Hogan Lovells

# Africa Newsletter

JANUARY 2014

## Contents



# Introduction

Welcome to the January 2014 edition of the Hogan Lovells Africa newsletter. We bring you the first newsletter of 2014 at an exciting time for Hogan Lovells. In November last year we announced the combination between Routledge Modise – one of the largest South African law firms – and Hogan Lovells. The combination provides us with an enhanced platform, adding a Johannesburg office and much broader sub-Saharan Africa capabilities. The new office comprises approximately 120 legal professionals, including 39 partners, with a focus on corporate, commercial, litigation, mining and employment work.

To coincide with our enhanced capabilities in South Africa, this edition of the newsletter brings news and updates with a focus on South Africa. We review the South African mining industry and, amongst other things, consider the impact of the Marikana Massacre.

We evaluate South Africa's foreign trade position in relation to the legal framework governing foreign investments in South Africa, and also discuss the rewards for potential Chinese investors in Africa. Further articles include a review of Real Estate in South Africa and of a case advised on by our Pro Bono team in Johannesburg, between Johannesburg Metro Police Department and street traders that were forcibly removed from their trading posts in an exercise to "clean" the city.

We hope you enjoy this newsletter, and as always, please get in touch with any questions.

Best wishes

**The Hogan Lovells Africa team**

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# South African mining industry at a crossroads

The South African mining industry has faced an unprecedented and complex range of challenges in 2012 and 2013, including the effect of the global economic downturn, industrial action and the ever-increasing costs of production. The uncertainty regarding the regulatory regime has impacted even further. In this article, we touch on the proposed amendments to the Mineral and Petroleum Resources Development Act (MPRDA), compliance with empowerment requirements, and the proposed amendments to the Mine Health and Safety Act (MHSA).

While the coming into force and effect of certain of the provisions of the 2008 Mineral and Petroleum Resources Development Act (the MPRD Amendment Act) aimed to address concerns raised by industry stakeholders, this has not necessarily been the case.

The situation has been impacted further by Cabinet approval of the Mineral and Petroleum Resources Development Amendment Bill (the Bill) at the end of May 2013, for tabling in Parliament.

The stated purpose of the Bill is to, among others, amend the MPRDA as amended by the MPRD Amendment Act to remove ambiguities, to provide for the regulation of associated minerals, partitioning of rights, and enhance provisions relating to the beneficiation of minerals, and to provide for enhanced sanctions.

There has been extensive comment and criticism by industry stakeholders, with the majority of the focus being on the negative aspects of the proposed amendments in the Bill.

Not all of the proposed amendments should, however, be viewed in a negative light – several are likely to impact positively on the mining industry.

One of the proposed amendments aims to improve the situation regarding associated minerals. Currently, rights are granted to mine for a specified mineral only, and if the holder of the right has not been granted the right to mine a particular mineral, even if it is in "mineralogical association" with the mineral in respect of which the right has been granted, the holder may not mine that mineral, lawfully. The Bill proposes to include a definition of "associated mineral", namely any mineral that occurs in mineralogical association with and in the same core deposit as the primary mineral being mined, where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith.

Another proposed amendment relates to partitioning of rights. The Bill proposes the substitution of section 11(1) of the MPRDA with a new sub-section, which provides that a right or a part of a right may be ceded, transferred, encumbered, let, sub-let, assigned or alienated with ministerial consent and subject to such conditions as the Minister may determine. Currently section 11(1) does not provide for this. The ability to partition rights is likely to assist several stakeholders, including entities such as joint ventures.

There has been far-reaching criticism in relation to the proposed amendments regarding the inclusion of historical mine dumps within the cumbersome parameters of the MPRDA, the repeal of the "first come first served" principle in relation to applications, ministerial discretion in relation to beneficiation and the associated requirements, increased sanctions in the form of administrative fines based on the right holder's annual turnover, and ministerial discretion regarding timeframes within which applications and related aspects are required to be addressed.

The Bill is subject to parliamentary processes and, it is hoped, that the comments submitted by industry stakeholders when the Bill was published for comment are properly considered and, where appropriate, incorporated in the Amendment Act, in support of the overwhelming desire to ensure that South Africa is an investment destination of choice, and South Africa's mining industry continues to play a significant role in the development of South Africa.

There has been a mounting sense of frustration in the Department of Mineral Resources (DMR) about what it perceives as a lack of transformation in the mining sector. At the same time, many mining companies express bewilderment as to what more they can do to satisfy the DMR's requirements. Meeting the transformation expectations may not be as difficult as some mining companies may think, but often, they only face compliance shortcomings during audits carried out by the DMR. These random audits started approximately two years ago, and look at all aspects of the mining operation's compliance record, from how it is implementing its social labour plan to its environmental management and reporting obligations.

