

21 LEGAL DEVELOPMENTS

FOR BUSINESSES TO MONITOR IN 2021

In 2021, various legal developments are expected to have an impact on businesses, particularly in the fields of liability, ESG, digital and economic transformation. The South African legal landscape is likely to deliver various

changes in 2021. Businesses will need to think carefully about what these changes mean for their operations, and assess how these changes may impact on their service and product offerings.

These are the key themes that businesses should be aware of as they prepare for 2021



LIABILITY CLAIMS

Legislation, including the Companies Act, increasingly allows for directors to be held personally liable for the conduct of companies, and for the swift imposition of penalties on companies in the event of contraventions through the use of administrative penalties and fines that may be imposed by regulators. International legal attempts to hold shareholders liable for company decisions that lead to harm continue to shine a light on the importance of risk management at all levels of operation and the proper consideration of corporate strategy and decision making.



SOCIAL RESPONSIBILITY

Proper ESG principles, and demonstrable compliance, continue to be front of mind in assessments for funding of new ventures and business operational stability when managing relationships with stakeholders and affected communities. In a post-covid world where the corporate focus across all sectors is on "building back better", properly understanding and managing ESG will be a central theme of senior managerial focus.



DIGITAL TRANSFORMATION

Compliance with information privacy will be a priority, as well as adopting measures to protect against cybercriminals. Increased regulation of digital markets and products means businesses operating in certain sectors may need to rethink their strategies and route to market.



ECONOMIC INCLUSION

Mobilising business to uplift and transform the economy will continue to be a critical factor for businesses in 2021. Businesses will need to demonstrate genuine black economic empowerment. Minimum wages, employment equity, equal access to healthcare, and property are key issues to address for businesses in various sectors.



1

COMPANY LAW

- The draft Companies Amendment Bill, which proposes amendments to the Companies Act, 2008 may come into force. Some of these changes relate to access to information, the disclosure of the remuneration of directors and public officers, the disclosure of beneficial interests in securities, and representation of labour on boards of directors.
- As a result of two recent judgments from the Supreme Court of Appeal and the High Court in Johannesburg, directors may face more derivative actions. These are legal proceedings brought by a person on behalf of a company to protect the legal interests of the company when, for example, the directors act wrongly.
- We also expect an increased focus on environmental, social and governance issues across all industries and businesses, following the expected release of a revised Code for Responsible Investment in South Africa in the first quarter of 2021.



2

BLACK ECONOMIC EMPOWERMENT

Many businesses may struggle with preserving cash and liquidity in 2021. Reduced spending by these businesses may affect black economic empowerment levels as well as ownership scoring. Many black economic empowerment schemes may seek clarity on their status from the appropriate regulator and the Minister, since the B-BBEE Commissioner questioned the status of some of these schemes during the course of 2020, and argued that they do not constitute genuine black ownership in the business.



3

TRADE ACROSS AFRICA

Parts of the African Continental Free Trade Area (AfCFTA) agreement that deals with trade in goods and services have become operational in January 2021. So far, the agreement has been signed by 54 countries out of 55 in Africa. The AfCFTA is likely to provide significant opportunities for African businesses and, according to President Ramaphosa (who is also the current Chairperson of the Africa Union), it will boost intra-African trade, promote industrialisation and competitiveness, contribute to job creation, and unleash regional value chains that will facilitate Africa's meaningful integration into the global economy.



4

COMPETITION - MERGERS

The Competition Commission will focus on creating a more inclusive economy and de-concentrating high levels of ownership. 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.



5

INFORMATION PRIVACY

Businesses will need to be fully compliant with the Protection of Personal Information Act, 2013 (POPIA) by 30 June 2021. The Information Regulator is expected to approve and publish various guidelines in 2021, which will help businesses to interpret and comply with POPIA. These guidelines include final Guidelines for codes of conduct, final Guidelines for the registration of Information Officers, and a guide to assist organisations to comply with POPIA and the Promotion of Access to Information Act, 2000.



6

ENVIRONMENT

It is anticipated that the National Environmental Management Laws Amendment Bill ("NEMLA") will be promulgated in 2021. The NEMLA seeks to amend an array of environmental laws which are largely aimed at giving effect to the 'One Environmental System' which was introduced in December 2014 and regulates environmental matters in the mining and petroleum industries. A number of changes in relation to the regulation and management of climate change and emissions reporting were introduced during 2020 which aim to enhance South Africa's ability to meet its international obligations in terms of the Paris Agreement on Climate Change, among other things. Additional laws and amendments to the current regulatory system in so far as climate change is concerned are expected during 2021. Following the approval of South Africa's National Climate Change Adaptation Strategy in 2020, a process for the management of carbon budgets for the period 1 January 2021 to 31 December 2022 was proposed. It is anticipated that the Climate Change Bill will come into force in 2021, and that once this happens, further regulations which govern both the carbon budget system as well as mitigation plans (currently known as pollution prevention plans) will be published.



