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South Africa Law Year in Review 2017 and Year to Come 2018
January 2018



Year in Review - South Africa Law in 2017

Stock exchanges: The Johannesburg Stock Exchange (JSE) proposed amendments to the Listings Requirements, including new expedited methods of equity capital raising and changes to the regulation of related party transactions. The JSE also aligned its Listings Requirements in relation to corporate governance with the King IV Report. [Read more...](#)The Financial Services Board granted Equity Express Securities Exchange (Pty) Ltd an exchange licence - bringing the total to three other licensed exchanges in South Africa.

Cross-border investment & trade: The Protection of Investment Act, which attracted controversy over concerns that it may deter foreign investment, has still not come into force. Draft regulations on Mediation Rules in terms of the Protection of Investment Act were published. [Read more...](#)The Invest South Africa One Stop Shop was launched to provide an investment facilitation mechanism where relevant government agencies are brought under a single cohesive structure that co-ordinates and streamlines processes to provide prompt, efficient and transparent services to investors. South Africa signed the Tripartite Free Trade Agreement aimed at creating a free trade area between the Common Market for Eastern and Southern Africa, East African Community, and Southern African Development Community.

International arbitration: The International Arbitration Bill was tabled in parliament. The Bill incorporates the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law into South Africa.

Credit ratings: In April, Standard & Poor's downgraded South Africa to sub-investment grade, while Fitch Ratings revised several of its ratings in relation to South Africa to sub-investment grade, with "stable" outlooks. [Read more...](#) Later in 2017, Moody's dropped their credit rating one notch above sub-investment grade. In November, Standard & Poor's downgraded South Africa to junk status while Moody's placed South Africa on review for downgrade.

Tax: 2017 saw far-reaching changes to South Africa's tax regime, aimed at raising additional revenues by increasing the dividends tax rate to 20% (from 15%) and introducing a new top personal tax rate of 45%.

Audit: The Independent Regulatory Board for Auditors issued a rule prescribing that all South African Public Interest Entities (including all listed companies) must rotate their audit firms after a maximum tenure of 10 consecutive years.

Competition/anti-trust: Merger notification thresholds and filing fees increased in 2017. [Read more...](#)The second civil damages claim arising from anti-competitive conduct was successfully prosecuted and market inquiries in the public passenger transport and data markets were launched by the Competition Commission.

Employment: A draft National Minimum Wage Bill, Labour Relations Amendment Bill and Basic Conditions of Employment Amendment Bill have been published for comment.

Public procurement: New Preferential Procurement Regulations came into force making key changes to procurement to the public sector. [Read more...](#)

Anti-bribery & corruption: A draft Prevention and Combating of Corrupt Activities Bill was released for comment and an amended Financial Intelligence Centre Act (FICA) came into force and effect aligning South Africa's anti-money laundering and counter-terrorist financing regulation with the Financial Action Task Force Recommendations.

Data protection & cybercrimes: Although the Protection of Personal Information Act has still not come into force, 2017 has seen some steps taken towards enforcement. [Read more...](#) The Information Regulator also issued draft regulations for public comment [Read more...](#)The Cybercrimes and Cybersecurity Bill was opened for public comment. The bill has wide application and creates a new set of cybercrimes. [Read more...](#)

Intellectual property (IP): In 2017, relaxations were introduced to the framework regarding IP and so-called "loop structures". [Read more...](#)A new Copyright Amendment Bill was also published. It has been highly criticised and stakeholders have recommended that the bill be redrafted.

Transformation & Black Economic Empowerment (BEE): The third iteration of the Mining Charter was published. It serves as an instrument through which the Minerals and Petroleum Resources Development Act could fuel transformation in the mining and minerals industry. The application of the Mining Charter is currently suspended. A number of sector codes were also adopted - aimed at facilitating transformation in identified sectors - including in the construction and financial services sectors. *Read more...* The Department of Trade and Industry also issued a notice providing that all major Broad-Based BEE ownership transactions must be registered with the BEE Commission. *Read more...*

ICT: Following publication of the ICT White Paper in 2016, the Minister of Telecommunications and Postal Services has suggested amendments to the Electronic Communications Act.

Environment: The promulgation of a suite of regulations under the National Environmental Management: Air Quality Act this year is in line with South Africa's international commitments to cut down Greenhouse Gas emissions. Key steps have also been taken towards finalising water management structures and guiding the water sector with investment planning for the development of water resources and the delivery of water and sanitation services. The National Water and Sanitation Master Plan and the Water and Sanitation Bill are expected to fundamentally change the manner in which water is regulated in South Africa. The promulgation of Regulations under NEMA this year has meant that obtaining *ex-post facto* authorisation for the unlawful commencement of activities has become far more onerous.