Typically, a mining company will only receive about two weeks' notice of an audit. The DMR is extremely thorough and leaves no stone unturned during these visits. If the company claims that it is running a community development project, the DMR delegation will want to see it. Where the DMR finds that the operations fall short, it will issue a section 93(1) notice (in terms of section 93(1) of the MPRDA): a directive requiring the company to take rectifying steps within a certain time frame. If the company does not respond adequately, the DMR can then issue a section 93(2) notice, suspending the operations until the shortcomings have been remedied. In the worst case scenario their license can be suspended or cancelled altogether.

There are usually three areas where companies tend to fall short: employment equity, procurement and community development. Often the shortcomings are a question of differences in interpretation between the DMR and the mining company, rather than a lack of effort or commitment to empowerment. For example, companies often believe that they are doing well on employment equity because their top leadership meets the recommended threshold for race and gender. The DMR might identify the problem as being in senior or middle management.

Because non-compliance is often a result of differences in interpretation, it is not as difficult as one may think to achieve compliance.

For example, while there are challenges to local procurement, one of the ways of overcoming these is to focus on small and medium-sized enterprise development, concentrating on equipping people from local communities with portable skills, such as plumbing, auto mechanics or business skills, which can be used in any sector, not just in mining. The mining company can then assist in registering the beneficiaries as a legal entity, such as a co-operative, using the services of the Small Enterprise Development Agency.

Community development initiatives can also be effectively and affordably implemented by concentrating on projects that do not pose unnecessary obstacles. The most difficult projects tend to be in agriculture. It is must simpler, quicker and more cost effective to focus on establishing or supporting schools and clinics in communities.

Prevention is always better than cure, and being pro-active is preferable to reacting to outside pressure.

The Mine Health and Safety Amendment Bill, which has been published for comment, aims to amend the MHSA, so as to streamline administrative processes, to strengthen enforcement provisions, to reinforce offences and penalties, to amend certain definitions, and to provide for related matters. There is little doubt that all role players in the mining industry, need to be committed to the health and safety of employees, and other persons who may be affected by the mining activities. It is hoped that the concerns raised by the industry in response to the proposed amendments are carefully considered to ensure that the objects of the Mine Health and Safety Amendment Bill are achieved.

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# Marikana and the Mining Charter

In August 2012, near the small rural town of Marikana in South Africa's platinum-rich North West Province, a stand-off between mineworkers, rival trade unions, their mining bosses and security forces resulted in the violent deaths of 44 people.

Although a comprehensive inquiry into what has been poignantly termed the Marikana Massacre is ongoing, it is generally accepted that at the root of this tragedy lies the socio-economic plight of mineworkers and their demand for improvement in their wages and living conditions.

As a result, Marikana has become more than the name of a rural hamlet. As a term, it encapsulates the aspirations of mineworkers for the contemporaneous and tangible improvement of their living standards.

Marikana has not only dramatically and irreversibly changed the landscape of industrial relations in the mining industry – it has also provided the expedient backdrop for the formation of a new political party, lead by a charismatic and controversial politician, underpinned by demands for increased state control in the mining industry.

Wage demands that followed Marikana, for the most part, were (and still are) characterised by socio-economic issues idiosyncratic to the mining industry. At a time when the mining industry is battling to cope with the effects of the worldwide economic slump, these demands are understandably difficult to satisfy and have to be managed in the fracas of inter-union rivalry for ascendancy in representation of mineworkers.

Mining resources are non-renewable and the economic benefit in an economy highly dependent on this industry is transient. It is not out of place that in this context, eyes turn to the mining industry to breach the gap and to bring about socio-economic improvements, which often cannot be achieved as quickly by other means. The aim is for the effects of such socio-economic upliftment to endure long after the mineral resources are depleted and mining investors have withdrawn.

One of the objects of the Mineral and Petroleum Resources Development Act. 28 of 2002 (MPRDA) is to promote social and economic development and so to give effect to constitutional principles – apart from the fact that it has fundamentally altered the mineral laws of the country.

The new mineral law dispensation, of which the MPRDA is the flagship legislation of the Department of Mineral Resources (DMR), has brought about a fundamental paradigm shift.  The mineral wealth of the country belongs to the people of South Africa and the

State is now the custodian thereof. This is a significant departure from the Roman-Dutch principles of private ownership of mineral resources with limited, or no State involvement as was hitherto the law.

As an inevitable consequence of this custodianship, the Minister has the duty to administer mineral dispensation with a social conscience. The Minister is expressly tasked by section 3(3) of the MPRDA to ensure that there is sustainable development of the country's mineral wealth while promoting economic and social development.