7

TECHNOLOGY

South Africa awaits policy and regulatory certainty on the licensing of high-demand spectrum, licensing of the Wireless Open Access Network and strategies from government relating to the 4th Industrial Revolution. Mobile network operators are likely to experience further increased regulatory pressure to lower the prices of connectivity services for the end-consumer. The convergence of technology will continue to change the regulatory landscape, as regulators such as the Competition Commission and the Independent Communications Authority of South Africa grapple with the disruption of over-the-top (streaming) services.



8

CYBERSECURITY

The Cybercrimes Bill is awaiting presidential signature and may come into force in 2021. Once the Bill is signed into law, a person found guilty of a cybercrime may be imprisoned for up to 15 years, depending on the offence. Cybercrimes include illegally accessing a computer system or intercepting data, cyber fraud, cyber forgery and cyber extortion. Electronic communications service providers and financial institutions will need to familiarise themselves with the reporting and other obligations imposed on them once the Bill is signed into law.



9

COMPETITION– MARKET CONDUCT

There may be an increase in complaints relating to buyer power and price discrimination. Following the Competition Appeal Court's finding that a small supplier abused its dominance by charging excessive prices for face masks, more abuse of dominance prosecutions are also likely. The Competition Commission is expected to launch an extensive market inquiry into digital markets in 2021.



10

TRANSPORT

A Transport Bill which seeks to consolidate the economic regulation of transport within a single framework and policy and to establish a Transport Economic Regulator may gain momentum in 2021.



11

PROPERTY

Land expropriation will remain a hot topic and the new Expropriation Bill may come into force. The Upgrading of Land Tenure Rights Amendment Bill, which provides for the application for conversion of land tenure rights to ownership, may also gain traction.



12

TAX

- The Covid-19 lockdown period magnified critical weaknesses at the South African Revenue Service (SARS), and meant that many taxpayers faced increased delays in the release of tax refunds. The lack of appropriate technology platforms available to all SARS employees also meant that many of them were unable to work remotely for a time or could only do so in a limited capacity. The result was that SARS experienced difficulties in attending to existing tax disputes and that taxpayers experienced longer than normal delays.
- SARS is likely to face continued challenges in dealing with backlog issues after its processes slowed down in 2020. We anticipate that these backlogs may lead to an increase in tax disputes, delays in the issuing of decisions on existing disputes, and further delays in the release of taxpayer refunds.
- The alcohol industry suffered severe strain in 2020 as a result of government's decision in March to ban all sales of alcohol during certain pandemic "Alert Levels", in terms of the amended Disaster Management Act, 2002. Importers and manufacturers of alcoholic beverages are required by law to pay excise duties on their products at the point of manufacture or import. Since excise duty is an indirect tax (passed onto the consumer at the point of sale), government was persuaded to grant the industry a special deferment to pay excise duties once alcohol sales resumed. With another alcohol ban effective from December 2020, and alcohol restrictions effective from February 2021, it seems likely that 2021 will see similar issues come to the fore.
- Lockdown resulted in many economic sectors closing down, while others continued to thrive online or via other digital platforms. Covid-19 has also had a significant impact on the collection of tax revenue. Due to the loss of revenue and the rapid rise in digitization of economic activities, it is likely that government will seek to implement new mechanisms to tax digital income streams. Apart from a special "digital tax" on the consumption of and income generated by digital economic activities, it has also been suggested that customs duties may be imposed on cross-border digital economic activities. Details of such measures may be announced in the Minister of Finance's annual Budget Speech in February 2021.



13

WORKPLACE

- The Employment Equity Amendment Bill is expected to become law soon. The Bill introduces several key changes to the current Employment Equity Act, 1998 (EEA) which includes empowering the Minister of Employment and Labour to determine sectoral numerical targets for different occupational levels, sub-sectors or regions within each national economic sector. The Draft Code of Practice on the Prevention and Elimination of Violence and Harassment in the World of Work is expected to be declared a final code soon and it will be housed under the EEA. The Code will guide employers in managing various workplace issues, including unfair discrimination, sexual harassment and bullying.
- The national minimum wage figures have recently been amended by the Department of Employment & Labour (DEL). These figures will come into effect on 1 March 2021.
- POPIA places various obligations on employers to manage employee personal information. Employers need to ensure that their internal policies and procedures are POPIA-compliant by 30 June 2021.
- The DEL has published a new earnings threshold under the Basic Conditions of Employment Act 75 of 1997. The new threshold will come into effect from 1 March 2021. The current threshold is 205 433.30 ZAR per annum while the new threshold will be 211 596.30 ZAR per annum (from 1 March 2021).



