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# 22 LEGAL DEVELOPMENTS

FOR BUSINESSES TO MONITOR IN 2022



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## 1. COMPANY LAW

We expect a revised draft of the Companies Amendment Bill will be published and tabled in Parliament early this year. The revised amendments may come into force this year.

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## 2. BLACK ECONOMIC EMPOWERMENT

We expect a panel will be appointed to provide a report on ways to address critical issues related to B-BBEE to ensure the appropriate changes are made to minimise exploitation of the B-BBEE provisions and ensure that broad-black ownership strengthens the transformation of the economy.

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## 3. TRADE ACROSS AFRICA

Although trading under the African Continental Free Trade Area was due to start in 2021, this has not been the case. As of February 2022, 41 of the 54 signatories have deposited their instruments of ratification. Negotiations to finalise the rules of origin took place in January 2022. The Pan-African Payment and Settlement System was also launched in January 2022 – the system aims to save currency convertibility costs. South Africa and other member states will continue to work towards implementing the AfCFTA.

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## 4. PROPERTY

Land expropriation will remain a hot topic, although the Expropriation Bill is unlikely to be passed as the country is still dealing with the pandemic.

The Property Practitioners Act, 2019 (assented to on 19 September 2019) and accompanying regulations (published on 14 January 2022) commenced on 1 February 2022. Given the short time frame between the publishing of the regulations and the commencement of this Act, the property market is under severe pressure to comply with the Act or face punitive measures.



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## 5. INFORMATION PRIVACY

Data breaches will probably continue escalating in 2022 because of a global shift to a digital/hybrid environment. Increased data protection enforcement by the Information Regulator is likely, aided by streamlined internal processes and technological developments in the office of the Information Regulator (such as an automated complaints management system). The Information Regulator will publish more guidance notes. We expect our courts will develop case law on the Protection of Personal Information Act, 2013 (POPIA), which will help with its interpretation.

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## 6. CYBERSECURITY

On 1 December 2021, parts of the Cybercrimes Act, 2020 came into operation. We expect the remainder of this Act will become effective in 2022, including the sections that create reporting obligations for electronic communications service providers and financial institutions.

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## 7. TECHNOLOGY

Connectivity and digital access will continue to be critical issues in South Africa. The licensing of the International Mobile Telecommunications spectrum is currently in process, but the licensing of the Wireless Open Access Network has been scrapped. The Independent Communications Authority of South Africa's market inquiry into signal distribution services in South Africa is likely to continue into 2022. Large/dominant players will be closely scrutinised. Ethical issues related to the regulation and use of AI will continue to be hot topics.

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## 8. COMPETITION - MERGERS

Public interest will continue to play a significant role in merger assessments. The South African Competition Commission (SACC) is mainly focused on the potential dilution of B-BBEE / historically disadvantaged persons ownership structures due to merger transactions. We also expect amendments to the merger filing forms will likely be finalised in 2022. Firms will have to provide extensive information about the effect of the merger on all public interest considerations and more detailed information on their proposed transactions. After the Constitutional Court's recent decision in Mediclinic, which emphasised that competition law must be interpreted and applied with regard to the Constitution, the scope of public interest considerations may be broadened to include constitutional issues.



## 9. COMPETITION - MARKET CONDUCT

Comprehensive recommendations will be published in the Online Intermediation Platforms Market Inquiry. The recommendations are likely to have far-reaching consequences for firms operating in digital markets.

In late 2021, the SACC published its report titled: "Measuring Concentration and Participation in the South African Economy: Levels and Trends", which found that in 144 sectors of the economy that were examined, 69.5% were highly concentrated. Sectors highlighted include agriculture, retail, healthcare, financial services, energy, gambling, and construction. Investigations and market inquiries may be launched in these sectors to probe competition dynamics more closely.



## 10. TRANSPORT

The Economic Regulation of Transport Bill was introduced to the National Assembly on 31 January 2020. The Bill seeks to create an integrated system of economic regulation over the transport of passengers and goods, by air or through airports or ports, and by road or rail, among other things. Various bodies currently regulate the South African transport sector. The Bill envisages a consolidated economic regulation of this sector within a single framework and policy under a single regulator, the Transport Economic Regulator. It envisages that several regulators will be consolidated into one. These are: the Ports Regulator, the National Public Transport Regulator, the Cross-Border Road Transport Agency, the Air Service Licensing Council, and the International Air Services Council. Notably, the list is not exhaustive, and a legislative framework may be created to enable the addition of other regulators into this consolidated system.



## 11. INFRASTRUCTURE

We anticipate that there will be more significant activity in the infrastructure landscape and accelerated development of bankable infrastructure projects. This follows the passing of the Infrastructure Development Act in 2014, with the subsequent designation of strategic integrated infrastructure projects, and the establishment of the ZAR100 billion Infrastructure Fund and Infrastructure South Africa in 2020/1. The President's economic recovery plan envisages that infrastructure will play a leading role in developing the South African economy over the next 30 years. The National Infrastructure Plan 2050, published in the last quarter of 2021, sets out ambitious plans for various infrastructure sub-sectors, which, if given effect, should see more significant investment flowing into the economy and a rapid acceleration of infrastructure development.