To achieve this aim, the Minister in September 2010 published an amendment of the Board-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (the Charter). The Charter in its current form is mostly known for its goal of achieving meaningful economic participation and ownership by historically disadvantaged persons of at least 26% in entities holding mining rights.

However, the Charter also prescribes other socio-economic goals, which include mine community development and the improvement of housing and living conditions of mineworkers.

Mine communities form an integral part of mining development. The Charter consequently requires mining right holders to make a meaningful contribution towards community development. This is done by identifying projects within a needs analysis and making a financial contribution thereto proportionate to the size of the mining investment.

Moreover, the Charter recognises that dignity and privacy for mineworkers are the hallmarks of enhancing productivity and expediting transformation of the industry in terms of housing and living conditions. All hostels must be converted and upgraded to family units, with an occupancy rate of one person per room. Mining right holders must also facilitate home ownership options for all mineworkers in consultation with organised labour.

Together with the Charter, the Code of Good Practice for the Mining Industry (the Code), published by the Minister in April 2009, mirrors the obligations of the Charter and provide the mechanisms for completing scorecards and submitting those to the DMR to measure compliance.

The Charter and its predecessor both provided for graduated and increased measures of compliance. However, these all come to fruition this year, being 10 years since the advent of the MPRDA. Like the proverbial stock-take, the time has now come to gauge the mining industry's performance in meeting its socio-economic obligations and to measure the State's resolve in enforcing compliance. This stock-take will no doubt occur against the backdrop of Marikana and within a heated political arena, but without escaping the realities of a worldwide economic slump and its effect on the mining industry.

Both the Code and the Charter provide that a failure to comply therewith is a violation of mining right conditions and may in appropriate circumstances entitle the Minister to revoke the mining right under section 47 of the MPRDA. In her budget speech in Parliament in May 2013, the Minister was critical of the progress the mining industry had made in achieving the ownership targets circumscribed by the Charter. In this context, it would seem that the Minister would not hesitate to act against mining right holders who fail to meet compliance targets. In response, the Chamber of Mines stated that it was confident that all its members will this year be compliant with the ownership obligations set forth in the Charter.

In the context of Marikana, there can be little doubt that the Minister and the DMR would adopt an equally strict view of compliance with the socio-economic obligations prescribed by the Charter as it would in the case of ownership obligations. It is most likely too that organised labour, fuelled by inter-union rivalry and political rhetoric, will at the very least demand compliance with the baseline obligations of the Charter against the call for State intervention where compliance is wanting.

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# No more BITS and pieces

**The legal framework governing foreign investments in South Africa**
On 1 November 2013 the Promotion and Protection of Investment Bill was published for public comment. The Bill is aimed at consolidating the regulation of all foreign investment into a codified framework as opposed to a plural system of bilateral investment treaties (BITs).

The Bill has received immediate attention from the market, with a number of critics speedily voicing their concerns and suggesting that its promulgation will result in a decrease in foreign direct investment (FDI). While the Bill should not come as a surprise to investors, who have been warned of it for three years now, its provisions contain potentially widespread ramifications for South Africa's status as the "go to" investment destination on the African continent.

What has confused both market commentators and investors is that South Africa has already begun the process of withdrawing itself from a number of important bi-lateral investment treaties (BITs) entered into since apartheid. While most BITs provide for extended protection beyond unilateral termination, it remains perplexing why these have been cancelled before the Bill has even overcome public scrutiny, let alone being passed into law.

This article aims to evaluate South Africa's foreign trade position under a centralised governing scheme as the successor regime to that of a plethora of separate bilateral agreements.

**BITs and their Context**
A BIT creates a form of protection for foreign investors by ensuring that their respective investments will be regulated and governed in accordance with international rules on investments. Among other things, BITs ensure that host countries' governments do not expropriate investments without fair and adequate compensation, usually market-related, as well as granting foreign investors treatment that is no less favourable than that accorded to domestic investors.

Perhaps the most critical aspect of a BIT is its provision for international dispute resolution, usually through the International Centre for Settlement of Investment Disputes (ICSID), which allows private investors to sue national governments in an international arbitration forum. The use of the ICSID eases investors' concerns

of being subject to an unknown and uncertain judicial system.

However, from a host country perspective, BITs invoke a number of undesired complications. The sheer multitude of agreements results in an uncertain and fragmented legislative regime, with different interpretations arising in respect of similar provisions on a constant basis. The confusion that this multifaceted governance framework creates has led the Department of Trade and Industry (DTI) to pursue a more standardised system.

