



Initial Public Offerings

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South Africa

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Introduction

In the past, the decision on where a company could list its securities in South Africa was quite a simple one as there was only one licensed exchange in South Africa, the Johannesburg Stock Exchange (**JSE**). The JSE operates two primary boards: a main board; and the alternative exchange (**AltX**), which is used for small and medium-sized companies.

The past few months, however, have seen four new exchanges being licensed by the South African Financial Sector Conduct Authority (**FSCA**) (previously the Financial Services Board (**FSB**)), namely: A2X, Equity Express Securities Exchange, ZAR X and 4 Africa Exchange (**New Exchanges**).

Whilst the introduction of the New Exchanges can be seen as a welcome development in the South African capital markets, the JSE remains the largest stock exchange in Africa, and so this chapter has been prepared on the basis of company listing on the main board of the JSE.

Capital markets in South Africa follow the trend of the global economy and as such, have been, and remain, depressed. The overall trend in initial public offering (**IPO**) and new listing activity on the JSE in the past five years has seen various fluctuations: 55 new listings in 2014 (with nine IPOs); 44 in 2015 (with 12 IPOs); 32 in 2016 (with seven IPOs); 52 in 2017; 53 in 2018 (with nine IPOs); and to date, one IPO having been recorded for 2019.

The JSE remains optimistic that additional IPOs may be expected for 2019, especially after the national elections in May 2019, which should create domestic political certainty in the country.

The past few months have seen an increase in new listings of the following types of businesses on the JSE:

- spin-offs of existing businesses;
- special purpose acquisition companies;
- private equity funds; and
- dual listings of existing businesses.

The increase in the dual listing of existing businesses can be partial attributed to the introduction of the New Exchanges. In addition, the JSE has seen a steady increase in the number of foreign companies listing on the JSE, which has unfortunately been coupled with a decrease of domestic company listings. In these tough economic times, one may take comfort in the knowledge that the domestic companies that have remained on the JSE are said to be more competitive, stronger and trustworthy and as such, do not struggle to make their securities attractive to potential investors.

There are various reasons why companies may elect to list their securities on the JSE, including:

- enabling the existing shareholders of a company to realise all or part of their shareholdings;
- access to larger and potentially cheaper financial markets, as JSE listed companies tend to attract large institutional investors;
- creating liquidity in the securities of the company, i.e. providing a market wherein the company's securities can be traded freely and in accordance with the developed framework, mainly governed by the JSE Listing Requirements of the JSE (**JSE Listing Requirements**) and the Companies Act 71 of 2008 (**Companies Act**);
- elevating their corporate profiles, as most listed companies form part of market analysts' reports and/or indexes; and
- improved valuation, because being listed securities generate an independent valuation of an organisation by the market.

In South Africa, a company is prohibited from making an IPO unless such offer complies with the provisions of the Companies Act and the JSE Listings Requirements, which set out the minimum requirements needed for listing and continuing to maintain a listing on the JSE.

As with most jurisdictions in the world, in South Africa any company which wishes to list its securities must prepare a detailed offering document providing potential investors with information about the company and the securities which the company intends to list (**Offering Document**).

The IPO process: Steps, timing and parties and market practice

All companies that wish to list on the JSE must ensure that the Offering Document which is prepared complies with the requirements for a pre-listing statement in terms of the JSE Listings Requirements (**PLS**).

If it is intended that the listing of the securities will be structured as an offer to the public of the company's securities, then in addition to the Offering Document complying with the JSE Listing Requirements for a PLS, the Offering Document will need to comply with the Companies Act provisions relating to prospectuses (**Prospectus**).

In order for some companies to raise capital, and to satisfy the JSE Listing Requirement to have a minimum 20% of the company's securities being held by the public prior to listing, the company can either offer shares to the public or conduct a private placement of its securities with sophisticated investors who fall within the ambit of section 96 of the Companies Act (**Sophisticated Investor Exemptions**).

Assuming that the IPO will involve the new issue of shares (in addition to the sale of certain shares held by the existing shareholders), the Company will need to decide whether the issue/sale would be in the form of a private placement in accordance with the Sophisticated Investor Exemptions (in which case the Offering Document need only comply with the JSE Listing Requirements for a PLS), or whether it will constitute an offer to the public in terms of the Companies Act and therefore require that the Offering Document comply both as a PLS and a Prospectus. This is an important consideration, as it will inform the drafting of the Offering Document, i.e. whether the Offering Document will need to be just a PLS or both a PLS and Prospectus.

