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Investment Protection and Regulation

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Western Cape
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Introduction

This Guide is developed in partnership between Dentons and Wesgro, the official tourism, trade and investment promotion agency for Cape Town and the Western Cape. Dentons is a global law firm with a strong presence in South Africa, providing comprehensive legal services across multiple practice areas, including constitutional law, investment law and property rights. The firm brings extensive expertise in investment protection frameworks, corporate governance and regulatory compliance. Wesgro works to promote investment and trade in the Western Cape, supporting businesses in understanding their rights and protections under South African law while fostering economic growth in the region.

1.1. The governance of the Republic of South Africa (“South Africa”) is rooted in and guided by the supremacy of the Constitution of the Republic of South Africa Act 108 of 1996 (the “**Constitution**”), which stands as the highest law of the land and underpins both democratic governance and the legal system. All organs of state are bound by the Constitution, ensuring that governmental power is exercised transparently and within the limits prescribed by law.

- 1.2. The Constitution upholds the doctrine of separation of powers, which carefully divides authority amongst three branches of government, namely, the executive, the legislature, and the judiciary. To prevent the abuse of power, this doctrine establishes a system of checks and balances, ensuring that power and authority is not concentrated in any single branch of government, but rather that different branches of government remain accountable to each other.
- 1.3. Through the doctrine of separation of powers, the courts are bound to ensure that the exercise of power by government branches are constitutionally valid. A key example of this is the judiciary’s power to review executive conduct and ordinary laws for compliance with the Constitution and the Bill of Rights, as any law or action which conflicts with the Constitution is invalid.
- 1.4. With the introduction of democracy in 1994, the new constitutional order sought to address the economic and social legacies of apartheid and to establish a framework for inclusive growth, fair competition, and enhanced investor confidence.



- 1.5. South Africa's investment protection framework is grounded in the Constitution and effected through national legislation. The Constitution recognises both the right to property and the right to invest in South Africa, seeking to balance the right to property and the need for equitable access to resources, to redress historical injustices and achieve economic transformation.
- 1.6. The Protection of Investment Act 22 of 2015 ("**Investment Act**") was implemented to ensure that investment protection aligns with the principles of the Constitution and South Africa's legal and policy objectives. The Investment Act provides a uniform framework for foreign and local investments.
- 1.7. The South African legal system seeks to achieve a delicate balance by promoting investor confidence and protecting property rights while advancing broad-based black economic empowerment, equitable access to land and economic prosperity.

2. Section 25 of the Constitution

- 2.1. Section 25 of the Constitution, often referred to as the 'property clause', provides the foundation for investment protection and property rights in South Africa. This 'property clause' is not limited to land and is key to understanding how property rights are treated in the context of investment.
- 2.2. Section 25 of the Constitution states that *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"*. In terms of the law of general application, property may only

be expropriated for a public purpose or in the public interest, and is subject to compensation for the amount of which, and the time and manner of payment of which, have either been agreed to by those affected or decided or approved by a court.

- 2.3. The term public interest explicitly includes South Africa's commitment to land reform, and equitable access to South Africa's natural resources. This ensures that property rights are protected whilst also providing the state a means to achieve transformative objectives to remedy injustices due to apartheid.
- 2.4. This is not dissimilar to jurisdictions such as the United States of America, Australia, and the United Kingdom, all of which retain the authority to acquire private property for recognised public purposes, subject to requirements of due process, compensation and lawfulness. As in those jurisdictions, South Africa's approach ensures that expropriation occurs strictly within the bounds of the law, namely, the Constitution, which guarantees that any deprivation of property must be just, equitable, procedurally fair, and subject to just and equitable compensation.

3. The Investment Act

- 3.1. The Investment Act is the primary framework regulating investment protection in South Africa. It reflects the country's commitment to fostering an equitable and sustainable investment environment. The Investment Act establishes a unified and constitutionally compliant framework that applies equally to domestic and foreign investors.

