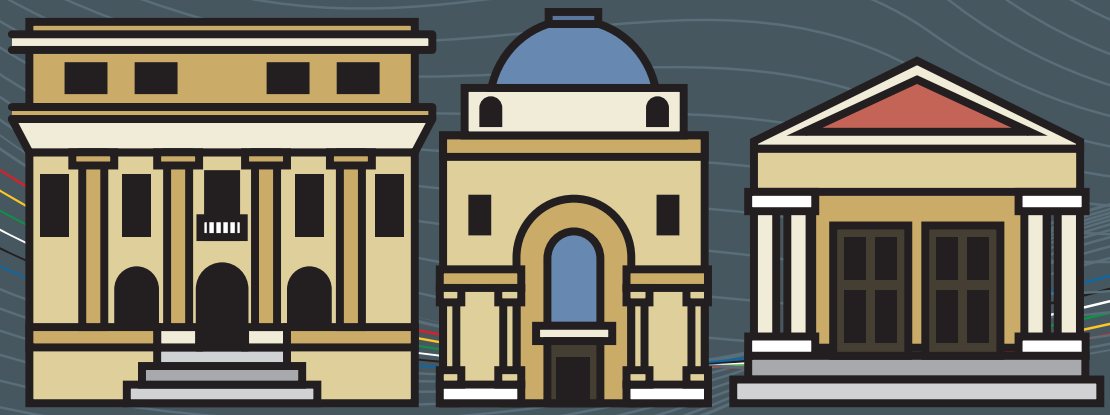

DISPUTE RESOLUTION

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Introduction

The attraction of South Africa as an investment destination is due, in part, to its relatively stable political environment and adherence to the rule of law.

South Africa is a constitutional democracy, with a three-tier system of government and an independent judiciary. Its laws are founded in:

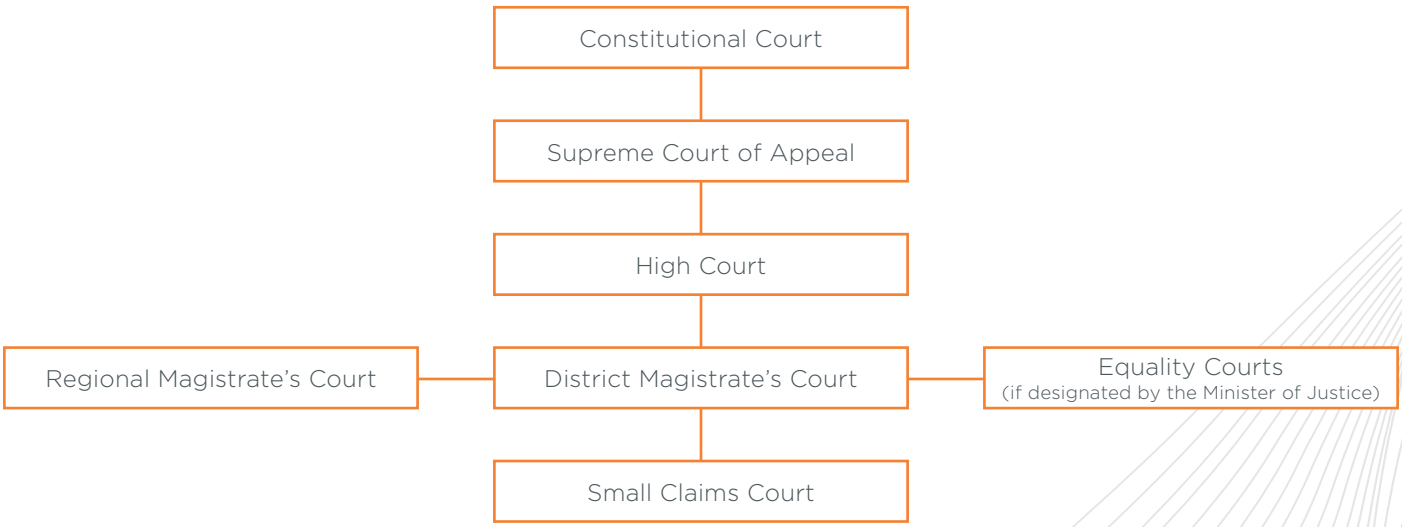
- statutory law: the most important of which is the Constitution of the Republic of South Africa, 1996 (Constitution);
- common law: judicial precedent from case law and the old authorities, English and Roman-Dutch law; and
- African customary law.