Agriculture: The draft Regulation of Agricultural Land Holdings Bill was published. The bill seeks to progress land reform by prohibiting the sale of agricultural land to foreign persons, permitting long-term leases in favour of foreign persons, providing for capped ownership parameters, requiring foreign persons intending to sell agricultural land to first offer same to the appropriate minister and requires a register to be established of all agricultural land ownership. The bill is in the process of being amended.

Financial services: Although the Financial Sector Regulation Act (FSR Act) was signed into law - it is not yet in force. While the **Insurance Bill** was introduced to Parliament in 2016, there have been several further draft publications of the bill which were circulated for public comment. The Insurance Bill is set to repeal numerous sections of the existing Long-term Insurance Act and the Short-term Insurance Act. The Financial Services Board also published draft replacements of the Policyholder Protections Rules and Regulations both published under the Long-term Insurance Act and the Short-term Insurance Act. These are both pieces of sub-ordinate legislation and the proposed changes seek to align the insurance industry with the Treating Customers Fairly principles and the Retail Distribution Review previously published by the Financial Services Board. September saw the launch of the African regional centre of the New Development Bank, more commonly known as the **BRICS Bank**. The bank's focus areas are regional integration and connectivity. The South African Reserve Bank issued a guidance note on the best practice standard expected of banks regarding cyber resilience; including, internal controls, risk assessments, and security testing that must be implemented by banks. The South African Reserve Bank also announced that it will begin initial phases of industry engagement and testing of **Bitcoin** so as to determine the exact nature of the regulatory need that Bitcoin may prompt in future. In mid-2017, the South African Financial Blockchain Consortium (SAFBC) was established. SAFBC comprises a number of industry stakeholders, the Financial Services Board and the South African Reserve Bank and aims to develop, test and implement **blockchain** solutions within the local financial services industry.

Mining: In June, we engaged with the Select Committee on Land and Minerals to highlight some unintended consequences in the proposed amendments to the Mineral and Petroleum Resources Development Amendment Bill introduced in 2013. *Read more...* Details of the Mining Charter are dealt with under 'Transformation and BEE'.

Oil & gas: A high court found that the minister's decision to promulgate regulations permitting fracking in South Africa was unlawful and the empowering regulations were set aside - effectively halting shale gas exploration activities in South Africa.

Transport: The Competition Commission launched a market inquiry into the public passenger transport sector. *Read more...* The Department of Transport approved a Comprehensive Maritime Transport Policy aimed at facilitating the growth, development and transformation of South Africa's maritime transport sector in support of socio-economic development whilst contributing to international trade. *Read more...*



Year to Come - South Africa Law in 2018

Stock exchanges: The proposed amendments to the Listings Requirements of the Johannesburg Stock Exchange (JSE) should be implemented during 2018.

Cross-border investment: The draft regulations on Mediation Rules in terms of the Protection of Investment Act may be finalised in 2018. The role of the One Stop Shop, launched in 2017, is expected to be elevated in the coming year as job creation will remain a key government priority.

International arbitration: The International Arbitration Bill may be passed into law in 2018.

Trade: At a regional level, the number of countries who will ratify the Tripartite Free Trade Agreement (TFTA) will be monitored closely as African leaders are under pressure to show the commercial benefits of the TFTA. The agreement will come into force when it has been ratified by 14 countries. At the end of 2017, it had only been ratified by one country.

Credit ratings: South Africa may be further downgraded by credit rating agencies - much will depend on the outcome of the ruling party's leadership election. The financing of State Owned Enterprises (SOEs) will continue to remain in the spotlight in 2018 with discussions about possible listings of these SOEs likely.

Tax: In 2018 there may be some efforts to increase tax payable by companies through targeting a number of perceived tax avoidance strategies in draft legislation. Changes may include expanding the definition of a "controlled foreign company", narrowing the foreign employment income exemption, targeting certain share buy-back and dividend stripping arrangements, expanding the scope of the current "debt reduction" rules, clarifying the trust conduit rules for employee share schemes, addressing structures which avoid dividends tax and widening the scope of the anti-avoidance provision regarding zero or low interest loans provided to trusts.

Company law: The Department of Trade and Industry may propose amendments to certain provisions of the Companies Act.

Competition/anti-trust: Far-reaching amendments to the Competition Act are expected in 2018. The proposed amendments are aimed at creating a more inclusive economy and deconcentrate high levels of ownership in particular sectors. During 2018, it is expected that extensive conditions, particularly in relation to public interest, will continue to play an essential role in merger assessments and that competition authorities across Africa will increase collaborative efforts. The Competition Commission will also begin enforcement of criminal sanctions against directors and managers found to have engaged in cartel conduct.

Public procurement: Wide-ranging changes to the regulatory framework for public procurement are anticipated in 2018, with the publication of a draft Procurement Bill. The primary purpose of the draft bill is to consolidate and simplify the fragmented legal and policy environment and to introduce a greater degree of flexibility into the public procurement framework. The draft bill is intended to provide the legal framework for the regulation, modernisation and transformation of public procurement and will include preferential targeting, local-content, supplier development and set-aside measures to achieve equity, job creation and local industrialisation. It will also introduce stricter sanctions for wrongdoing and non-compliance with public procurement rules.