- 3.2. In terms of the Investment Act, an investment includes any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of South Africa. It involves committing resources of economic value, over a reasonable period of time, in anticipation of profit, or securing shares, debentures or other ownership instruments of an enterprise.
- 3.3. The objectives of the Investment Act are to:
- 3.3.1. protect investments in a manner that balances the public interest with the rights and obligation of investors, in accordance with the Constitution;
 - 3.3.2. affirm South Africa's right to regulate investments in pursuit of the public interest; and
 - 3.3.3. confirm the rights and responsibilities found in the Constitution and the laws applicable to all investors and their investments in South Africa.
- 3.4. Key investor protections provided in terms of the Investment Act include:
- 3.4.1. foreign and domestic investors are guaranteed equal treatment and protection under South African law, promoting an investment environment that does not discriminate against foreign investors;
 - 3.4.2. investors, irrespective of nationality, enjoy the right to property as provided in section 25 of the Constitution, prohibiting arbitrary deprivation of property, unless in the public interest and subject to compensation as determined by the affected parties or as approved by a court;
 - 3.4.3. foreign investors are afforded the right to transfer funds related to their investment, provided that such transfer complies with taxation obligations and other applicable laws;
- 3.4.4. investors, regardless of nationality, are entitled to physical security of property, by the state, in accordance with the minimum standards of customary international law, and within the limits of its available resources and capacity; and
- 3.4.5. investors are entitled to fair administrative treatment, where the state must ensure that administrative, legislative and judicial processes are not arbitrary and that investors are not denied procedural justice in respect of their investments.
- 3.5. The Investment Act further provides investors with the opportunity to utilise domestic dispute resolution mechanisms, encouraging investors to resolve disputes through mediation facilitated by the Department of Trade, Industry and Competition before resorting to domestic courts. However, this provision does not preclude the investor from approaching any competent court, independent tribunal, or statutory body within South Africa for the resolution of a dispute.

4. The Expropriation Act

- 4.1. There has been much commentary regarding expropriation in South Africa, with concerns raised as to whether the state is permitted to take private property from a property owner arbitrarily. This view is incorrect, as the Expropriation Act 63 of 1975 ("**Expropriation Act**") does not authorise arbitrary deprivation of property. Rather, the Expropriation Act provides a legal framework that

governs when and how property may be expropriated, ensuring that such actions occur only in the public interest or for a public purpose and in accordance with the Constitution.

- 4.2. The Expropriation Act regulates the procedures and conditions under which the state may expropriate property, whether movable or immovable, for a public purpose or in the public interest. It provides a legal framework for notification, compensation, and transfer of ownership, ensuring that expropriation occurs lawfully and transparently.
- 4.3. Although the Expropriation Act predates the Constitution, it continues to apply to the extent that it is consistent with the Constitution, which reiterates the notion that any legislation or section thereof that is inconsistent with the Constitution is invalid. The purpose of expropriation is not to deprive investors arbitrarily of their property, but to advance legitimate public objectives, such as infrastructure development, land reform, social and economic development, and redress.
- 4.4. The Expropriation Act provides that the Minister of Public Works may, subject to an obligation to pay compensation, expropriate property for public purposes or take the right to use temporarily any property for public purposes. However, this is limited by the Constitution, in which the Constitution requires that any expropriation must be subject to compensation of which the amount, the time, and manner of the compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected.

4.5. The Constitution provides that, when determining what constitutes just and equitable, the following factors must be considered:

- 4.5.1. the current use of the property;
 - 4.5.2. the history of the acquisition and use of the property;
 - 4.5.3. the market value of the property;
 - 4.5.4. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - 4.5.5. the purpose of the expropriation.
- 4.6. From an investor's perspective, the Expropriation Act, as aligned with the Constitution and the Investment Act, provides guidance to investors by defining the circumstances, procedures and the methods used to determine compensation in matters of expropriation.
- 4.7. The framework for expropriation serves as a key safeguard for investor confidence, balancing the state's developmental and redistributive objectives with the protection of property rights guaranteed in terms of the Constitution. It provides assurance that expropriation will not be used as a punitive or discriminatory measure but rather as an instrument of public policy and equitable reform conducted within a predictable and lawful process which complies with the principles of the Constitution.
- 4.8. There have been recent legislative developments with the assent of the Expropriation Act 13 of 2019 (**"New Expropriation Act"**). While the New Expropriation Act reflects the principles of the existing Expropriation Act, it introduces additional procedures and