The Constitution guarantees both civil liberties (found in most liberal Constitutions) and socio-economic rights (such as access to housing and health care), which the South African Government is tasked with realising within its resource constraints.

South Africa's legal system has well-functioning dispute resolution mechanisms. Parties institute and defend claims before independent courts, arbitral tribunals, mediators and conciliators.

The Legal Profession

South Africa has a split legal profession, akin to that of the United Kingdom. Attorneys advise, liaise with and represent clients, and manage the litigation and arbitration process and strategy. Clients instruct attorneys who, in turn, may brief counsel. Counsel specialise in advocacy work in court.



Courts

The structure of the courts

Under the Constitution, the judicial authority of South Africa vests in the courts, which are independent from the executive and the legislative arms of Government.

Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Any order or decision issued by the courts binds all persons to whom they apply as well as rgans of State.

The Constitution makes provision for the Constitutional Court, the Supreme Court of Appeal, the High Court (which has different divisions), the Magistrate's Courts (which are lower courts) and any other court recognised or established in terms of an Act of Parliament.

Some specialist courts established by Parliament with the status of superior courts include the Admiralty Courts, the Special Courts for Income Tax Appeals, the Competition Appeal Court, the Equality Court, the Land Claims Court, the Copyright Tribunal, the Labour Court and the Labour Appeal Court.

The Constitutional Court

The Constitutional Court is a product of South Africa's new political dispensation. It was established in 1994 by South Africa's Interim Constitution and is situated on Constitution Hill, Johannesburg.

This court is the highest legal authority and the apex court in South Africa in respect of all matters. In practice, however, the Court largely limits itself to hearing constitutional matters and issues connected with decisions on constitutional matters, including matters such as whether acts of Parliament and the conduct of the President and the executive are consistent with the Constitution. The Constitutional Court interprets its jurisdiction widely in this regard.

It is generally a court of appeal and there is no automatic right of appeal to the Constitutional Court. The Constitution prescribes certain limited circumstances in which the Constitutional Court may function as a court of first instance.

The Constitutional Court has the inherent power to regulate its own process and to develop the common law in accordance with the Constitution. Its decisions are binding on all persons, including organs of State, and all other courts in South Africa.

The Supreme Court of Appeal

The Supreme Court of Appeal is the successor to the Appellate Division of the Supreme Court. Sitting in Bloemfontein, it is the general court of appeal in all matters except those specifically reserved for other courts by statute and is only a court of appeal. There is no automatic right of appeal to the Supreme Court of Appeal. In theory, all decisions of the Supreme Court of Appeal are subject to appeal to the Constitutional Court, if the interests of justice so require.

The decisions of the Supreme Court of Appeal are binding on all lower courts.

The High Court

The High Court is divided into several divisions, each with jurisdiction over a defined geographical area. These areas of jurisdiction have not changed since the advent of the new political dispensation in South Africa, which created nine provinces out of the four pre-1994 provinces and the former self-governing territories.

Draft legislation has been passed (but not implemented) to affect major changes to the number, and geographical jurisdictions, of the various divisions of the High Court.

The High Court hears all major criminal and civil matters, except those that are reserved for certain specialist courts or tribunals. Appeals against and reviews of decisions of the Magistrate's Courts are also heard in the High Court.

A decision of a division of the High Court is not binding on another division, but in practice it has strong persuasive force.