There are currently 36 BITs to which South Africa is a signatory, though only 16 of these have been promulgated into South African law. These numbers were higher before the Minister of Trade and Industries, Rob Davies, announced the withdrawal of treaties with certain European Union countries – Belgium-Luxembourg (October 2012), Spain (August 2013), Germany (October 2013), Switzerland (October 2013) and the Netherlands (November 2013) – a trend that is set to continue until all BITs are eventually terminated.

The EU, through trade commissioner Karel de Gucht, has expressed its unhappiness at this state of affairs. De Gucht recently met with Davies, supposedly in an attempt to retain BITs with EU countries. The EU's concern may well be based on South Africa's currentpolicy of pursuing closer relations with Brazil, Russia, India and China, which suggests a greater reason to establish a comprehensive and uniform legal framework.

It is, however, noteworthy that South Africa is not alone in this trend – Australia, Brazil, Canada, Norway, the USA and Sweden have expressed their intention to review and amend their existing BITs in favour of the host country's interests.

**BITs and their Purpose**

The purpose of a BIT, especially in the context of a developing country, is to draw in Foreign Direct Investments (FDI). It is argued that multinationals view BITs as a central pillar to their FDI policy owing to the inevitable reduction in transaction costs brought by the strengthening of the legal environment to which their investments are subject.

Confirmation that their investments will not be expropriated without due compensation is seen as a major comfort. This seems to be supported by the negative sentiment that has been expressed by the EU, where De Gucht has been reported as saying

the unilateral change of the investment regime was "not good, and is not good for SA".

However, there is empirical evidence against the contention that BITs result in increased FDI. Indeed, in a review of South Africa's BITs conducted from 2007 to 2010, it was confirmed that there was "no clear relationship between BITs and increased FDI inflows" with the review going on to suggest that FDI comes from a number of countries with whom we do not have a BIT (for example, Japan, the USA and India).

It is also argued that BITs are established by countries as the groundwork required for the more influential preferential trade agreements (PTA) to follow suit. However, an examination of South Africa's current PTA network also refutes this contention as there doesn't appear to be any significant correlation between BITs that are enforceable and PTAs that are in places.

The two different schools of thought leave us at a stalemate on whether the alleged economic value of BITs is enough to compensate for the complications which they bring.

**The Promotion and Protection of Investment Bill**

First, an issue that must be answered by the DTI is how South African investors, who have interests in foreign countries that are counterparties to a current BIT, are to be protected in respect of their investments. For companies such as South African Breweries (SAB), Naspers and others, which have large investment portfolios with signatories to a BIT, does this replacement of BITs with domestic legislation diminish their protection?

Cognisance should particularly be taken in respect of investments by South African companies within Africa. It is very likely that the inbuilt legal protections of countries such as Mauritius and Mozambique offer far less protection to the private investor than the respective BITs that are currently in place. Further clarity from the DTI on this issue should be requested.

Moreover, the Bill includes the following contentious provisions and aspects that are to be considered:

- An investment may not be expropriated without just and equitable compensation;
- The concept of expropriation is defined narrowly;
- Investment disputes may only be referred to South African arbitration or courts;
- Government is entitled to take a number of measures in favour of public interest, which may have a detrimental impact on an investment.

In light of the importance of BITs to multi-nationals, as suggested by De Gucht, it is no surprise that the Bill has already been the subject of market outcry. The concept of "just and equitable" compensation for expropriation will be evaluated against the considerations of the public interest, invoking a firm belief that this amount will inevitably fall below the market value of the investment.

Though this is in line with the Constitutional protection afforded to property rights, foreign investors will require some form of assurance that their investments will receive a reasonable compensation.

Furthermore, the concept of "expropriation" is limited, and excludes, among others, instances where a government measure has an indirect adverse impact on an investment or is introduced to protect public welfare objectives. It is contended that the uncertainty, coupled with the lack of adequate compensation this provision contains, calls for a compromise that must be reached between the legislators and investors.

Critically, the removal of foreign investors' rights to seek relief on a dispute through international arbitration is said to be of major concern to the foreign market.

However, it must be noted that the South African government has only once been taken to the ICSID for an investment dispute – the matter involved the change from old order rights to new order rights brought about by the Minerals Petroleum Resources Development Act, which was greatly attenuated and eventually resulted in an argument in The Hague over costs.*

The submission of this single dispute to arbitration begs the question – is the removal of BITs's such a grave danger? According to Minister Davies, both South African courts and the Arbitration Foundation of South African (AFSA) are considered efficient and well capacitated dispute resolution systems and will certainly provide litigants with a legitimate and credible judiciary

While it is acknowledged that a neutral territory will always be comforting to a foreign investor, South Africa's judiciary has developed and progressed extensively over the years and should not be seen in the same light as that of many other African states. For these reasons, the removal of an international arbitration mechanism should not act as a deal breaker for investors.