conditions under which expropriation may occur. The New Expropriation Act has attracted significant commentary, and its constitutional validity has been challenged in the High Court of South Africa. Amongst the provisions of the New Expropriation Act, it introduces the possibility of expropriation with no compensation in circumstances deemed just and equitable. It is important to note that although the New Expropriation Act has been assented to, it is not yet in force and as such has no application as of yet. Furthermore, the challenge of the New Expropriation Act's consistency with the Constitution remains ongoing.

5. The Companies Act

- 5.1. In addition to the protections afforded to investors through the Investment Act, the Companies Act 71 of 2008 and the Companies Regulations 2011 (together, the “**Companies Act**”) reinforces a culture of ethical responsibility and good governance across both the public and private sectors. By promoting well founded governance practices, the Companies Act fosters a stable and responsible investment environment, aligning business conduct with South Africa's constitutional values, as well as international standards.
- 5.2. The Companies Act requires all public companies and state-owned enterprises (“SOEs”) to establish and annually re-elect a social and ethics committee (“SEC”). A company's SEC is responsible for monitoring the

company's activities and ensuring that the company's operations align with the principles of ethical conduct, good corporate citizenship and sustainability.

- 5.3. SECs are responsible for, amongst other things, monitoring the company's activities to ensure compliance with legal, ethical, environmental, and social responsibilities, including, but not limited to, compliance with the OECD recommendations regarding corruption, the Employment Equity Act 55 of 1998, and the United Nations Global Impact Principles. In addition to this, SECs are required to provide compliance oversight to codes of best practice, and corporate governance standards, promoting accountability, transparency, and responsible corporate conduct.
- 5.4. A company's SEC is accountable to the board of directors and must report on its activities and matters within its mandate to the shareholders of the company at its annual general meeting. The responsibilities and duties of a company's SEC, in turn, promotes transparency and corporate accountability.
- 5.5. Through this requirement imposed by the Companies Act, state-owned enterprises and public companies are held to a higher standard of ethical conduct. This fosters an investment environment that is characterised by integrity and responsible governance, aligned with both domestic and international standards of ethical and sustainable business conduct.

6. Conclusion

- 6.1. South Africa's investment protection framework, based on the Constitution, the Investment Act and the Expropriation Act provides a balanced legal framework that upholds equality before the law, economic development, redress, and fair protection and treatment of investors.
- 6.2. The investment protection framework protects property rights and promotes investor confidence while preserving the state's right to regulate in the public interest, underpinning South Africa's greater goals of transformation, sustainable development, and economic growth.

7. How to get assistance

- 7.1. Investors seeking further information or support regarding expropriation in South Africa and/or investment protection can obtain guidance from the Department of Public Works and Infrastructure; the Department of Trade, Industry and Competition; Wesgro; Dentons; or your trusted legal advisor.

About the Partners

Wesgro

Wesgro is the official tourism, trade and investment promotion agency for Cape Town and the Western Cape. The investment team assists Western Cape companies seeking expansion, South African companies investing in the region and foreign companies entering the market for the first time. Wesgro offers a comprehensive range of services to investors, including providing market intelligence, navigating South Africa's policy and regulatory landscape, assisting with site location identification, addressing regulatory challenges and facilitating referrals to specialist advisory services such as legal firms, recruitment agencies and property professionals.

Dentons

Dentons is the world's largest global law firm, connecting talent to opportunity across more than 80 countries. As a trusted legal partner to investors, Dentons South Africa combines local insight with global reach to help clients navigate complex legal and regulatory environments. The firm advises across key sectors such as finance, energy, infrastructure, real estate, technology and private equity, offering expertise in corporate and commercial law, mergers and acquisitions, employment, competition and regulatory compliance. With a strong track record in supporting businesses entering or expanding in Africa, Dentons helps investors establish operations, secure project financing and achieve sustainable growth.



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For further information on setting up or expanding your business in Cape Town & the Western Cape, please contact Wesgro's Investment Team



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