Year in review,
Year to come
South Africa Law

December 2019
Year in review
South Africa Law in 2019

The President (in 2018) announced a drive to mobilise ZAR1.2 trillion in new investments into South Africa by 2023.

Gradual and incremental steps are being taken by government to achieve this goal.

Johannesburg Stock Exchange (JSE):
Proposed amendments to the Listings Requirements, were finalised – effective 2 December 2019. Read more...

Tax:
The South African Revenue Service increased policing of cross border transactions. Focus areas are permanent establishment challenges, transfer pricing and controlled foreign company-based disputes. VAT e-commerce regulations were also published and exchange control regulations were also revised. Read more, here and here.

Company Law & Black Economic Empowerment:
The Companies Amendment Bill (draft published in 2018), which proposes amendments to the Companies Act, remained under review. Various amendments to the Amended Generic Codes of Good Practice were signed into law. Read more.

Dispute Resolution & International Arbitration:
The first decision taken by the courts in respect of the application of the International Arbitration Act was handed down. It held that a SA court retains the discretion afforded by section 5(1) of the Admiralty Jurisdiction Regulation Act to allow the joinder of a party to court proceedings, despite the existence of an arbitration agreement between the party seeking the joinder and the party sought to be joined.

SA and 27 other countries ratified the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA). At end of 2019, four countries (including SA) ratified the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community, and the Southern African Development Community (SADC). Ten further ratifications are required for the agreement to come into force.

2019 highlights
Investment commitments worth ZAR363 billion made by domestic & foreign firms at the 2nd South African Investment Conference on 6 November 2019, eclipsing the 2018 figure by some 17%.

2019 highlights
SA was ranked 1st in budget transparency in the 2019 World Economic Forum global competitive index.

2019 highlights
According to the Trade & Industry Minister, in the first half of 2019 SA received ZAR 38 billion in FDI. This was more than the total amounts for the 2015, 2016 and 2017 financial years.

Competition/Anti-trust:
Certain sections of the Competition Amendment Act came into effect. Read more Guidelines for the determination of administrative penalties for failure to notify mergers also came into effect. Read more Guidelines dealing with price discrimination & buyer power were published for comment. Read more Final recommendations were made in the private healthcare market inquiry and provisional recommendations published in the grocery retail and data services market inquiries.

International Trade:
SA and 27 other countries ratified the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA). At end of 2019, four countries (including SA) ratified the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community, and the Southern African Development Community (SADC). Ten further ratifications are required for the agreement to come into force. On 7 September 2019, the negotiations for the Economic Partnership Agreement (EPA) between the Southern African Customs Union (made up of Botswana, Eswatini, Lesotho, Namibia and South Africa) (SACU) and Mozambique (together, SACUM) and the United Kingdom (UK) were concluded. The terms of the SACUM-UK EPA are largely the same as the EU-SADC EPA. The International Trade Administration Commission of SA initiated an investigation into a proposed export tax on scrap metal. If implemented, this will be the first export tax imposed by SA.

Land & Property:
The Property Practitioners Act was passed (repealing the Estate Agency Affairs Act) regulating broadly those involved in the sale, purchase, managing and letting of immovable property.

Environment:
Progress on transitioning SA to a low carbon economy was made: The Carbon Tax Act came into effect. Read more. greenhouse gas reporting regulations were published under the National Environmental Air Quality Act; and a second draft of new financial provisioning regulations which will govern the energy industries was also published. Read more
Employment:

A national minimum wage was introduced. New strike legislation was promulgated to enhance the collective bargaining system, including new mechanisms to prevent violent and obstinate strike action. There is also a compulsory requirement for picketing rules to be established before employees may picket in furtherance of a strike. Parties to mutual interest disputes may also now elect to refer such disputes to advisory arbitration with a view to resolving the matter as soon as possible. Trade unions must also conduct secret ballots before embarking on strike action.

Financial Services:

The National Credit Amendment Act (Debt Relief Act) was signed into law to provide overburdened, low-income, indebted consumers with relief. No commencement date has been proclaimed.

