Looking back, looking forward.

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South Africa Law Year in Review 2016 and Year to Come 2017
January 2017
New Code on corporate governance: The fourth iteration of the King Report on Corporate Governance for South Africa was launched in November 2016. King IV replaces King III, which was published in 2009, in its entirety and is effective in respect of financial years starting on or after 1 April 2017. Read more…

Johannesburg Stock Exchange ("JSE"): Amendments to the JSE Listings Requirements in 2016 include changes to the treatment of fractional entitlements to bring them in line with international best practice; increased sponsor oversight; together with additional changes specifically impacting mineral companies and property entities. In July, the JSE also reduced the settlement period for equity transactions from T+5 to T+3. This move aims to bolster the credibility of South Africa as an investment destination by bringing the market even closer to international best practice in the settlement space.

New stock exchanges: The Financial Services Board granted exchange licences to both ZAR X Limited and 4 Africa Exchange Limited, bringing to an end the monopoly of the JSE on the South African stock market. The new exchanges aim to offer a cheaper alternative to investors and companies looking to raise capital.

Financial services regulation: 2016 saw a number of significant reforms make their way through Parliament, embodied in the Financial Sector Regulation Bill, Insurance Bill, Financial Intelligence Centre Amendment Bill, and draft regulations promulgated under the Financial Markets Act. We anticipate that these reforms will be implemented in 2017.

Terminating the banker-client relationship: In a recent judgment, it was held that, in terms of their contractual relationship with their clients, South African banks have no obligation to retain clients whose monitoring in terms of money laundering regulations would be more onerous than the benefit in retaining them and, in such instances, are entitled to terminate their banking relationship on reasonable notice. In this particular case, the bank's former client had asked for certain information because he viewed the closure of his accounts as unfair and a breach of his constitutional rights.

Challenger banks: Three companies, Discovery Bank, Postbank and Tyme, were granted provisional banking licences by the South African Reserve Bank. Discovery Bank is an offshoot of a large insurer, Postbank is an existing market participant currently not regulated by the Banks Act, and Tyme is a local mobile payment start-up recently acquired by Commonwealth Bank of Australia. While challenger banks can develop better technology than existing lenders from their inception, banking is capital-intensive and they will have to overcome significant regulatory hurdles.

LNG-to-Power Programme: The Information Memorandum for the South African LNG-to-Power Independent Power Producer Procurement Programme ("LNG IPP Programme") was released by the Department of Energy ("DoE") in October 2016. The DoE has earmarked 3000 MW for the LNG IPP Programme with a view to stimulating local gas demand and the development of new gas-fired generation capacity.

Draft Preferential Procurement Regulations published for public comment: These regulations propose amendments to the preference point system and a compulsory sub-contracting requirement for contracts above R30 million. Read more… They are in the process of being tabled with the Minister of Finance for approval and, once finalised, will serve as an interim measure whilst the legislature finalises its Public Procurement Bill, which will contain similar provisions.

Protection of Investment Act: This Act, which has attracted controversy over concerns that it may deter foreign investment, received presidential assent in December 2015 but its effective date has not yet been proclaimed. Read more…

Key trade developments: On 10 October 2016, the Economic Partnership Agreement ("EPA") between the European Union ("EU") and the Southern Africa Development Community ("SADC") EPA Group comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland (the "SADC EPA") came into force between the EU and five SADC EPA Group countries excluding Mozambique. The SADC EPA establishes a free trade area between the EU and the SADC EPA states.
Tax developments: South Africa increased the capital gains tax rate and introduced a Special Voluntary Disclosure Programme for tax and exchange controls during 2016. The proposed 15% withholding tax on service fees derived from a South African source was withdrawn. Fees paid above a certain threshold to foreign suppliers must now be reported under the reportable arrangements mechanism.

Carbon Tax Bill: South Africa officially joined the climate change movement by ratifying the Paris Agreement on 2 November 2016. The South African Government is in the process of adopting various climate change initiatives and policies in transitioning to a low carbon economy. The Carbon Tax Bill, which was published in 2015, is now expected to be ratified late in 2017.

Broad-Based Black Economic Empowerment ("BEE") Codes of Good Practice: During June 2016, the BEE Regulations were published regulating the implementation of the BEE Act 2003 and the functions of the BEE Commission. It has been proposed that all major BEE ownership transactions over R100 million (combining the asset value/turnover of the BEE investor and the target company) be registered with the BEE Commission. The amended Marketing, Advertising and Communication; and the Information and Communication Technology Sector Codes have been adopted. Transport, Construction and Financial Sector Codes, as well as the revised BEE Mining Charter, were published for comment.

Voluntary Rebuild Programme: On 8 October 2016, the South African Forum of Civil Engineering Contractors and the national government entered into the Voluntary Rebuild Programme agreement with several construction companies to accelerate transformation in the industry. The Agreement will see the parties involved in collusion, recently uncovered by South Africa's Competition Commission, collectively make a contribution of R1.5 billion over 12 years to a social and economic development fund.

