in the Act as South African company where from day 1,80% of its investment in terms of cost is outside South Africa and 50% or more of its gross income comes from those foreign investments (e.g. dividends, rentals, interest, management fees, royalties from foreign companies in which at least 10% of equity is held or from proceeds on the disposal of equity shares in foreign companies in which at least 10% of equity is held). Furthermore, each shareholder of the holding company must have at least a throughout the year of assessment.

In terms of South Africa's headquarter tax regime companies won't be taxed on the income of its controlled foreign companies anymore and for this purpose only it will be deemed to be a non- resident. Headquarter companies will also be exempted from Dividend tax in respect of dividends remitted to foreign investors and from the proposed dividend tax on dividend flows from South Africa.

Finally, the thin capitalization rules won't apply to headquarter companies in the sense that they will be allowed to borrow as much as it likes from a foreign group company and to deduct all the interest payments from its taxable income, provided that it on-lends the funds to its qualifying foreign investments. Interest will not be treated as dividends and no longer subject to STC either.

# REPATRIATION OF PROFITS

**Capital:**
**There is no restriction on the repatriation of investment capital made by non-residents. Therefore the shares of a non-resident investor in a local subsidiary can be remitted freely out of South Africa.**

**Dividends and Branch Profits: There is no restriction on the transfer of dividends or branch profits provided the income is derived from trading profits.**

An auditor's certificate to this effects is necessary, confirming that no portion of the net income out of which the dividend is declared, arises from any surplus as a result of the re-evaluation of assets or from the realisation of any non-trading assets.

- All applications for remittance by "affected persons" (companies in which more than 75% of shareholding is held by non-resident) must be referred to the South African Reserve Bank for approval, if any local borrowing facilities are held at the company's disposal.
- If the company's borrowings are within the formula, there is no difficulty in obtaining authority to remit dividends.
- Interest; provided the approval of the Reserve Bank has been obtained and the IWT has been paid over to SARS, interest payments are freely transferable.

# Transfer Pricing

In line with the trend in most developed countries, transfer pricing (the process by which multinational enterprises set the prices at which they transfer goods or services between group entities) has become a key focus area for the South African Revenue Service (SARS). Transfer pricing has often been used by multi-national enterprises as a tool to allocate profits to low tax jurisdictions.

Transfer pricing rules were introduced as early as 1995. However, SARS only drafted their practice note on transfer pricing in 1997 and only recently acquired the necessary personnel and tools to effectively to police these rules.

Since the legislation has been effective as from 1995, transfer pricing adjustments can be made back to that date, with significant penalties and interest accumulating. It is thus imperative for multinational enterprises to ensure compliance with current transfer pricing legislation.

The South African transfer pricing rules and the guidelines in the practice note are based on the transfer pricing guidelines issued by the Organisation for Economic Co-operation and Development (“OECD”). The rules grant the Commissioner the discretion to adjust the consideration in respect of a supply or acquisition of goods or services in terms of an international agreement between connected persons.

Additionally, any adjustment will be deemed to be a dividend for purposes of dividend withholding tax, which dividend withholding tax will be levied on the adjusted amount at a rate of 12,5%.

# REMUNERATION OF | EMPLOYEES AND AGENTS

**The South Africa tax regime can be very beneficial to employees coming from abroad to work in South Africa. In terms of South African income tax law a distinction is drawn between the concept of "residents" and "non-residents".**

**An individual will be resident in South Africa and therefore, subject to South African income tax:**

If he is either "ordinarily resident" or "physically present" in South Africa. In terms of South African case law, a person is ordinarily resident in the country to which that person "would naturally and as a matter of course return from his wanderings". It is the place that may most aptly be described as the person's real home.

## Residents

A person who is not ordinarily resident will be deemed to be a resident if he or she is physically present in South Africa for more than 91 days in each of the current and preceding five years and for a period or periods exceeding 915 days in aggregate during the preceding five years subject to the DTA. South African residents are taxed on their worldwide income.

## Non-residents

Individuals who do not meet any of the above mentioned requirements and therefore, are regarded as non-residents are only taxed on South African-source income.

## Income Tax

South Africa taxes individuals on their South African income, whether they are resident in South Africa or not. Full domestic rates of income tax are therefore applicable to the remuneration from their employment carried on in South Africa. The rate of normal income tax on taxable income of any natural person is 18-45% (depending on the income).