It is important to note that in South Africa, the vast majority of IPOs are structured as private placements relying on the “safer harbour” Sophisticated Investor Exemptions, so as to ensure that there is no offer to the public in terms of the Companies Act and therefore no requirement for the Offering Document to satisfy the requirements of a Prospectus.

It is worth noting that in either case of the Offering Document being a PLS or a combination of a PLS and Prospectus, the directors of the Company will take personal responsibility for the statements made therein.

The timeline for an IPO on the JSE is determined by the:

- complexity of the transaction (including whether the offering will be through a private placement or offer to the public);
- amount of preparatory work that needs to be done to prepare the company for listing;
- company’s post-listing operations as a public company; and
- market conditions.

In our experience, the IPO process can take anything from 10 to 14 weeks and takes place in the various steps set out below.

When a company decides to pursue an IPO, the company will have a kick-off meeting with all its key advisors (**Advisors**) (as detailed below) and various role players in the IPO process (collectively, the **Deal Team**) to discuss the IPO structure, work streams and timelines.

Following the kick-off meeting, during weeks 2 to 5, the legal advisors along with the corporate advisors will commence the drafting of the Offering Document, whilst the accountants prepare the financial reports. Various drafting meetings will be scheduled with the Deal Team where all the various role players will provide input on the Offering Document.

The drafting process is usually done in parallel with one of the other critical work streams, being the comprehensive due diligence exercise conducted by the Advisors on the company from a legal, financial and tax perspective. The due diligence exercise will assist in the preparation of the Offering Document and assessment of any potential hurdles to a successful IPO.

Depending on the progress on the Offering Document, at the end of week 5, the draft Offering Document will be finalised for submission to the JSE as a PLS and the Companies and Intellectual Property Commission (**CIPC**) (if the listing is structured as an IPO) for review and informal comment. In the following weeks, further submissions of the Offering Document will be made to the JSE and CIPC for formal comment and later approval. Once approval is obtained, then if the listing is structured as an IPO, the public offer would commence for a week or more and the listing would commence thereafter.

Whilst the drafting sessions and various submissions of the Offering Document are under way, the investment banks will engage in various marketing initiatives to prospective investors, including assisting the company with preparing and conducting analyst presentations and roadshow presentations.

A summary of a potential timeline is set out below:

Week 0 Appointment of Advisors

Week 1 Kick-off meeting and preparation for IPO process

Week 2 – 5 Due diligence process and pre-listing steps:

- legal, financial and tax implications affecting the IPO;

- method of listing; and
- corporate restructuring, if required.

Week 2 – 5 Drafting of Offering Document:

drafting meetings are conducted to finalise the draft Offering Document and reporting accountant's report.

Week 6 – 8 Submission of Offering Document to JSE (and CIPC):

the draft Offering Document is submitted to the JSE for review and comment and to the CIPC (if IPO).

Week 6 – 8 Analyst presentations, road show presentations

Week 9 – 10 Listing commences, if the IPO offer is placed or opens

Week 11 Placing of the offer closes

Week 12 Listing commences, if placing or public offer closes

Week 14 Listing commences, if public offer.

In addition to the board of directors of the company and the selling shareholder, the main parties that are typically involved in the listing process (from the decision to go public to drafting the listing documentation with the JSE until a company is listed) are listed below, together with some of the actions which they are tasked with attending to. The parties listed below are in addition to any other technical advisors who may be required for a particular company's IPO.

Merchant/investment bank(s) to act as a coordinator(s) or corporate advisor(s) for the IPO:

- coordinates the listing process;
- advises the company on the method of listing to be followed;
- advises the company on the size, terms, timing and pricing of the offer; and
- assesses the market conditions and the expected demand for the company's shares.

Merchant bank/investment bank to act as the JSE sponsor (JSE Sponsor):

- acting as the liaison between the company and the JSE, responsible for confirming the JSE Listings Requirements have been complied with in respect of the IPO;
- submitting all documentation to the JSE on behalf of the relevant parties to the IPO; and
- advising on the JSE Listing Requirements.

Independent Reporting Accountants:

- preparing the financial report to be attached to the Offering Document; and
- reviewing the Offering Document to ensure alignment with the financial report.