ICT White Paper: The long-awaited ICT White Paper was released in October setting a framework for the improvement of communications, infrastructure and services. In the interests of open access, open internet and open spectrum, network providers and service providers will be required to make certain infrastructure and services available to achieve effective access to infrastructure, transparency and non-discrimination.

Competition/anti-trust: 2016 was marked by increased enforcement and landmark decisions. The Commission conducted numerous dawn raids and imposed the largest fine yet for anti-competitive behaviour. Cartel conduct was criminalised and the first civil damages claim arising from anti-competitive conduct was successfully prosecuted. A number of co-operation agreements were concluded between competition authorities across Africa and public interest considerations continued to play a key role in merger assessments.

Clarity obtained on key employment issues: A number of notable judgments have been handed down this year clarifying, among other things, that certified arbitration awards can be treated as writs of execution Read more...; providing further requirements on how protected and unprotected strikes should be dealt with Read more...; setting the frame for the proper interpretation and application of employment equity Read more... and establishing that section 197 of the Labour Relations Act (the automatic transfer of employment by operation of law) will only apply if there is sufficient proof that the business transfer is holistically "seamless".

Occupational health and safety: The Labour Court provided key guidelines to the Department of Mineral Resources and clarified the manner in which Inspectors are able to use their powers to issue instructions to, in effect, halt mine operations when an Inspector believes there is a danger to employee health or safety. In addition, the Department published further Guidelines of Mandatory Codes of Practice that must be implemented to further safeguard employee health and safety at mines.

Emoluments attachments orders: The Constitutional Court has held that emoluments attachment orders may no longer be issued unless pursuant to a court order where the court is satisfied that it is just and equitable to do so and the amount is appropriate.

Significant legal developments impacting constitutional democracy: A number of ground-breaking judgments have been handed down this year upholding the rule of law and supporting the basic tenets of a constitutional democracy as embodied in our constitution. Read more ...
**Financial Sector Regulation Bill:** Forming part of the “Twin Peaks” model of financial regulation in South Africa, this Bill is likely to come into effect in the first half of 2017. It provides for the creation of two new regulators, the Prudential Authority and the Financial Sector Conduct Authority, and seeks to form a regulatory and supervisory framework that promotes financial stability.

**Financial Intelligence Centre Amendment Bill 2015:** This Bill aims to establish stronger frameworks to combat anti-money laundering and the financing of terrorism. It requires banks to apply special scrutiny to politically connected individuals including politicians, judges and business people. The Bill was referred back to Parliament in November 2016 around concerns about the constitutionality of certain provisions.

**Revised draft Regulations under the Financial Markets Act:** These support the objects of the Financial Markets Act and South Africa's commitment to the G20 obligations relating to regulatory reforms of the over the counter (OTC) derivatives market. It is anticipated that these regulations, once finalised, will come into effect in 2017.

**Insurance Bill:** This Bill seeks to provide a legal framework for the prudential supervision of insurance business in South Africa that is consistent with international standards. It also introduces micro-insurance by seeking to provide affordable insurance that is appropriately and proportionately regulated. The Bill will replace certain parts of existing insurance legislation and is likely to come into effect in the first half of 2017.

**Possible sovereign downgrade:** Moody's put South Africa on a negative outlook in December 2015 and has now put the country on review. A sovereign downgrade is likely to negatively affect South Africa's banks as their own ratings will follow suit. Given the large quantities of government bonds and treasury bills held by South Africa banks, they will also need to buy more liquid assets to meet applicable regulatory requirements.

**Key trade developments:** Negotiations on tariff liberalisation, rules of origin and trade remedies for the proposed Tripartite Free Trade Area (“TFTA”) between the Common Market for Eastern and Southern Africa, the East Africa Community and the Southern Africa Development Community are expected to be concluded during the second quarter of 2017. The TFTA will cover 26 countries and is expected to boost intra-African trade. South Africa also needs to work on its bilateral relations with the United Kingdom in anticipation of the exit of Britain from the European Union.

**Amendments to the Companies Act:** It is anticipated that amendments to the Companies Act 2008 will be proposed in 2017 affecting, in particular, the current business rescue regime.

**New Corporate governance requirements for listed companies:** The corporate governance provisions of the JSE Listings Requirements will be amended to align with the King IV Report on Corporate Governance for South Africa released in 2016. Proposed changes include a mandatory non-binding vote of shareholders on remuneration policy, disclosure of racial diversity policy at board level and the mandatory appointment of a social and ethics committee. Read more…

**Anticipated tax developments:** Legislation is expected classifying interest forgone on loans to trusts as donations subject to Donations Tax. The rules dealing with dividends derived from employee share incentive schemes will become more punitive, taxing certain distributions as revenue. It is anticipated that South Africa will sign the Base Erosion and Profit Shifting (“BEPS”) multilateral instrument, which will have the effect of amending its existing tax treaties in line with the BEPS measures. The Special Voluntary Disclosure Programme will be extended to 30 June 2017.