**Any earnings from any employment carried out totally overseas (or for that matter, any other overseas income to which the individual may become entitled) will only be subject to South African income tax if the person is resident in South Africa.**

**01** However, a person, whether or not resident in South Africa, who remits the overseas earnings (or other income) to South Africa, will pay South African tax on the amount of the remittance. It should be noted in this context that "remittance" for the tax purposes has a somewhat more comprehensive meaning that simply transferring funds to South Africa and covers many indirect ways in which the benefit of the funds can be enjoyed in South Africa.

**02** Because of the extended meaning of remittances, it is essential that especially an overseas executive who is to become resident in South Africa, but retains a foreign employment as well, or has other overseas income, should organise his bank accounts in an appropriate fashion before taking up residence in South Africa.

**03** It follows that, if an executive is assigned to work in South Africa and he also has duties which he carries on abroad, then if those duties are carried out under a separate service arrangement with a different company in the group and are properly remunerated, no South African taxation need be payable on that remuneration, provided that the person does not become a South African resident.

**04** It may also be that, as a result of available exemption or relatives, such overseas remuneration will bear no tax, or tax at a reduced rate, under the domestic law of the executive's of origin.

Employers in South Africa are obliged to make payment on account of their employees' liability to income tax on their salaries and other remuneration under a system known as "pay as you earn" (PAYE).

The liability extends to overseas employees with branches in South Africa. The employer is also obliged to make unemployment contributions both on its own account and by deduction from amounts paid to its employees. The full employer's rate of unemployment insurance (UIF) will be 1% of the remuneration.

Employees are not usually liable to account for the income tax or unemployment insurance liabilities of self-employed persons, such as agents or independent contractors, whom they engaged to render private services. The Government has introduced rules to impose such liabilities where so – called "personal service companies" are used to avoid the operation of PAYE and unemployment insurance.

# STAFFING A SOUTH AFRICAN BUSINESS

**South African labour law is regulated primarily by legislation and the common law. South African legislation seeks to give effect to the Constitutional right to fair labour practices and the right to take part in collective bargaining. The most important legislation regulating employment in South Africa are the Labour Relations Act 66 of 1995 (the LRA), the Basic Conditions of Employment Act 75 of 1997 (the BCEA) and the Employment Equity Act 55 of 1988 (the EEA).**

The LRA establishes dispute resolution structures specific to labour law disputes, facilitates collective bargaining and regulates dismissals of employees.

The BCEA lays down fundamental minimum requirements for employment, such as working hours, overtime and leave. The BCEA further allows the Minister of Labour to regulate employment in specific industries through sectorial determinations. The EEA seeks to prohibit unfair discrimination in the work place and provides for the implementation of affirmative action.

## 01

**Employment Contract**

**Current Labour legislation prescribes that an employer is required to conclude a written contract of employment with an employee.**

The written contract must include; the identity of the parties, date the employment began;

Scale or rate of remuneration and intervals of pay, hours of pay, any terms relating to:

Holiday and holiday pay, sickness and sickness pay, pensions and pension schemes, the length of notice required to terminate the contract.

## 02

**In the case of non-permanent employment, the period for which it is expected to continue or, if it is for a fixed term, the date it is to end;**

In addition to the job title or a brief description of work;

Particulars of any collective agreements which directly affect the terms and conditions of employment, disciplinary rules (and procedures of the company, if available); grievance procedure.

If there is no term in the contract relating to one or more of the above matters (e.g. there is no pension scheme), this fact must be stated.

## 03

**Working Time Regulations give rise to rights and obligations to work and rest. The principal provisions are as follows:**

Weekly working time: No employer may require or permit an employee to work longer than 45 hours a week, or nine hours a day if the employee works five days a week, or eight hours per day if the employee works more than five days a week. All work beyond this is considered overtime.

## 04

**It is possible to contractually exclude the payment of hours which qualify as overtime.**

Daily rest period: Every employee is entitled to a daily rest period of at least 12 consecutive hours between the end of a day's work and the start of the next.

Weekly rest period: Employees are entitled to a weekly rest period of at least 36 consecutive hours, which must include a Sunday, unless otherwise agreed.

## 05

**Meal break: Employees are entitled to a meal interval of one continuous hour after five hours work, for which they must be paid if they are required to work or be available for work during this interval period; otherwise, meal intervals of an hour or more are not treated as paid working time.**

Meal intervals may be reduced by agreement between employer and employee but not to less than 30 minutes, or they may be dispensed with altogether if the employee works less than six hours in a day.

## 06

**Annual leave: Employees are entitled to 21 consecutive days paid annual leave.**

This entitlement to leave may not be replaced by an "allowance in lieu" (e.g. pay or extra pay replacing actual leave to which the employee is entitled) except on termination of employment. If a public holiday falls in a period of leave, the employee's leave must be extended by a day.