Magistrate's Courts

The Magistrate's Courts are lower courts. Unlike the superior courts, which have "inherent jurisdiction" to regulate their own procedure, the Magistrate's Courts are "creatures of statute"; they may only do what is prescribed under statute or the rules made under the Magistrate's Courts Act, No. 32 of 1944.

South Africa is divided into several hundred magisterial districts, each with its own Magistrate's Court. It is less costly to litigate in the Magistrate's Courts than in the High Courts. The civil jurisdiction of the Magistrate's Courts is currently limited to ZAR 200 000 for District Magistrate's Courts, ZAR 400 000 for Regional Magistrate's Courts and to the geographical areas of each Magistrate Court district.

Certain Magistrate Courts are designated Regional Courts. They deal only with criminal matters and they hear the more serious cases (the most serious are heard in the High Court). The Regional Courts may not impose a sentence of imprisonment of more than 15 years or a fine exceeding ZAR 600 000.

The other Magistrate's Courts are District Courts. They try lesser criminal offences and may not impose a sentence of more than three years' imprisonment or a fine exceeding ZAR 120 000.

The territorial jurisdiction of the superior courts over foreign defendants is regulated. In cases where there is a monetary claim and the defendant is neither domiciled nor resident in South Africa (a foreign defendant), South African courts will assume jurisdiction only if:

- the foreign defendant's property is attached in South Africa; or
- legal process is served on such defendant in South Africa.

The Civil Litigation Procedure in the Magistrate's and High Courts

The general procedures in the Magistrate's Court and High Court are very similar. Virtually all of them take the form of an "action" or "application".

An action is the correct procedure where disputes of fact are likely to arise. Only the essential facts, on which the cause of action or defence is based, are pleaded (not the evidence to support those facts). An action culminates in a trial, at which oral evidence is presented and the opposing party has a right to cross-examine witnesses.

An application (motion proceedings) is the preferred procedure where disputes of fact are not likely to arise or where it is possible to resolve disputes of fact without regarding oral evidence. The facts on which an application is based must be set out in detail in the founding affidavit. If factual disputes arise in the proceedings, they may be referred to the hearing of oral evidence.

An action

An action commences with a summons (which sets out the plaintiff's particulars of claim). The sheriff of the court serves the summons on the defendant.

The defendant is called on to notify the plaintiff if he or she intends to defend the action and thereafter to file a plea. The defendant may also file an exception to the summons on the grounds that it fails to set out a cause of action or that it is vague and embarrassing.

If a defendant does not defend the action, or does not timeously lodge his or her plea, the court may enter default judgment against the defendant.

Preparation for trial

Once all pleadings have been exchanged, parties prepare for trial. The two most important stages in preparing for trial are "discovery" (the process whereby the parties identify all the documents in their possession which are relevant to the dispute) and a "pre-trial conference" at which the parties are required to attempt to narrow the issues in dispute and to make final preparations for the trial.

The rules relating to the discovery process are very similar to those in England.

The trial

At the trial the parties present oral evidence to support their claims or defences and the opposing party has the right to cross-examine the other party's witnesses. Each party may subpoena witnesses (who must attend the trial, on pain of criminal sanctions).

After the conclusion of the oral evidence, the parties' counsel present an argument to the court on the law and the facts.

Generally, the judge will reserve judgment and thereafter hand down a written and reasoned judgment.

The duration of an action

The duration of an action depends on the circumstances of each case. As a rule of thumb, however, the exchange of pleadings usually takes several months. In many divisions of the High Court, the waiting time for a trial date after the close of pleadings is in excess of a year. The actual trial may last from a day to several weeks, or even months (in very complex cases). If an appeal is noted, it may take upwards of a year for the appeal to be heard.

An application (motion proceedings)

An application commences with a notice of motion (in which the relief sought is set out), supported by a founding affidavit (which sets out the factual basis for the claim). The sheriff of the court serves the notice of motion on the respondent.