**Public procurement:** Wide-ranging changes to the regulatory framework for public procurement are anticipated in 2017, with the publication of a draft Procurement Bill expected early in the year. As an interim measure pending the promulgation of new legislation, new draft regulations to the Preferential Procurement Policy Framework Act, which govern all public procurement process, have recently been published. The most notable change arising from these controversial regulations is that the tender price will be a less significant factor in determining tender awards, while greater emphasis will be placed on advancing certain targeted groups. Read more…
Data protection: The effective date of the Protection of Personal Information Act is likely to be announced soon. Companies will then have 12 months to comply with the provisions of the Act. The Information Regulator may opt to schedule the deadline for compliance to coincide with the May 2018 compliance deadline under the EU General Data Protection Regulation (GDPR).

Competition/anti-trust: We expect increased enforcement efforts and further precedent setting cases, in particular more dawn raids and an increase in claims for civil damages. We anticipate possible amendments to the abuse of dominance sections of the legislation and that the Commission is likely to take the necessary steps required to begin actively enforcing criminal sanctions. We also anticipate that additional co-operation agreements will be concluded between African competition authorities, and that the East African Community Competition Authority will commence enforcement of its competition law legislation.

Construction: Draft amendment regulations to the Construction Industry Development Board Act, once promulgated, are expected to change the face of the construction industry, particularly in the dispute arena.

Land reform: In a bid to speed up land reform in South Africa, in February 2016 the National Assembly passed the Expropriation Bill 2015 which provides a framework for the expropriation of private property for public purposes or in the public interests, subject to just and equitable compensation (as opposed to market related compensation). Questions have been raised over whether the correct procedural steps have been followed in approving the Act and it has therefore not yet been signed into law by the President.

Mining developments: Amendments contemplated in the Mineral and Petroleum Resources Development Amendment Bill are likely to come into effect by mid-2017 and will potentially unlock significant investment in the upstream industry. In time, the Government intends to promulgate bespoke legislation for the upstream stream thereby bifurcating its long association with the mining industry. In addition, the third iteration of the Mining Charter, the key document which governs transformation in the mining industry, is likely to come into effect soon. Like the Bill, the Mining Charter has far-reaching consequences for a fragile industry.

LNG-to-Power Programme: The LNG IPP Programme will be conducted in two phases. The initial phase entails the pre-qualification of bidders that satisfy certain key financial and technical criteria of the DoE. In the second phase, following the issue of a request for proposals expected in April 2017, pre-qualified bidders will be invited to submit formal proposals to develop, finance, construct and operate identified projects.

Energy updates: The draft Integrated Resource Plan and Integrated Energy Plan are to be released by the Department of Energy. The latter Plan aims to guide future energy infrastructure investments up to 2050 and will recommend policy options to shape South Africa’s future energy landscape. The Integrated Resource Plan serves to guide the Government’s plan for electricity provision within the energy mix and may elucidate the Government’s strategy in respect of nuclear procurement.

Broad-Based Black Economic Empowerment (“BEE”) Codes of Good Practice: Draft Sector Codes will likely be adopted for Transport, Construction, Forestry, Property, Agriculture and Finance. The functioning of the BEE Commission will become clearer as it becomes more established and developed.

Copyright changes: The Copyright Amendment Bill is expected to be promulgated in 2017 amending the Copyright Act 1978. The Bill has been widely criticised for being poorly formulated and restricting sales, assignments and other transactions involving copyright. Another concern is that the Bill vests residual rights and claims in authors of certain works. It is unclear whether the Bill will be approved in its current form.

Hate speech bill: The Prevention and Combating of Hate Crimes and Hate Speech Bill was published in October 2016 for comment, creating two crimes of hate speech and hate crime. Read more…

Occupational health and safety: Proposals continue to be discussed to ensure equitable and appropriate compensation for employees who sustain work-related injuries or contract occupational diseases. An increased focus by regulators on employee well-being will continue in 2017, including a drive to increase employer penalties for breaches of occupational health and safety legislation.

Independence of key constitutional institutions: The High Courts and Constitutional Court will, in the coming year, be pronouncing on whether the appointment of critical office bearers in South Africa’s constitutional democracy was lawful; and whether certain other office bearers should be disciplined and/or removed as a result of misconduct or no longer being fit and proper.

International Arbitration: It is anticipated that the International Arbitration Bill will be put forward to South Africa’s National Assembly in the final months of 2016 and be promulgated into law in 2017. This Bill seeks to incorporate the UNCITRAL model and will enable the hosting of international arbitrations in South Africa.
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