The conglomerate provisions of the Financial Sector Regulation Act (FSR Act) which provides a framework for the supervision of financial conglomerates in SA and empowers the Prudential Authority (PA) to designate entities as a financial conglomerate, and for the holding company of the financial conglomerate to also be subject to supervision in terms of the act became operative. The authorities have not yet designated any financial conglomerates.

Chapter 11 of the FSR Act, which deals with the regulation of significant owners of financial institutions, came into effect. Section 157 of the Act defines a significant owner of a financial institution as a person who directly/indirectly, alone or together with a related or inter-related person, has the ability to control/influence materially the business/strategy of the financial institution. The Act provides that a person must also obtain approval and/or notify the PA when the extent to which such person can control/influence the business/strategy of the financial institution changes. Transactions without the requisite approval and/or notification are void.

Following promulgated regulations to the Financial Markets Act (FM Act), market participants must comply with the new licensing regime, trade reporting and clearing requirements in respect of “over-the-counter” derivatives transactions. Market participants are now required to be licensed in accordance with Ch 2 of the FM regulations. The trade reporting and clearing requirements are not yet in force.

Insurance: The PA and the FSCA issued a guidance note on the application of S 5 of the Insurance Act. S 5(1) of the act provides that a person may not conduct insurance business in SA without being licenced in terms of the act. S 5(2) provides when it will be deemed that a person conducts insurance business in SA - with deeming provisions much wider than the corresponding provisions under the Long-Term & Short-Term Insurance Acts and must be considered by entities providing services like insurance business offshore.

Banks: The Financial Sector Conduct Authority published a draft Conduct Standard applicable to banks operating within SA. Read more The Minister of Finance determined that the provisions of the Banks Act do not apply to the New Development Bank (or BRICS Bank). The definition of “public company” was expanded by the Financial Matters Amendment Act to include national state-owned companies. The amended Banks Act provides that a state-owned company may apply for authorisation to establish a bank only with the approval of the Finance Minister, granted with the concurrence of the Minister who is accountable for that state-owned company. The PA of SARB released new reporting requirements for banks in relation to material information technology and cyber incidents. Banks must have more robust governance structures and notify the PA of any cyber incidents.

Payment Systems: The South African Reserve Bank (SARB) plans to reform the regulatory model of the SA National Payments System. Proposed reforms include: dismantling the Payments Association of SA as the payment system management body; the payment system being subject to greater supervision and more stringent licencing requirements; the market conduct aspect of the payment system being subject to the regulatory supervision of the Financial Sector Conduct Authority (FSCA) to the exclusion of the SARB; and reforming the regulatory environment so as to enable fintech payment providers and non-banks to better operate within the payments sector.

TMT & IP:

The President signed the Films and Publications Amendment Act, introducing significant changes to media law. Read more A policy on High Demand Spectrum & Policy Direction on Licensing of a Wireless Open Access Network was published. Read more The Cybercrimes & Cybersecurity Bill was revamped into a Cybercrimes Bill but was not passed into law. The long-awaited Protection of Personal Information Act is still not yet in force. Government announced a policy decision to introduce substantive search and examination into patent procedure. As of end 2019, there was no sign of legislative amendments to implement this decision. A proposed Copyright Amendment Bill – which included many controversial provisions - was not passed into law.

Healthcare:

Several comments on a National Health Insurance Bill (published on 21 June 2018) which seeks to introduce universal healthcare and establish a national fund to cover comprehensive health care services were received. The Bill precludes private medical schemes from offering cover for the services covered by the fund, effectively making fund membership compulsory. Following a 2018 Constitutional Court decision which decriminalised the possession, use and cultivation of cannabis in a private dwelling by an adult there has been a surge of CBD-containing products entering the SA market, especially related to use for medical/health reasons.

Fintech:

A working group was established to observe the fintech industry and determine the need for regulation. Cryptocurrency, crypto assets and blockchain technology are products/services of interest to the working group. A policy paper on crypto-assets was released setting out the way the regulators view crypto-assets and the potential risks posed by cryptocurrency and crypto assets in the SA payments system and financial services industry. Regulators did not regard the current level of usage to warrant stringent regulatory policy.