The respondent must respond, within a specified time, by giving notice if he or she intends to oppose the application and, if so, file an answering affidavit. If the respondent does not oppose the application, the matter may be set down to be heard on an unopposed basis.

As all the factual material is set out in the affidavits, there is no trial at which oral evidence is heard. The matter is argued before the court by the parties' counsel.

The duration of application proceedings and urgent applications

The duration of application proceedings depends on the circumstances of each case. It is possible to present an application to court on an urgent or a semi-urgent basis, within a matter of hours or days from the inception of the dispute. This can even be done without notice to other parties concerned, if the circumstances justify it. A person seeking urgent relief from a court (such as an interdict) will do this by making an application. Each division of the High Court has judges on duty to hear matters on an urgent or semi-urgent basis, if good cause is shown.

If there are no grounds for urgency, several months may lapse before the matter is argued. The hearing usually lasts between an hour and several days (in very complex cases).

Judgment is sometimes handed down immediately (especially in urgent matters) or within a matter of days. If an appeal is noted, this may extend the process by several months or upwards of a year.

The Execution of Judgments

Although in practice most disputes are settled before or during a trial or hearing, some proceed to judgment.

If any person obtains a judgment against another, it may be executed by the sheriff of the court. Execution of judgments sounding in money usually take place by the attachment of a person's property and the sale of that property at an auction. Debts may also be attached and the courts may order the periodic deduction of a specified sum of money from a person's salary and the payment of the amount to the judgment creditor.

In certain cases (primarily where a person is ordered to do something) the sheriff may execute the judgment in person, (eg by evicting the judgment debtor or attaching property which belongs to the judgment debtor and handing it over to him or her).

In exceptional cases and as a last resort, persons who do not comply with orders of court may be imprisoned for contempt of court.

Proceedings against the South African State

Under the State Liability Act, No. 20 of 1957, the South African State does not enjoy sovereign immunity and may sue or be sued.

There are certain limitations, however, on the right to sue the State. In terms of the Institution of Legal Proceedings against Certain Organs of State Act, No. 40 of 2002, no legal proceedings for the recovery of a debt may be instituted against specific organs of State (eg any central or provincial Government department or a municipality) unless:

- notice has been given of the creditor's intention to sue within six months of the debt arising;
- that organ of State consents to dispense with the time period in writing; or
- the court condones non-compliance with this requirement.

Service of the notice must comply with the procedure as determined in that Act.

Arbitration

Arbitration, if managed correctly, may present many advantages over court proceedings. Principally, arbitration may provide confidentiality, country neutrality, relative cost-effectiveness and the ability for parties to tailor the procedure to their own needs. It may also allow them to appoint an arbitrator with specialist knowledge in a particular field in question.

These advantages have not been lost on the business community in South Africa, as is evidenced by the wide acceptance and rapid growth of arbitration as a method of dispute resolution.

There is no appeal from the decision of an arbitrator unless an appeal procedure is agreed upon by the parties. An aggrieved party may apply to the High Court to review an arbitrator's award if he or she alleges that the arbitrator has misconducted him- or herself in relation to his or her duty as arbitrator or has committed a gross irregularity in the conduct of the proceedings.

The commencement of arbitration

Generally, parties may agree to submit any dispute to arbitration at the time of contracting or once a dispute has arisen. Very often commercial agreements contain provisions for disputes to be resolved by arbitration.

The Arbitration Act, No. 42 of 1965 (the Arbitration Act), governs international and domestic arbitration in South Africa. The Arbitration Act also applies where a statute prescribes arbitration as the form of dispute resolution, in so far as the Arbitration Act is not excluded by the statute, or is not inconsistent with the statute.