Finally, a degree of uncertainty is created through the entitlement of government to take any measures in favour of public interest. This provision, which is drafted widely, may be read with government's rights of expropriation for the benefit of the public interest. Again, the failure to appropriately compensate investors for expropriation will no doubt act as a deterrent to multi-nationals considering the establishment of their businesses in South Africa.

Notwithstanding Davies' assurances that the Constitution will provide investors with extensive protection of their property, they need to be directly comforted that their investments will be protected to the best degree possible, and that they will be treated fairly and reasonably.

**Too soon to panic?**

There is no doubt that these contentious provisions will result in a protracted negotiation process between the public and legislators, further delaying the promulgation of the Bill. While this delay will be of concern to investors who are protected by BITs that are already in the process of termination, it must be acknowledged that most BITs provide for an extended protection of investments for 10 to 20 years after termination of the treaty, notwithstanding the provision for retrospective application of the Act. So though new investors may not be so lucky, foreign investors currently established in South Africa will have continued protection under their BITs for some time to come.

Furthermore the Bill is currently open for public comment until 1 February 2014. Foreign investors are encouraged to use this opportunity to propose alternative mechanisms, which provide a sustainable compromise between government's needs and foreign investors' concerns.

In line with market commentators, it is suggested that two aspects of the Bill need to be addressed:

- The lack of adequate compensation for expropriation – an element of objectivity needs to be instilled in the valuation of "just and equitable";
- The lack of certainty of an investment's security – despite s7 of the Bill (Security of Investment) government needs to make a concerted effort to ensure investors will be treated fairly and reasonably and not unduly deprived of their investment.

When all is said and done, both investors and government require certainty. Switzerland, a non-EU country, though regretting the recent cancellation of its BIT with South Africa, has confirmed that it will continue trade relations provided government establishes a "reliable and equivalent national legal framework for the promotion and protection of investments". The Bill has the opportunity to deliver a well-rounded and balanced governing framework in place of a number of BITs and pieces.

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* The International arbitration case was brought in 2007 in terms of the bilateral investment treaties entered into by the SA government with the governments of Belgium, Italy and Luxembourg. Marlin Holdings, Marlin Corporation and Red Graniti (SA) (owned by Italian investors through Finstone, a Luxembourg-based holding company), claimed $266 million compensation for the effective expropriation of their granite mining operations under the MPRDA. The companies had not originally applied to convert their existing "old order" mining rights to "new order" rights as Finstone had not been an investor in the country before 1993 and was not a signatory to the Mining Charter. In 2009, following a settlement with the Department of Mineral Resources (DMR), the DMR converted all the companies' old order rights as the applications "fully met the requirements of the law." Under the settlement, the companies initiated an employee share ownership scheme for 5% BEE ownership and a 21% offset against the Charter's 26% target on the basis of their beneficiation activities, as provided for in the Charter. As a result of this, the companies withdrew their claim. The case heard in The Hague in 2010 thus became one to resolve the issue of costs – Editor, Without Prejudice

# Fruits to be harvested in the continent

Challenges abound for potential Chinese investors in Africa, but so do the rewards.

Africa has found favour with China, and China has become one of the largest investors in Africa, having concluded more transactions than any other country other than Britain and France.

China was one of the first countries to recognize that great opportunities existed in Africa, which, as a continent, will have the world's largest workforce by 2035, with half of the population now under the age of 20. This is in contrast to Europe, where populations are becoming older.