Energy & Infrastructure:

An Integrated Resource Plan (IRP), an electricity infrastructure development plan was published. A Roadmap for SA’s electricity public utility, Eskom, was also published. The Roadmap highlights issues Eskom is facing and sets out the government’s plan to address these and may impact Independent Power Producers, lenders and other stakeholders. Total announced a gas condensate discovery off the southern coast of SA. The discovery renewed investor appetite and has given impetus to the government to promulgate the draft Petroleum Resources Development Bill.

There were several key regulatory and other developments in the SA mining sector during 2019.
Year to come
South Africa Law in 2020

Initiatives to drive growth and stabilise the economy will be a focus.

Efforts to root out corruption and state capture will continue.

JSE:
Robust corporate governance for listed companies will remain a focus area of the JSE.

International Trade:
Trading under the AfCFTA will begin in July. The EPA between the Southern African Customs Union (made up of Botswana, Eswatini, Lesotho, Namibia and SA) (SACU) and Mozambique (together SACUM) and the UK will replace the current legal framework for SACUM-UK trade under the EU-SADC EPA if and when the UK leaves the EU customs union.

Tax:
Significant changes regarding the taxation of expats is expected from March 2020.

Arbitration:
The 1965 Domestic Arbitration Act will be replaced by an updated version which will be released for comment.

Company Law:
The long-awaited Companies Amendment Bill may come into force.

Competition/Anti-trust:
All the amendments to the Competition Act will be enacted. The regulator will remain focused on creating a more inclusive economy and deconcentrating high levels of ownership. There may be an increase in the number of complaints relating to buyer power & price discrimination. As a further consequence of the Competition Amendment Act coming into effect, it is also expected that extensive conditions, particularly in relation to public interest concerns will continue to play a major role in merger assessments. These concerns primarily relate to employment, the promotion of a greater spread of ownership and the ability of small and medium businesses to effectively participate within a market.

Environment:
A significant overhaul of the financial provisioning framework is anticipated once the 2nd draft Financial Provision Regulations are finalised. These ‘replacement’ regulations propose a ‘sustainable end state’ in respect of mine closure, which represents a mind shift from classic mine closure to focussing on a transitional economy. Significant proposals in respect of the GHG reporting framework may also come into force in 2020.

TMT & IP:
The Cybercrimes and Cybersecurity Bill as well as the Protection of Personal Information Act may come into force in 2020. The policy on High Demand Spectrum and Policy Direction on Licensing of a Wireless Open Access Network may also gain some momentum in 2020.

Employment:
Employers can expect the full implementation of the new parental and related leave regime. Although the regime’s legislation has been signed into law, full commencement of the legislation is only expected in early 2020.

2020 highlights
Trading under AfCFTA – which begins in July 2020 - could unlock significant opportunity on the continent.

2020 highlights
SA will continue to introduce regulations to meet its international obligations in relation to climate change mitigation.

2020 highlights
The commercial opportunity that the cannabis market could bring SA is likely to be explored.
Land and Property:
The Expropriation Bill, which intends to provide a way for the government to expropriate property for public purposes or in the public interest and to provide for a procedurally fair process for expropriation, and the Regulation of Agricultural Land Holdings Bill, which aims to prohibit the sale of agricultural land to foreign persons and only permit foreign persons to enter into long-term lease agreements, will continue to be discussed over 2020.

Public procurement:
Changes to the regulatory framework for public procurement may emerge in 2020 to consolidate and simplify the fragmented legal and policy environment.

Healthcare:
Although the National Health Department’s latest annual performance plan indicates that the final National Health Insurance Bill is likely to come into effect before March 2020, fiscal issues raised by the National Treasury makes 2020 implementation seem unlikely. Given that taxes are a key funding source, and tax revenue collections are low, there are significant concerns from various stakeholders (including medical schemes, healthcare providers and treasury itself) regarding the feasibility of the Bill. Regulation of CBD-containing medical/health products seems likely.