Legal advisors for the company and the various banks involved in the IPO process:

- drafting the Offering Document and any necessary underlying agreements (i.e. placement/underwriting agreement);
- attending to any corporate restructures required for the IPO (i.e. conversion of the company to a public company, drafting a new memorandum of incorporation (MOI) that complies with both the Companies Act and Listings Requirements;
- advising on Companies Act and Listing Requirements; and
- if applicable, preparing the share scheme options for the applicant issuer.

Regulatory architecture: Overview of the regulators and key regulations

The JSE and the CIPC are the two main regulatory bodies governing the IPO process in South Africa. The JSE intends to adopt the principles of the International Organisation of Securities Commissions, so as to deter misconduct in the stock exchanges market.

The JSE derives its powers from the Financial Markets Act 19 of 2012. These powers are, however, limited to matters that are dealt with in the Listings Requirements, such as granting, reviewing, suspending and/or terminating the listing of a company or public offering of its securities. As part of the listing process, the JSE will review and comment on the Offering Document to ensure that it complies with all the disclosure requirements for a PLS. As with most jurisdictions, the intention by the JSE is to ensure that a complete and comprehensive Offering Document is provided to potential investors so as to enable such potential investors to make an informed investment decision.

CIPC regulates the more administrative part of the South African IPO process. A company that is desirous of making an IPO needs to file a copy of their Offering Document (which must comply as a Prospectus in terms of the Companies Act) for approval and registration by the CIPC. Furthermore, where such a company is a foreign company, it must also file a copy of its MOI and a list of the names and addresses of all its directors with the CIPC at least 90 (ninety) days before making the IPO.

The requirements for the information which must be included in the Offering Document from both the JSE (for purposes of the PLS) and CIPC (for purposes of the Prospectus) is similar but not the same, therefore a compliant PLS in terms of the JSE Listing Requirements will not necessarily be compliant as a Prospectus for registration with CIPC in terms of the Companies Act, and as such, it is important that the drafting parties in the IPO process satisfy themselves with the compliance of whichever regulatory body governing the specific document they are drafting at the time.

Sections 16(9) to section 16(11) of the Listing Requirements lists documents that must be submitted to the JSE in order to get the listing process under way. Special mention is made of the key documents that are essential to the IPO process, namely “Part 1” and “Part 2” documents.

Part 1 documents are the application documents and they consist of (but are not limited to):

- completed listing application;
- explanation of how the public shareholder spread is to be achieved;
- signed Offering Document;
- accountant’s confirmation that the information in the Offering Document is not contrary to the reporting accountant’s report;
- list and analysis of shareholders confirmed by the JSE Sponsor;
- underwriting agreement/placement agreement (if any) and accompanying information; and
- STRATE confirmation that an applicant issuer has been approved in terms of the central securities depository participant (CSDP) Rules and Directives. STRATE is a CSDP which operates as a clearing and settlement system for electronic share transactions on the JSE. All issuers listed on the JSE are required to be so approved. This is a technical/administrative requirement.
- list of companies’ current directors, or previous directors who have been directors during the previous five years and the nature of business of such companies;

- all details concerning any planned price stabilisation exercise (if agreed to between an applicant issuer and the banks);
- applicant issuer's constitutional documents (which comply with Schedule 10 of the JSE Listings Requirements);
- specimen share certificate (which complies with Schedule 6 of the JSE Listings Requirements);
- the board of directors of an applicant issuer providing Schedule 3 general undertaking to the JSE;
- experts' consents (as named in the Offering Document);
- statement from the applicant issuer's company secretary regarding corporate details; and
- proof of payment for listing and documentation fees.

Part 2 documents are also application documents, however, these documents must be submitted to the JSE within 48 hours before the date of listing. These documents comprise:

- JSE Sponsor certificate confirming contents of Offering Document;
- notarially certified copy of signed Offering Document;
- list and analysis of shareholders confirmed by the JSE Sponsor;
- number of shares allotted/sold;
- confirmation of shareholder spread;
- schedule 4 statutory declaration; and
- auditor's certificate certifying that the applicant issuer share capital and share premium has been issued, fully subscribed for and deposited with its bankers.

The well-established status of the JSE as the premier exchange has somewhat settled the South African regulatory framework in the context of IPOs and the interpretation of the JSE Listing Requirements. To the extent that there are any uncertainties in respect of the JSE Listing Requirements, an applicant is able to engage its JSE Sponsor in this respect. The introduction of the New Exchanges in the South African capital markets is expected to be disruptive to the South African economy as the New Exchanges target different segments of the market than those currently targeted by the JSE and aim to broaden the current investment base by offering more affordable and easy-to-follow listing opportunities for smaller and medium-sized domestic entities. These New Exchanges and their respective listing requirements are still in the process of being fully explored and tested by the market at large.