## 12. RISK MITIGATION

We may see an increase in ESG-related litigation and the use of arbitration to settle disputes. We are also likely to see an uptick in damages claims following data breaches.



### 13. ENVIRONMENT

**NEMLAA4 Bill:** The long-awaited NEMLAA4 Bill should finally be enacted into law. The Bill seeks to amend almost every Environmental Management Act in the country, including Waste, Air, Biodiversity and Water.

**ESG:** There is a growing acceptance and integration of ESG principles among South African corporates, who recognise that this is essential to attracting investment and aligning with global expectations of corporate responsibility and sustainable impact. This trend is likely to speed up in 2022. Coupled with this, the demand for sustainability-linked loans is surging, with banks competing to offer this new form of finance in South Africa. These loans could be used for any purpose, such as making an acquisition. However, the interest rate applicable is informed by the achievement of specific targets by the borrower on key ESG indicators.

**Extended Producer Responsibility:** The scope of the Extended Producer Responsibility framework may be extended to include a broader number of sectors to further the development of a circular economy.

**Climate Change Bill:** The Climate Change Bill, published for comment in 2018, was adopted by Cabinet in September 2021 and tabled in Parliament in October 2021. We expect this Bill, which aims to formalise South Africa's carbon budget market, amongst other things, will be enacted this year.



### 14. GOVERNMENT CONTRACTING

**Draft Preferential Procurement Regulations:** The Constitutional Court (the Court) left the procurement regulatory regime uncertain after it delivered judgment in *Minister of Finance v Afribusines NPC* on 16 February 2022. The Court did not address whether the Supreme Court of Appeal's declaration of invalidity in respect of the 2017 Preferential Procurement Regulations were to take effect immediately or be suspended to allow for National Treasury to take corrective action. The Minister of Finance has subsequently filed an urgent application to the Court to seek confirmation thereon. National Treasury (Treasury), by means of an advisory note, provided organs of state with regulatory guidance whilst they await an answer from the Court. Treasury advised the following: tenders advertised before 16 February 2022 will be finalised in terms of the 2017 Regulations; tenders advertised on or after 16 February 2022 will be held in abeyance; and no new tenders will be advertised. In a follow-up advisory note on 3 March 2022, National Treasury clarified that organs of state have scope to determine their own preferential procurement policies within the framework of the Preferential Procurement Policy Framework Act. Draft Preferential Procurement Regulations (the Draft Regulations) have also since been published on 10 March 2022, with the window for public comment closing on 11 April 2022. The Draft Regulations prescribe the thresholds for using the 80/20 and 90/10 preference point systems, together with the formula to be applied as well as other matters necessary and expedient to achieve the objects of the Preferential Procurement Policy Framework Act. The Draft Regulations are essentially a watered-down version of the 2017 Regulations. In the interim, the preferential procurement regulatory regime remains uncertain, as there is no requirement for uniformity in the way organs of state carry out their preferential procurement processes.



## GOVERNMENT CONTRACTING - CONTINUED

**The Draft Public Procurement Bill:** 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 also aims to establish the office of the Public Procurement Regulator. The Minister of Finance has mentioned in Parliament that Treasury must first address the content of the Judicial Commission of Inquiry's state capture report (Zondo report) and consider the Constitutional Court's judgment referred to above before the Bill is published. The wait for the Court's judgment may have delayed the progress on the Bill in 2021. We anticipate that the legislature will publish a revised Bill later this year, once the Court provides clarity on its order and Treasury has had time to make amendments based on the Zondo report.

**Advance rulings:** The Customs and Excise Act will be amended to allow taxpayers to apply for advance rulings for tariff or value determinations. This provides more certainty and clarity for importers and manufacturers paying excise duties.

**Diesel refund regime overhaul:** Rules and notes will be amended to take into account comments from industry-specific workshops.

**Advance Pricing Agreements:** Multinational businesses will soon be able to negotiate bilateral advance pricing agreements (APA) with SARS and revenue authorities in OECD member countries once enabling legislation for the pilot project is passed.

**Cross-border intra-group loans:** SARS released a draft interpretation note for comments on how the arm's length principle would apply to intra-group loans of multinationals. We hope to see the final interpretation note issued taking into account comments on the draft.



## 15. TAX

**Reduction in corporate tax rate:** The corporate tax rate will be reduced from 28% to 27% for years of assessment ending on or after 31 March 2023. However, setting-off of assessed losses will be limited to a 80:20 split.

**Vision 2024:** The South African Revenue Service (SARS) proposes to have third party returns submitted on a "real-time" basis (currently, annually) to enable more accurate and efficient collection of income tax from individuals.