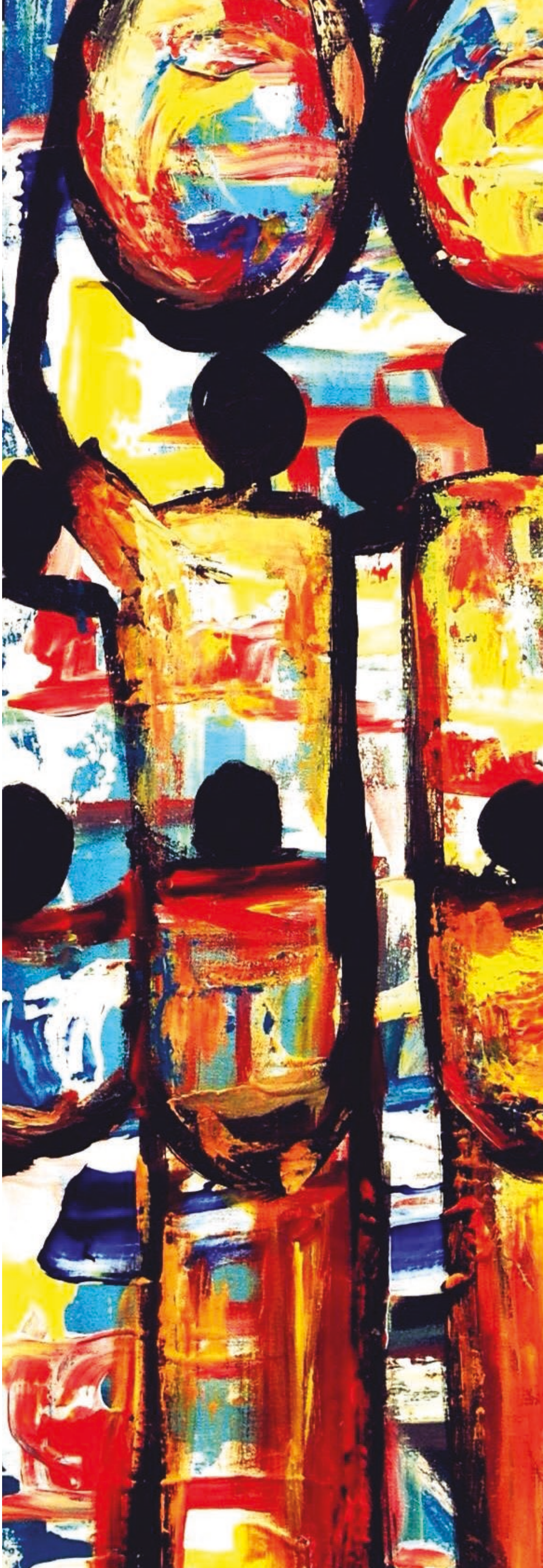
Africa is a continent rich in natural resources, and Chinese firms have invested billions of dollars in securing rights to these to ensure a ready supply of the resources needed to grow the Chinese economy. China's rapid modernization and industrialization can be directly linked to the African commodities boom.

More than 2,000 Chinese enterprises have invested in more than 50 African countries covering industries such as agriculture, construction, logistics, manufacturing, mining and real estate. Even though China's interest in Africa has been driven mainly by securing natural resources, the fact is that less than one-third of Africa's growth has come from natural resources, perceptions to the contrary notwithstanding. The balance of growth has come from agriculture, construction, manufacturing and services, all of which have also been a focus of Chinese investment.

However, trade has not been one way, and a middle class is rapidly emerging in Africa that is now equal in size to that of India. So consumption is going to be an important driver of economic growth across the region, and this presents enormous opportunities for Chinese companies.

One of the primary benefits for Chinese companies investing in Africa is that commercial returns often exceed those achievable elsewhere. Huge investment and infrastructure development is planned in the short term, opening doors for Chinese companies in infrastructure and allied sectors.

While Chinese investment has been most welcome in Africa, a primary driver for wanting Chinese investment in Africa is to grow jobs. The unemployment rate on the continent poses a problem for leaders because



most foreign direct investment in Africa, including that from China, is in the form of mergers and acquisitions, as opposed to green fields entry, which does not usually translate into more job opportunities.

While Chinese investment is welcome in its present form, being primarily that of mergers and acquisitions, it hinders the continent's desperate need to haul millions of its people out of poverty. The need for Chinese investment to create employment will be of increasing importance when doing business in Africa. Investments, no matter from whom and from where, will be more closely scrutinized for their potential to create jobs in Africa.

A problem with encouraging investment in Africa is that scepticism about the continent still runs deep. There is an outdated image of it as a poverty-stricken, disease and conflict-ridden basket case. Despite numerous African successes such as Botswana, Mozambique, Rwanda and Zambia, the focus tends to be put on cases of failure, and that reinforces the stereotype.

This is a perception that Africa needs to dispel, and recent events, such as the shopping mall siege in Nairobi, should not result in the entire continent's image as an investment destination being tarnished.

Chinese investment in Africa has not been without its challenges. In addition to the political risk attached to making acquisitions in Africa, Chinese investment has to negotiate other hurdles, including corruption, cultural differences, infrastructure and logistics challenges, uncertain property rights and unfamiliar laws and weakening currencies.

One of the primary detractors to Chinese investment and acquisitions on the continent are the local content and ownership requirements that form part of the laws of many African countries, such as South Africa and Zimbabwe. These laws discourage direct foreign investment, something that may need to be reconsidered by governments that have imposed these idealistic and protective laws, causing direct foreign investment to be channelled to other jurisdictions.

Despite the challenges, those in China who are willing to seek appropriate advice in those countries where investment opportunities exist and are willing to be guided by properly qualified local advisors in dealing with the challenges that the African continent presents will ultimately enjoy the fruits of what this previously forgotten continent offers.