The ability of these New Exchanges to target specific groups of investors is especially important in the context of the ownership element contemplated in the Broad-Based Economic Empowerment Act 53 of 2003 (**B-BBEE Act**). The market has already seen a few established JSE listed companies opting for a secondary listing of their securities on one of the New Exchanges or electing to utilise the New Exchanges for the purposes of listing their black ownership schemes.

Public company responsibilities

The South African legislative framework imposes obligations on public and listed entities. Of importance are the Listings Requirements, the Companies Act, the B-BBEE Act as well as the King IV Report on Corporate Governance for South Africa 2016 (**King IV Report**).

Listings Requirements

The Listings Requirements prescribe various requirements which comprise one-off and continuing obligations on the applicant, namely:

- complying with the requirements for listing on the JSE;
- continuing obligations that need to be complied with in order to ensure that all the necessary information required by the shareholders to assist them in exercising their rights as holders of securities is frequently updated;
- making disclosures through announcements about material issues relating to the company via the stock exchange news service or through external press publications; and
- requisite disclosures in the company's financial statements.

The obligations imposed by the Listing Requirements are more onerous than those imposed by the Companies Act in respect of public companies, and can thus be seen as an extension of the Companies Act requirements for public companies to consistently provide extensive information to their shareholders on any material information in respect of the company.

King IV Report

Since June 2017, the Listing Requirements require that all companies listed on the JSE must comply with the non-legislative principles of the King IV Report, and record such compliance in their annual financial statements. This is in line with international best practice so as to improve good corporate governance, business confidence and corporate transparency. Non-compliance with the principles of the King IV Report can be interpreted as non-compliance with the Listing Requirements, and may lead to sanctions being imposed by the JSE.

B-BBEE Act

All listed companies have a duty to assist in the achievement of the objectives of the B-BBEE Act; as such, all listed companies must submit their Broad-Based Black Economic Empowerment (**B-BBEE**) annual compliance report to the B-BBEE Commission. The compliance is measured in terms of five criteria making up the various elements of the B-BBEE scorecards, namely: ownership; management control; skills development; supplier development; socio-economic development; and any other factor which can be used in the calculation of a listed company's B-BBEE scorecard.

Potential risks, liabilities and pitfalls

In the event of the Offering Document being either a PLS or a combination of a PLS and Prospectus, the directors of the company will take personal responsibility for the statements made therein. It is therefore imperative that the Advisors assist the directors in ensuring that the contents of the Offering Document are accurate and do not contain any material omissions.

The due diligence process of the IPO is therefore quite an important process which needs the appropriate level of attention from the Deal Team to ensure the thoroughness of the Offering Document and reduce the risk of legal action being taken by a prejudiced third party, or sanctions being imposed by the JSE against the directors or the company.

As with all jurisdictions, any investment into the South African capital markets comes with risks. As can be seen in section 4 above, the South African regulatory market has some unique considerations which one needs to be cognisant of when conducting business.

South Africa has quite extensive exchange control provisions to restrict the movement of currency between itself and other countries. These regulations are important, so it is also important for the applicant issuer and potential foreign investors to be aware of the required compliance.

Due to the historical injustices which occurred as a result of Apartheid, the South African government has been actively seeking to rectify the racially imbalanced economy. The South African government is legally empowered to take ownership of land and re-distribute it to third parties who were previously disadvantaged by the Apartheid regime. In recent times the South African government has used the B-BBEE Act as a mechanism to try and achieve some of these goals. This has resulted in companies which, for example, require regulatory licences to operate (such as in the mining sector) needing to ensure compliance with the requirements of the black ownership requirements of the B-BBEE Act. In addition, the various political discussions around the redistribution of land in South Africa are currently very topical and will most probably have an impact on the decision of companies considering listing in South Africa.

Conclusion

Whilst the IPO process in South Africa continues to evolve and align with international best practice, we have no doubt that the new developments will enhance the South African capital markets. The introduction of the New Exchanges will no doubt add an interesting dimension to the legal framework regulating the South African capital markets landscape, and we will continue to assist clients in navigating this new landscape.



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He has also conducted a number of due diligence investigations.

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