Certain disputes, such as matrimonial disputes, may not be referred to arbitration. If a party to a dispute, which is subject to an arbitration clause in an agreement, embarks on litigation without following the arbitration procedure, the other party may request the court to stay the proceedings in terms of the Arbitration Act until such a time as the dispute has been resolved through arbitration.

Arbitration and the courts

The courts have very limited scope for interfering in arbitral proceedings. The parties are, however, usually permitted to seek limited assistance from a court on an urgent basis.

For instance, where the parties are unable to reach agreement regarding the appointment of an arbitrator, the courts may appoint the arbitrator and thus prevent the proceedings from being frustrated.

Once a matter has been referred to arbitration, the court's assistance may be obtained in the form of orders to make discovery or orders for the examination of witnesses before a commissioner in South Africa or abroad. The Arbitration Act also provides a procedure whereby a party may refer a question of law, which arises in the course of arbitration, to the courts for an opinion. This opinion, once given, is binding on the parties and is not subject to appeal.

It is significant that an arbitral award is considered final in South African law. Recent South African case law confirms that the courts will give due deference to an arbitral award. A court is not a forum to hear appeals against arbitral awards. The power of the court to intervene in arbitration proceedings is limited to procedural impropriety, lack of substantive jurisdiction and gross misconduct.

Arbitration Foundation of Southern Africa and the Association of Arbitrators (Southern Africa)

The Arbitration Foundation of Southern Africa (AFSA) and the Association of Arbitrators play a similar role to that of the International Chamber of Commerce's (ICC) Arbitration Division and the Permanent Court of Arbitration in an international context.

AFSA was founded in 1996 and is a joint venture between organised business and the legal and accounting professions. Parties may agree in an arbitration clause that the arbitration will be conducted under the rules of AFSA or that any other rules of procedure, such as those of the ICC, will apply. AFSA has standard Commercial Rules and Expedited Rules (the Rules), which are suitable for smaller, less complex issues.

AFSA is administered and supervised by the AFSA Secretariat, a body appointed and constituted by the Alternate Dispute Resolution Association of South Africa (ADRASA). The Rules also provide for the appointment of a registrar who performs various administrative functions as prescribed by the Rules.

The Rules detail various guidelines and procedures to be followed by parties wishing to use AFSA's arbitration process. The Rules provide detailed procedures and time periods for the delivery of pleadings, documents and notifications. Parties are permitted to have representation and witnesses may be summoned to give evidence. The parties may also agree to the recording of oral evidence as they see fit.

The Rules also govern the power of arbitrators, their appointment, the nature of the disputes they can hear, the making of an award, and the costs of the arbitration.

The Association of Arbitrators was founded in 1979 to:

- promote arbitration as a means of dispute resolution;
- provide a body of competent and experienced arbitrators and specialists for appointment to arbitral tribunals; and
- assist arbitrators in the effective discharge of their duties.

The Association tends to specialise in building and construction disputes. AFSA's website address is www.arbitration.co.za.

Procedure in arbitrations

In principle, parties are free to adopt the procedure of their choice. The arbitration agreement may itself specify the rules of procedure to be followed or the parties may leave it to the arbitrator to determine the procedure (subject to the provisions of the Arbitration Act).

The rules of AFSA or the Association of Arbitrators are often incorporated into arbitration agreements by reference.

International commercial arbitration in South Africa

South Africa is not a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), but many of the contracts which the South African Government and its agencies conclude with foreign bodies and investors provide for compulsory international arbitration under the:

- ICSID Convention Rules: Additional Facility, 1978 (the ICSID Rules);
- ICC Rules; or
- UN Commission on International Trade Arbitration Rules (the UNCITRAL Rules).

The 1992 Optional Rules for international commercial arbitration, issued by the Permanent Court of Arbitration (established by the 1899 Hague Peace Conference), are less often adopted.

South Africa has ratified many Bilateral Investment Treaties (BITs) which include:

- guarantees of fair and equitable treatment for foreign investors;
- the extension of "most favoured nation" benefits; and
- strong protection against unreasonable, unlawful or inadequately compensated expropriation of foreign investments.