Fintech:
The SARB, together with the FSCA, will establish an innovation hub for the regulation of fintech and innovative financial products and services. The innovation hub is set to come into operation in the first half of 2020 and will include: a regulatory guidance unit where innovators can engage with the regulators; and a regulatory sandbox to allow innovators to test their products and services in a ‘live’ environment with specific regulatory relief.

Financial Services:
The Conduct of Financial Institutions Bill (CoFI) could be enacted in 2020. CoFI, with a focus on treating customers fairly, will replace existing conduct provisions in financial sector laws and aims to build a reliable, strong and effective market conduct legislative framework for all institutions carrying out financial activities.

In 2020, we may see some traction of the FSCA draft general exemption that proposes to exempt managers and auditors of collective investment schemes and their portfolios from those parts of section 74(1)(a) and (2)(c) of the Collective Investment Schemes Control Act (CISCA). The sections require the manager and auditor of a CIS to ensure that AFS are prepared in conformity with GAAP. The draft general exemption makes a distinction between the accounting standards applicable to managers and auditors in respect of the collective investment schemes themselves (which entails full IFRS and IAS application) and the accounting standards applicable to managers and auditors in respect of the individual portfolios within the collective investment schemes (which entails a limited or “fit for purpose” IFRS and IAS application).

We also expect to see the first designation of financial conglomerates in terms of the FSR Act during 2020.

Since 2002, persons/entities rendering financial services in SA must be authorised as Financial Services Providers (FSPs) in terms of the Financial Advisory and Intermediary Services Act (FAIS Act). Such FSPs, as well as their appointed key individuals and representatives must comply with the Fit and Proper Requirements for Authorised Financial Services Providers issued in terms of Board Notice 194 of 2017 (Fit and Proper Requirements). The Fit & Proper Requirements apply irrespective of whether an entity/person is South African or domiciled, ordinarily resident/registered offshore, and includes, amongst others, requirements relating to Continuous Professional Development (CPD) to be undertaken in SA. Foreign FSPs, key individuals and representatives who are members of foreign professional bodies, have recently been granted some leniency in respect of CPD, in that CPD offered by foreign professional bodies will in future also qualify as CPD for purposes of compliance with the Fit & Proper Requirements.

Insurance:
The Insurance Act came into effect on 1 July 2018 and prescribes the relicensing of all insurers that are currently registered as a long-term or short-term insurer in terms of the Long-Term or the Short-Term Insurance Acts, respectively. The relicensing process is expected to take place between 1 January 2020 and 1 July 2020 in respect of active registered insurers. Once licenced, the provisions of the Insurance Act, including in respect of specific classes or sub-classes of business which may be underwritten, will apply to such insurers. Cell captive insurers, being a type of insurer that only conducts insurance business through cell structure arrangements, has never been formally regulated in SA, other than though the licensing conditions imposed on a traditional insurer. The Insurance Act, however, now provides for cell captive insurers as a separate kind of insurer, and we expect a draft Conduct Standard regulating cell captive insurers to be published during 2020.

Energy & Infrastructure:
The market awaits a further round of renewables procurement under the Renewable Energy Independent Power Producer Procurement Programme, which was announced (with no definitive timing) on several occasions by the previous Minister of Energy prior to the release of the IRP. In the wake of the IRP publication, it is anticipated that this fifth round will be launched during the coming year, although the exact timing and framework (including potential changes in some of the requirements from previous rounds) remain unclear.
Government has indicated that it will aim to rejuvenate the mining sector with a focus on policies aimed at creating sustainable near mine communities and driving the formation of subsidiary industries to improve the longevity of such communities. Government may also introduce a bespoke Bill into parliament aimed at regulating the upstream oil & gas sector - following the recent success of the Brulpadda off shore well.
What now?

Your contacts

We hope that you have found this guide useful. Please contact your usual Linklaters contact or one of the people listed below, if you would like to discuss any of these matters further.

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