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# Real Estate in South Africa

Hogan Lovells (South Africa), through its combination with Routledge Modise, has become involved in what has taken the best part of five years in development of mixed-use residential accommodation in the central Johannesburg and Sandton (Northern Johannesburg) areas.

In 2007 the entire property market countrywide in South Africa hit a slump not known since the 1976 Sharpeville incident.

Developers, however, had the vision that residential accommodation is a basic requirement, no matter how depressed the world and local economies are.

Routledge Modise has been the legal advisor of property developers in the Johannesburg area since 1978, and the vision of investors, town planners and developers has culminated into, what we believe, to be the 2014 to 2016 years of reaping what has been sown since the slump.

The revitalisation of downtown Johannesburg, in which Routledge Modise has played a part, has transformed a no-go area into a vibrant, urban community with modern apartments and roof-top areas where young professionals, artists and entrepreneurs can enjoy sunsets over what is still a beautiful city.

Strategically, the development of the northern part of Johannesburg into the new Central Business District (CBD) (Sandton) resulted in the Stock Exchange and big businesses moving from the Johannesburg CBD. This caused a boom in residential development in that area. Residential accommodation in the Sandton CBD in 2014 will be selling at up to ZAR42,000 per square metre.

Hogan Lovells is now part of the new era of growth in the real estate market in South Africa of which Routledge Modise has been the driving force over the past 30 years.

Investors need to understand the real estate environment in each individual country in Africa and need to pay special attention to local knowledge, because developments must be designed to suit market demands.

The real estate team at Hogan Lovells (South Africa) can assist developers in choosing the correct strategy that will achieve long-term rewards.

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# Victory for informal traders in urgent Constitutional Court appeal

Hogan Lovells (South Africa) represented the South African National Traders Association (SANTRA) in the application it launched against the City of Johannesburg (the City) and the Johannesburg Metropolitan Police Department (JMPD) in respect of the conduct of the City and the JMPD in relation to thousands of street traders.

SANTRA, an association of some 1500 members, was established and exists for the purpose of protecting and promoting the rights of street (informal) traders within the inner city of Johannesburg.

Due to high unemployment rates informal trading is a characteristic of most African cities and is one of the biggest forms of self-employment in Africa. While many informal traders were forced to the street due to their circumstances, they now consider this to be their "small business" and are proud of what they have achieved. The existence of informal traders is not a new phenomenon in South Africa and in fact endured throughout the apartheid regime. Some of our clients had been trading in the inner city of Johannesburg for 20 to 30 years.

The Businesses Act 71 of 1991 was the first piece of national legislation that spoke to the legality and regulation of informal trading in South Africa. The Businesses Act, while prohibiting certain areas of trading, also set strict requirements for the municipality to adhere to in order to protect the rights of informal traders. To give effect to the Businesses Act, the City then enacted street trading by-laws and formulated policies (the By-Laws). There is currently confusion as to which By-Law is applicable, given the version of the By-Law the City is applying, and whether it has been properly gazetted. However, in general the By-Laws brought about various negative comments from the organisations that had assisted in drafting the Business Act. They were considered to be too prohibitive as opposed to being facilitative, as was believed to be the intention of the Businesses Act. Notwithstanding this, the By-Laws continue to be relied upon by their proponents and detractors, as they are yet to be challenged.

Briefly, the By-Laws set out a number of different types of places at which informal trading is to be prohibited. These include prohibitions based on distance from roads, intersections and pedestrian walkways, and buildings of public importance such as churches, hospitals, parks and gardens. The By-Laws also set out the mechanism for their enforcement by the JMPD.

In the inner city of Johannesburg we have seen that the City, in order to facilitate trading, has established "linear markets", Steel stalls have been erected and stands have been demarcated. In these markets, stands and stalls people are allowed to trade by way of selling clothes, food and other goods. Traders are vetted by the City and allocated an area where they may trade. SANTRA only allows lawful street traders to obtain membership and strictly monitors their conduct and compliance with the municipal by-laws.

In this particular case the issue was that the City and JMPD had removed a number of traders who were trading in compliance with the By-Laws and the City's policy either in the stands, markets or stalls. Initially the City had called people to a meeting to advise that they would be removing unlawful traders, but the next day it became apparent that all traders would be prohibited from continuing to trade.

An agreement was then reached between the City and the informal traders that upon re-verification by the City they would be entitled to return to their original trading sites. Notwithstanding this agreement, the City and JMPD then started demolishing the steel stalls and advised the traders that they would be relocated.