**Scope of "electronic services":** Value-added Tax (VAT) regulations on the scope of "electronic services" will be updated, in line with OECD developments.

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**16. WORKPLACE**

**Employment Equity:** The Employment Equity Amendment Bill is yet to become law. The next step in the parliamentary process is for the Bill to be considered by the National Council of Provinces. The Bill introduces several changes to the current Employment Equity Act, 1998 (EEA), including 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.

**Mental health issues:** Managing employees with mental health-related issues will be crucial for employers. Mental health-related issues can lead to decreased productivity and work performance, poor working relationships with colleagues and increased sick-related absenteeism. It can also compromise workplace safety. Employers should manage employees with mental health-related issues carefully and fairly to avoid the need to terminate an employee's employment and assist the employee in dealing with their mental illness.

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**17. EMPLOYEE HEALTH AND SAFETY**

Employers will continue to grapple with whether to adopt mandatory vaccination policies for their employees. Employers must ensure that they conduct a comprehensive risk assessment when evaluating this. Employers will may be required to consider complex subsidiary issues, including:

- the use of different Covid-19 vaccination policies for different categories of employees;
- potential claims of unfair discrimination by vaccinated and unvaccinated employees;
- refusals to vaccinate by some employees; and
- disclosure of vaccination status by employees and POPIA considerations.

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**18. BUSINESS CONTINGENCY PLANNING**

We anticipate that several financially-distressed businesses will need to be restructured or liquidated. We expect a continued focus on the various restructuring options available to corporate South Africa, including informal restructures, compromises, and business rescue. We also expect to see a continued increase in mergers and acquisitions in a distressed debt space. The restructuring of financially-distressed SOEs will generate opportunities for private investment.

## 19

**19. PENSIONS**

Two new discussion papers before Parliament propose amendments to the Pension Funds Act, 1956 (PFA) and may come into force. The two notable changes would be:

- a "two-pot" retirement fund where members are entitled to withdraw up to one-third of their benefit at any time, with the remaining two-thirds remaining invested until retirement; and
- the structure of umbrella funds to ensure better outcomes for members – this may impact employer-based retirement funds.

Government's proposed Comprehensive Social Security and Retirement Reform model may gain momentum this year following an updated green paper submitted to Parliament for discussion in 2021. There may be further engagement with industry on proposed amendments to Regulation 28 of the PFA, making it easier for pension funds to invest in infrastructure, before the proposed amendment will take effect.

We expect there will be a continued focus on pension fund investments and ESG issues among pension funds, following a concentration on these matters, both internationally and nationally, in 2021.



## 20. PRODUCT REGISTRATIONS

Recently-introduced Covid-19-related health products, like vaccines and medical devices, were approved in terms of the emergency use authorisation provisions of the Medicines and Related Substances Act, 1965. This year, more applications for the approval of Covid-19 treatments and home-based testing may be submitted to the South African Health Products Regulatory Authority under these provisions. Government could change the licensing and registration regime for these types of health products this year in response to the varying levels of vaccination and infection. Registrations might encounter third party and IP challenges.



## 21. NATIONAL MANDATORY VACCINATION POLICY AND NATIONAL HEALTH INSURANCE

Government has established a task team to undertake broad consultations on making vaccination mandatory for specific activities and locations. The task team will report to a committee chaired by the Deputy President, which will make recommendations to Cabinet on the approach to vaccine mandates. Additional details on the policy are expected early in 2022.

The National Health Insurance Bill (NHI Bill) is currently under consideration by the National Assembly. The NHI Bill may gather momentum in 2022, particularly after almost two years of the Covid-19 pandemic impacting individual health and socio-economic well-being across the population.



## 22. FINANCIAL COMPLIANCE

**Legislative changes:** A Conduct of Financial Institutions Bill (CoFI) may be submitted to Parliament in 2022 as part of the twin peaks model to reform the sector. CoFI, focusing 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. Amendments proposed in 2021 to the Financial Intelligence Centre Act, 2001 (FICA) may gain traction in 2022.

**Fintech:** We expect South Africa will focus on fintech policies, primarily because regulators recently confirmed they would include crypto assets within their scope and respond to the aggressive market growth and social benefit that the fintech industry provides. Much social and economic development results from open finance and digital banking, and we anticipate both will expand in 2022. We foresee that, as the regulators account for the social and economic impact of fintech, they will be committed, just as they have demonstrated with crypto assets, to developing an open finance regulatory framework.

We expect that the regulators will respond to the Inter-governmental Fintech Working Group's recommendation to introduce standardised open finance policies. In line with impending reforms to South Africa's national payments system regulations, the South African Reserve Bank may introduce numerous policies to regulate digital payment services and alternative payment methods in South Africa. The first of these will be the regulation of faster payment systems and services, such as 24/7 real-time / near real-time clearing, in early 2022.



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