Employment: Subsequent to amendments made to the Labour Relations Act in 2015, it is anticipated that an appeal will be heard by the Constitutional Court in 2018 in relation to whether temporary employment services (i.e. labour brokers) or their clients are to be the deemed sole employers of employees earning below a gazetted minimum threshold of remuneration. There may be some progress on the draft National Minimum Wage Bill, Labour Relations Amendment Bill and Basic Conditions of Employment Amendment Bill. Given that South Africa's official unemployment rate appears to be at an all-time high, it will be noteworthy to examine whether the proposed adoption of a national minimum wage will impact on unemployment levels. Transfers of a business as a going concern and outsourcing arrangements will continually need to be scrutinised on a factual case-by-case basis to ascertain whether a transaction (including an outsourcing) will result in the automatic transfer of contracts of employment from the old to the new employer. Enhanced minimum leave and benefits for working parents may also be on the cards for 2018 - the current legislative framework currently only caters for four

months' maternity leave and for three days' paid family responsibility leave in certain circumstances. [Read more](#)

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Data protection: The commencement date of the Protection of Personal Information Act will be announced in 2018. Businesses will have a 12-month grace period to ensure that they comply. With the coming into effect of the General Data Protection Regulation (GDPR) in May 2018, South African businesses will also need to evaluate whether they fall within the wide territorial reach of the GDPR.

Intellectual property (IP): Further relaxations are anticipated to promote cross-border transactions involving IP and to make it easier for South African companies to obtain foreign partners, customers and capital.

Environment: The National Greenhouse Gas Emission Reporting regulations will come into operation in 2018.

Environment: Recently published draft Financial Provisioning regulations are expected to significantly improve the manner in which financial provisioning is regulated in the mining and oil and gas industries. The new regulations are anticipated to come into force in 2018 and will, among other things, reduce the amount of financial provisioning that must be set aside for environmental rehabilitation that is currently required. Many of these changes are in line with additional amendments to the regulation of financial provisioning under the National Environmental Management Act (NEMA) which are proposed by the National Environmental Management Laws Amendment Bill. Once promulgated, this bill will also close many of the legislative gaps associated with the shift in environmental regulation away from the Mineral and Petroleum Resources Development Act, otherwise known as the 'One Environmental System'.

Agriculture: Amendments to the draft Regulation of Agricultural Land Holdings Bill will be published in early 2018. The Bill seeks to progress land reform within the agricultural sector.

Construction: The release of the NEC4 suite of contracts in 2017 - which introduces an Alliance Contract which hopes to assist parties to achieve assimilation in segmented projects; and a Design, Build and Operate Contract - may result in the South African market (which currently uses NEC3 series of contracts) moving towards adopting NEC4 as their preferred contract choice.

Financial services: While the Financial Sector Regulation Act (FSR Act) has been passed, it is yet to come into law. Given the broad impact of the FSR Act, it will be introduced in tranches with the first enactment expected to take place in the first half of 2018. It will have a dramatic impact on the regulation of financial services and financial products in South Africa with the establishment of two new regulators, the Prudential Authority and Financial Sector Conduct Authority. It is also anticipated that the Conduct of Financial Institutions Bill (COFI Bill) will be published in the second half of 2018. This is set to repeal several pieces of legislation and will regulate the distribution of financial products and the rendering of financial services. These pieces of legislation include the Collective Investment Schemes Control Act, Pension Funds Act, Long-term Insurance Act and the Short-term Insurance Act. To date, the COFI Bill has not been published or circulated for comments. Having regard to initiatives and statements made by the Financial Services Board (FSB) and the South African Reserve Bank in 2017 - it seems likely that in 2018 - the initial phases of engagements with the industry around developing regulatory sandboxes and the publication of the FSB's paper on crowdfunding in South Africa will begin.

Mining: The third iteration of the Mining Charter, the key document which governs transformation in the mining industry, is likely to come into effect in 2018. High Court judgments in regard to the "once empowered, always empowered" principle and the interpretation of the Mining Charter will be rendered in the first half of 2018. These judgments are likely to significantly improve regulatory certainty. Further, amendments contemplated in the Mineral and Petroleum Resources Development Amendment Bill may come into effect by mid-2018 and will potentially unlock significant investment in the upstream petroleum industry. In time, the government intends to promulgate bespoke legislation for the upstream stream thereby bifurcating its long association with the mining industry. The mining sector in South Africa will also be affected by a number of environmental law developments, detailed above.

Oil & gas: The high court judgment which found that the minister's decision to promulgate regulations permitting fracking in South Africa was unlawful and set aside the empowering regulations may be appealed by the minister.



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