Most of the BITs also provide for compulsory international arbitration in case of a dispute between South Africa as the host country and an investor from the other state which is party to the BIT. A number of BITs have been cancelled by South Africa to make way for the Promotion and Protection of Investment Bill which is to introduce a comprehensive and uniform legal framework to govern investments in South Africa. This Bill has been gazetted for public comment, but is not yet enacted into legislation. Despite cancellation of certain BITs, the protection under those BITs would typically endure for many years following such cancellation.

While the Arbitration Act currently governs both domestic and international arbitrations which take place in South Africa, commentators consider that a separate statutory regime should be adopted in relation to international arbitrations.

The South African Law Reform Commission (the Commission) has recommended that South Africa adopt the provisions of the UNCITRAL Model Law (the Model Law) to govern international arbitrations. The Model Law provides a framework within which international commercial arbitrations may be conducted with a minimal degree of judicial intervention and a significant degree of party autonomy. The Model Law further promotes the harmonisation and uniformity of national laws pertaining to international arbitration proceedings.

The Commission also drafted a Domestic Arbitration Bill which is aimed at aligning domestic arbitrations with modern practice. These recommendations have not yet been implemented.

The Enforcement of Judgments and Arbitral Awards in Foreign Jurisdictions

Arbitral awards

The recognition and enforcement of South African arbitral awards in foreign countries are governed by the law of the country in which awards are sought to be enforced.

South Africa, like many other jurisdictions, is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention aims to achieve uncomplicated and speedy enforcement of foreign arbitral awards.

As such, it lays down limited grounds on which an arbitral award made in a foreign jurisdiction may be refused recognition or enforcement by a court of another country. Essentially, the grounds cover:

- serious procedural defects such as a substantial failure of natural justice or failure by the arbitral tribunal to understand the scope of its mandate; and
- substantive aspects such as a conflict with the public policy of the enforcing state.

If no such grounds exist then the court is obliged to recognise and enforce the foreign arbitral award.

South African law gives affect to the New York Convention through the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977 (the REFAA Act), which provides the mechanism for the enforcement of foreign arbitral awards in South Africa.

All that is required for a party seeking to enforce a foreign arbitral award is to make an application to any High Court of South Africa. This application should be accompanied by either the original or a certified copy of the foreign arbitral award and the arbitration agreement in terms of which the award was made.

The REFAA Act contains grounds, which are substantially similar to those in the New York Convention, on which an arbitral award made in a foreign jurisdiction may be refused recognition or enforcement.

Judgments

The recognition and enforcement of South African judgments in foreign countries are governed by the laws of the country in which the judgment is sought to be enforced. Many of the principles which govern recognition and enforcement by South African courts, discussed below, are applicable in foreign jurisdictions.

Although foreign judgments are not directly enforceable in South Africa, they constitute a cause of action which can be pursued in South African courts. South African courts have laid down a number of requirements for the enforcement of foreign judgments including:

- the foreign court should have had "international jurisdiction" in accordance with South African law;
- the foreign judgment must be final and conclusive in its effect;
- the foreign judgment should not have been obtained fraudulently, should not be contrary to South African public policy, and should not seek to enforce a penal or revenue law of another state; and
- the applicant should have complied with any relevant provisions of the Protection of Businesses Act, No. 99 of 1978 (the PBA).

South African courts have adopted an expansive notion of the term "international jurisdiction" in relation to judgments sounding in money. Foreign monetary judgments may be enforced through the swift "provisional sentence" procedure in the High Court or Magistrate's Courts and may be enforced in South African or foreign currency. As a general proposition, owing to considerations of comity and reciprocity, the realities of international trade and commerce, as well as the need to ensure that wrongdoers do not slip through the jurisdictional net, South African courts readily recognise and enforce judgments of both foreign courts and bespoke international tribunals such as the Southern African Development Community Tribunal.