In response to this, SANTRA approached us and asked that we assist them in reviewing the decisions taken by the City (as being carried out by the City and the JMPD) and in the interim obtain an urgent interdict to allow their lawfully trading members to return to the streets pending the outcome of the review.

The urgent relief sought was to prevent the City from demolishing any further stalls, to compel it to allow informal traders who were lawfully entitled to trade in the areas previously allocated to them and to compel it to reinstate the stalls that had already been demolished. The above extensive relief required to return the status quo was coupled with a prohibitory interdict in terms of which the City and the JMPD were prevented from unlawfully interfering with the traders restored to trading. After granting the City and JMPD an additional week to file their answering affidavit, the affidavit was filed but dealt only with the issue of urgency.

At the hearing of the matter hundreds of traders congregated outside court. Those who were able made their way up to the court where the urgent application was heard by the presiding judge. The court was filled to capacity with members of SANTRA and reporters.

When the matter was called, it was established that another organisation, South African Informal Traders Forum (SAITF) had launched an urgent application against the City of Johannesburg on almost identical grounds and that another party had sought to be joined to the proceedings. The matters were all heard as one. The main arguments advanced related to the legality of the traders we were representing and the failure on the part of the City to comply with the Businesses Act, whereby satisfying the requirements for an interdict. Argument was also presented on the issue of urgency, our advocates having explained that many of our client's members and their children and grandchildren were starving and unable to attend school due to the lack of income in the family.

The City in oral argument contested that there was no urgency and it was commonplace in South Africa for children to be absent from school or families to go hungry.

Arguments were heard late into the evening. At the end of the arguments, the presiding judge reserved judgement. When leaving the court the importance of the matter was seen again as the crowds of SANTRA and SAITF members had remained outside the court gates, eager to hear the outcome of the matter and grew silent as the legal team approached.

On 27 November 2013 judgment was handed down, whereby the matter was removed from the urgent roll on the basis that it did not satisfy the requirements for urgency. The presiding judge did not give reasons for his order at the time it was handed down. We have requested these reasons but to date we are still waiting.

The decision was a huge disappointment to the informal traders, who in the normal course would have had to wait until February 2014 for their matter to be heard on the ordinary court roll. Due to the extreme hardship suffered by its members and their families, SANTRA asked that the matter be taken to the Constitutional Court. While provision is made for direct access to the Constitutional Court, it is highly unusual that a matter is heard urgently after being heard on the urgent roll in a High Court. The legal representatives debated the issue and decided that a matter of this magnitude justified such approach.

SANTRA sought leave to appeal the Order of the High Court and further, pending the outcome of the appeal, that the Constitutional Court allow the legal informal traders to return to the sites where they traded before their removal.

The application was heard on 5 December 2013 at the Constitutional Court with an opening introduction to the court being directed at SANTRA's members by the acting chief justice, Justice Moseneke.

Each legal representative was allowed a limited time in which to present their arguments to the ten justices hearing the matter. SANTRA had to bring to the attention of the court the existence of exceptional circumstances, the desperation of the traders and their families, and the contravention of constitutional rights to convince the court of its right to approach it. During argument the Constitutional Court judges probed the City and JMPD as to how the decisions had been taken and whether there were no contraventions of the Business Act.

After hearing argument and a short deliberation, Acting Chief Justice Moseneke handed down a unanimous decision, ruling that the matter was urgent and that the application for leave to appeal and the actual appeal be upheld. The net result was that traders were allowed to return to the sites that they had previously occupied, and the City and JMPD were interdicted from interfering with the trading activities of the persons listed in the annexures to the papers.

As the ten judges left the court the crowd in attendance started singing and ululating. While the review application is pending the informal traders, who were trading lawfully, are allowed to continue in the same fashion and are able to support themselves and their families again without having to rely on State grants.

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# Notes

The artwork used throughout these materials has been licensed from Tony Cyizanye, an artist based in Rwanda.

**About the artist**
Tony Cyizanye was born in Bujumbura, Burundi, and later moved to Rwanda. He comes from a family of artists, with a musician as a father. His inspiration comes from his family as he was growing up, he saw his uncle, Adolphe Bigirimana painting and making music, his aunt is a fashion designer, and another uncle is a musician.

Being surrounded by the art and music inspired his passion and dedication to his art. In 2010 he exhibited in FESPAD in Rwanda, in the University of Colombia, New York, at the UN day in the Milles Collines Hotel Kigali Rwanda, and for the launch of the Ivuka magazine 'Rwanda Art' at the Novotel Hotel, Kigali, Rwanda.

In 2011 he has exhibited in the 'Survival' exhibition in Kigali, Rwanda and in Belgium, he has painted with street children in the Nyamirambo market, Kigali, Rwanda.

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