14

FOREIGN EMPLOYEES

- Given the resumption of work visa (and related visa) services at the end of 2020, many employers will recruit, or extend, employment of foreign employees in 2021. With the proliferation of remote-working arrangements, not only in South Africa but globally, some employers may not find it necessary to recruit foreign employees to work inside South Africa but will recruit foreign employees on remote-working arrangements (which will remove the requirement for work visas).
- The Department of Home Affairs (DHA) has outsourced its visa processing function to VFS Global. The DHA will continue to process visas through VFS Global for the foreseeable future. This is despite DHA's previous announcement that it is considering a public-private partnership with a new service provider soon. This process has been delayed due to the Covid-19 pandemic and the DHA has announced that it will take approximately 24-36 months to be finalised.



15

NATIONAL HEALTH INSURANCE

National Health Insurance (NHI) may gather momentum in 2021, particularly given the Covid-19 pandemic and government's strategy of moving towards universal health coverage. The NHI is a health financing system designed to pool funds to provide access to quality affordable personal health services for all South Africans based on their health needs, irrespective of their socio-economic status.



16

BUSINESS CONTINGENCY PLANNING

- Following from the financial distress caused by Covid-19, it is likely that many businesses will need to restructure as they struggle with the impact of Covid-19 and a muted economy. Many more business rescues and liquidations may also be likely. The restructuring of financially distressed state-owned enterprises will generate opportunities for private investment.
- The various lockdowns, together with the fact that a national disaster was declared, means that the ordinary rules governing steps that need to be taken if companies are in breach of solvency and liquidity requirements are unlikely to be rigidly applied. A court is likely to take into account public policy considerations which could include the need to preserve food supply chains, look after employees, protect the economy and avoid panic buying and price increases in assessing actions that may have been taken by directors/boards during the period.
- Despite the above, directors will face possible criminal and civil liability if they trade in insolvent circumstances. There are defences available to them, but these would have to be proved and one would not wish to have to rely on them.
- We would expect a greater focus on the various restructuring options available to corporate South Africa which include informal restructures, compromises and business rescue. We would also expect to see an increase in mergers and acquisitions in a distressed debt space.



17

RISK MITIGATION

- The identification and mitigation of external and internal risk and ensuring that adequate measures are in place to eliminate or control those risks will become increasingly important in 2021. If the Covid-19 pandemic has taught us anything, it is that unexpected risks do materialise, and businesses need to be ready to anticipate and adapt to those risks as they emerge.
- Externally, risks emanating from regulatory changes, innovation, technology and cybersecurity, geopolitical and economic developments and terrorism, natural catastrophes and climate change will all weigh heavily on businesses. The same applies to internal risks such as business continuity / financial, capital, workforce and legal and compliance.
- Risk planning will require a deep understanding of the business and the environment within which it operates to make the best decision on the spread of that risk to external players, such as the insurance industry.



18

FINANCIAL COMPLIANCE

We expect greater scrutiny of crypto assets under South African financial sector regulation and anti-money laundering legislation. We also anticipate the development of products to ensure compliance with the Financial Intelligence Centre Act, 2001, given Covid-19 limitations on face-to-face meetings. This may include artificial intelligence-based "Know-Your-Client" products for fraud detection and facial recognition, and the regulation of these products.



19

GOVERNMENT CONTRACTING

- Revised regulations on procurement might be published following a 2020 court order by the Supreme Court of Appeal declaring the Preferential Procurement Regulations, 2017 (Procurement Regulations) invalid. This was, however, suspended by the court for 12 months to enable the Minister of Finance to remedy the defects in the regulations. The court order has been appealed to the Constitutional Court to determine the validity of the regulations.
- The Draft Public Procurement Bill may be enacted. The Bill seeks to consolidate existing statutes, regulations, instructions, guidelines and practice notes that govern public procurement. The Bill further seeks to establish the office of the Public Procurement Regulator. This will create a comprehensive statutory framework for public procurement in South Africa. Timing may be impacted by the appeal to the Constitutional Court and Parliament may await the court's decision before making any changes to the Bill.



20

PRODUCT REGISTRATIONS

Any Covid-19-related vaccine or medical devices would have to comply with the licensing and registration regime created by the Medicines and Related Substances Act, 1965 under the authority of the South African Health Products Regulatory Authority. It is possible that registrations may face third party and IP challenges.



21

EMPLOYEE HEALTH AND SAFETY

Employers need to enter the new year with a new-found focus on employee health and safety, particularly due to the impact of Covid-19 in the workplace. Employers must remain agile and flexible on employee health and safety, given the ever-changing regulations surrounding the Covid-19 pandemic and the increased understanding of the interconnection between public and occupational health, which may require a change in approach to internal looking health and safety management processes. Changes to legislation are likely to see a greater impetus on employer risk based approaches to work based safety, allowing the most appropriate and reasonably practicable measures for the hazards and assessed risks in each workplace to be managed as best as possible, while meeting minimum regulatory criteria. Employers should focus, in the coming months, on assessing internal competency for various specific risk assessments that will be required and to ensure that all required measures to safeguard employees are in place.

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