## 07

**Overtime leave: Overtime may not exceed 10 hours in any week and total working hours may not exceed 12 hours per day.**

The rate for overtime is one and a half times the normal wage. Time off in lieu of pay for overtime must be taken within a month of the time worked, unless the employee agrees in writing to a longer period of 12 months.

## 08

**Employer's financial obligations**

Employers have certain financial obligations from the employment relationship which are outside the contract of employment itself. There is a compulsory Unemployment Insurance Scheme to which both the employer and the employee are liable to contribute, the employer and the employee are liable to contribute, the employer being responsible for deducting the employee's contributions from the employee's remuneration.

### Employers are required to insure against their liability for any personal injury to their employees

Employers are required to deduct the income tax payable by employees on
their remuneration at the time of payment and to account to the Inland Revenue for this tax.

### General legal duties and obligations. The law relating to trade union recognition is complex.

The trade union has certain rights of consultation. Every employer has a general legal duty to ensure, as far as reasonably practicable, the health, safety and welfare at work of all its employees. There are specific regulations concerning rights such as leave for pregnant women, maternity leave, paternity leave and unpaid parental leave which apply to all businesses.

Detailed provisions regulate particular employments, industries and it is not lawful to discriminate on grounds of race, sex, or non/membership of trade unions. All employees are entitled to equal remuneration. Female employees have legally established maternity rights.

## 09

**Termination. If an employer wrongfully terminates an employment, the employee us entitled to compensation for breach of contract.**

An employee also has the statutory right not to be unfairly dismissed, for which statutory compensation (from the employer) or possibly reinstatement is possible. Unfair dismissal may occur if proper disciplinary processes are not followed, even if the employment ends contractually or the termination is otherwise justifiable. An employee whose employment is terminated by reason of redundancy (the work that they perform is no longer required by the business) is entitles to receive redundancy compensation. This payment is addition to any other compensation arising if they are wrongfully or unfairly dismissed or selected for redundancy.

# BLACK ECONOMIC EMPOWERMENT

Since the first democratic elections in 1994, the South African government attempted to address the economic injustices of the past by promoting the empowerment of previously disadvantaged groups (Black African, Coloured, Indian and Chinese) by attempting to distribute the wealth across as broad a spectrum of the previously disadvantaged society of South Africa as possible.

**The Broad Based Black Economic Empowerment Act ("the Act") was passed during 2003.**

Which was aimed at replacing earlier empowerment initiatives of the government, which had resulted only in the enrichment of a few previously disadvantaged individuals.

After further amendments in 2007 and still not satisfied with the speed and effectiveness at which transformation was taking place, the Department of Trade and Industry (DTI) revisited the effectiveness of the Act and the existing Codes, which resulted in the Broad Based Black Economic Empowerment Amendment Act, 53 of 2013, being passed by Parliament and revised Codes of Good Practice being published. The new codes became operational on 1 May 2015.

**The Codes provide a mechanism for rating measured entities' compliance with Broad-Based Black Economic Empowerment.**

Compliance with the Codes is to a large extent voluntary, meaning that every business is able to determine its own implementation of B-BBEE, depending on its unique requirements.

Compliance with the Codes and a higher B-BBEE Rating does however make a business more competitive, by in turn affording the business' customers a higher B-BBEE score. Further, the government and many public entities require compliance with a minimum B-BBEE level.

Accordingly, businesses which choose not to comply with the Codes are potentially less competitive from doing business with the state and other corporations in South Africa.

**Codes of Good Practice:**

The Act does not provide the mechanisms for achieving the stated purpose and affords the Minister of Trade and Industry ("the Minister") the power to issue Codes of Good Practice on black economic empowerment to give effect to the purposes of the Act ("the Codes"). Such Codes may be industry Sector specific (e.g.: Mining, ITC, etc.) or of general application, i.e.: generic. The Codes provide a mechanism for rating measured entities' compliance with Broad-Based Black Economic Empowerment. Compliance with the Codes is to a large extent voluntary, meaning that every business is able to determine its own implementation of B-BBEE, depending on its unique requirements. Compliance with the Codes and a higher B-BBEE Rating does however make a business more competitive, by in turn affording the business' customers a higher B-BBEE score. Further, the government and many public entities require compliance with a minimum B-BBEE level. Accordingly, businesses which choose not to comply with the Codes are potentially less competitive from doing business with the state and other corporations in South Africa.

# VULKAN

WHEREVER
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YEARS IN SOUTH AFRICA
**2003-2023**

**INTERGEST SOUTH AFRICA (PTY) LIMITED**
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