Under the PBA, however, all foreign judgments and arbitral awards which are connected with the "mining, production, importation, exportation, refinement, possession, use or sale of or ownership of any material, of whatever nature, whether within, outside, into or from the Republic", may not be enforced by South African courts without the permission of the Minister of Economic Affairs.

One of the PBA's key aims is to prevent the recovery of punitive damages awarded by foreign courts to externally-based companies against South African corporate entities or individuals, which may adversely affect the South African economy.

South African courts tend to interpret the PBA narrowly, as applying only to judgments and awards relating to raw materials or produce and to cases where punitive damages are awarded.

The Cost of Arbitration and Litigation in South Africa

The usual position

As in most other jurisdictions, dispute resolution and litigation in South Africa is fairly costly.

The usual rule with regard to costs is that the losing party bears its own legal costs and is ordered to pay the successful party's legal costs. This rule is subject to a number of qualifications, both substantive and quantitative.

The rule does not extend to all kinds of disputes. In matters having a constitutional dimension (as well as criminal matters), each party usually pays its own costs. In civil matters, the judicial officer has a discretion to award costs on a higher scale or to deprive a party of its costs if the circumstances warrant such an order.

The successful party will seldom recover its actual legal costs, as the costs in the High Court are taxed according to outdated tariffs. The tariffs only allow costs for particular tasks and do not fully account for differences in complexity among cases.

The High Court tariff does not apply to arbitral proceedings, unless otherwise agreed by the parties.

Contingency fee agreements

As the "usual" position with regard to the recovery of costs has tended to discourage litigation, except in large matters where the costs are insignificant in relation to the amounts in dispute, some South African lawyers make "contingency fee" arrangements with their clients.

The "no success, no fee" agreements usually take one of two forms where the lawyer:

- may agree to receive a fee for his or her professional services only if the litigation is successful (the conditional fee agreement). The lawyer's "success fee" is usually substantially higher than his or her normal fee, in recognition of the risk in taking on the case; or
- is entitled to a percentage of the final award or settlement which the client receives (the pure contingency fee agreement).

At common law, all "no success, no fee" agreements have traditionally been viewed as champertous, contrary to public policy and thus void.

The Contingency Fees Act, No. 66 of 1997 (CFA) has, however, introduced a statutory exception to this overarching rule. The CFA does not authorise the pure contingency fee agreement. It contemplates a specific version of the conditional fee agreement. The maximum "uplift" that is permitted is 100% of the practitioner's ordinary professional fees and such uplift must not exceed 25% of the total award to the client.

Although the CFA and attendant regulations make it possible to enter into a conditional fee agreement, administrative procedures associated with such agreements make them unpopular with legal practitioners. Thus, little use is made of the CFA in practice.

Security for costs

In terms of South African civil procedure, foreign plaintiffs (individuals and companies) may be ordered to provide security for the legal costs of defendants. The security may take the form of a bank guarantee or a payment into the trust account of a designated attorney.

The amount of the security depends on the estimated costs which are likely to be awarded to a successful defendant. This relates to the nature of the dispute and the likely duration of the judicial proceedings.

The rules regarding security for costs are aimed at ensuring that successful South African defendants are able to recover cost awards in their favour. These rules are, however, interpreted so as not to infringe on a person's fundamental right of access to the courts, as enshrined in the Constitution.

Conclusion

South Africa has a modern and reasonably efficient legal system which enables parties to have their disputes adjudicated in a number of ways including litigation, arbitration, mediation and conciliation. Various impartial forums have been created to facilitate these methods of adjudication.

Importantly, South African law also provides an effective system for the enforcement of both court orders and arbitrators' awards. This is significant, as it creates a considerable measure of certainty in the operation and effectiveness of South Africa's legal system. It is this certainty which ensures that investors continue to invest in South Africa.