

AFRICA

A Legal Guide for Business
Investment and Expansion

SOUTH AFRICA



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SOUTH AFRICA

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Major local and international clients include automotive corporations, banks and other financial institutions; commercial and industrial corporations; bodies representing various professions, transportation companies, research councils and bodies, security firms, property developers and agents, various councils, dairy and agricultural concerns.

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- Property, township development, transfers and bonds
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1. What role does the government of South Africa play in approving and regulating foreign direct investment?

South Africa is a constitutional democracy and an active member of the international investment community. It has the most industrialised economy on the African continent. Since the advent of democracy in 1994, the South African Government has developed an international investment, trade and industry policy of not renewing long standing Bilateral International Investment Agreements. This was due to international investors challenging domestic legislation in terms of the Bilateral Investment Agreements.

Conscious of the need to protect and promote the rights enshrined in the South African Constitution and recognizing the importance of foreign direct investment to the well-being of the people of South Africa, the Government enacted the Protection of Investment Act No. 22 of 2015. In terms of the Protection of Investment Act, any lawful investment enterprise is to be conducted in terms of the laws of the Republic, and the provisions of the Act must be interpreted and applied in a manner that is consistent with the Republic's Constitution, customary international law as contemplated in terms of section 232 of the Constitution, international law as contemplated in terms of section 233 of the Constitution, and any relevant

convention or international agreement to which the Republic is or becomes a party. In terms of section 233 of the Constitution: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative that is inconsistent with international law."

South Africa has a strong, reputable and independent judiciary to adjudicate on foreign investor disputes. All foreign exchange transactions in South Africa are subject to exchange control regulations. The current set of Exchange Control Regulations was promulgated on 01 December 1961 and they were last amended up to Government Notice No. R.9 in Government Gazette No. 33926 of 14 January 2011. Control of the regulations vests in the Treasury.

2. Provide advice on best entry strategies to employ in South Africa and common corporate structures used.

Foreign Investors can conduct business in South Africa without a local partner. South Africa is investor friendly and therefore has minimal requirements, although local partner knowledge may assist with navigating unique domestic legal requirements such as Broad Based Black Economic Empowerment (B-BBEE) and specific sector charters. The most commonly used corporate structure is private companies ((Pty) Ltd).

3. How does the South Africa government regulate commercial joint ventures between foreign investors and local firms?

The South African Government does not regulate joint ventures between foreign investors and local firms. These are regulated as per the terms and conditions and agreements between the parties. A foreign direct investor enterprise conducted in terms of a joint venture will be subject to the provisions of the Protection of Investment Act No 22 of 2015.

4. How does the South Africa government regulate proposed activities by foreign investors and are there any areas of the economy where they are prohibited (e.g., natural resources, energy, telecommunications or real estate)?

Foreign direct investment is not restricted to any sector of the domestic economy. Activities of a foreign investment enterprise will be regulated by the Protection of Investment Act No 22 of 2015.

5. How do labour statutes regulate the treatment of local employees and expatriate workers?

Conditions of employment within all private sectors of the domestic South African economy are regulated in terms of the Labour Relations Act No. 66 of 1995 and the Basic Conditions of Employment Act No. 75 of 1997.

The legislation provides a codified employment law framework in South Africa with the objective of encouraging collective bargaining and the settlement of workplace disputes.

6. Capital availability and access considerations in South Africa – any major capital, infrastructure or labour constraints to be aware of and strategies to mitigate?

South Africa has one of the more sophisticated banking systems in the world and does not experience the same trauma as many more developed economies. Prudent lending practices have contributed to this. Access to finance is improving in corporate and retail markets and solid asset classes and sound business plans will be supported by the banks and lending institutions in South Africa. There is currently low appetite for lending in property development. Interest rates continue to remain relatively low in South Africa. When local banks receive foreign currency, they convert according to the rates ruling on that day. Repatriation of funds is done on a similar basis provided the investment was properly declared when the funds were brought into the country. Letters of credit and other transactions are transacted as on a commercial basis anywhere in the world.

South Africa has a well-developed infrastructure, the most industrialised economy on the African continent and a highly developed financial and banking sector. Foreign investment enterprises will be well advised to seek strategic advice on Black Economic Empowerment and Employment Legislation.

7. What types of taxes, duties, and levies should a foreign investment in South Africa expect to encounter?

A foreign investment enterprise conducting business in South Africa will be liable to pay tax to the South African Revenue Service in accordance with the provisions of the Income Tax Act No. 58 of 1962 and the Value Added Tax Act No.89 of 1991.

8. What are the main IP law provisions likely to be most relevant to inbound investors and/or foreign imports and their distributors (e.g. trademark protection, licensing, other)?

The South African legal system protects and facilitates the acquisition and disposition of intellectual property rights. South Africa is a party to the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). Foreign owners of patents and trademarks may license them locally. When the use of a patent licence domestically entails the payment of royalties to a non-resident licensor, the royalty agreement must be approved by the Department of Trade and Industry. Patent rights are granted for a period of twenty years, usually with no option of renewal. Trademarks are registered for a period of 10 years and are renewable for ten year periods. Intellectual property rights are recognised and offered statutory proprietary protection in terms of, inter alia, Section 25 of the Constitution, the Copy Right Act 98 of 1978 and the Patents Act 57 of 1978.

9. If a commercial dispute arises, will local courts or will international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

In terms of the Protection of Investment Act No. 22 of 2015, commercial disputes involving foreign investment enterprises in South Africa will be adjudicated in terms of South African law.

10. What laws and business practices are peculiar to South Africa?

In South Africa, B-BBEE codes are enforced to ensure that the economy is structured and transformed to enable the meaningful participation of the majority of its citizens and to further create capacity within the broader economic landscape at all levels through skills development, employment equity, socio economic development, preferential procurement, enterprise development, especially small and medium enterprises, promoting the entry of black entrepreneurs into the mainstream of economic activity, and the advancement of co-operatives.

South Africa has a strong culture of consumer protection and foreign investment enterprises may be subject to the provisions of the Consumer Protection Act No. 68 of 2008. For example, in any transaction or agreement pertaining to the supply of goods to a consumer in South Africa, there is an implied provision that the producer, importer, distributor and the retailer each warrant that the goods are of a good quality, in good working order and free of any defects.

11. What are the regulations, protocol, and practicalities around public procurements and financing in South Africa?

Financing of private persons and certain entities is regulated by the National Credit Act. Private entities regulate their procurement through their procurement policies while government institutions are regulated by legislation such as the Municipal Financial Management Act, the Public Finance Management Act and the Preferential Procurement Policy Framework Act. The public sector in South Africa adopts a strong local beneficiation and Black ownership transformation approach in its supply chain choices.

12. What kind of actions should investors take to avoid corrupt practices in South Africa?

Investors should do business with reputable entities that apply best compliance practices within their organisations. South Africa has adopted the Financial Intelligence Centre Act (know-your-client-legislation) and is in the process of implementing information security measures through the Protection of Private Information Act. The Companies Act requirements also specify other mandatory measures for all registered companies such as a social and ethics review and adherence.

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