

Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements

The purpose of this country-specific guide is to provide assistance to investigators on the type of information that is available on the natural persons who control legal persons and arrangements, such as companies and trusts, or otherwise play an important role in a legal person and arrangement in **South Africa**, and the conditions that need to be met to be able to access such information. For ease of reference, the Contents of the guide are listed below.

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I. Definitions and Company Formation Process

1. What is the definition of legal ownership in South Africa?

There is no legal definition of legal ownership under the South African law. However, based on case law, *ownership* can be described as an abstract legal relationship, which implies that:

- a) a legal relationship exists between the owner and a thing (object) in terms of which the owner acquires certain entitlements, and
- b) a relationship exists between the owner and other legal subjects in terms of which the owner can require that others respect his entitlements regarding the object.

The relationship:

- c) consists of indeterminate entitlements in that they vary from time to time regarding the same relationship or regarding different relationships, and
- d) is limited by statutory measures, limited real rights, creditor's rights of third parties and the interest of the community."

The Companies Act (Act 71 of 2008)¹, defines "a person controls a juristic person, or its business, if—

- a) in the case of a juristic person that is a company—
 - (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or
 - (ii) that first person together with any related or inter-related person, is—
 - (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or
 - (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;
- b) (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;
- c) (c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or
- d) (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c)."

2. What does "beneficial ownership" mean in South Africa?

The South African law does not currently define *beneficial ownership per se*. The notion of beneficial interest is found in the Companies Act of 2008, in relation to company securities. It is defined as follow: "*beneficial interest*, when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to:

- (a) receive or participate in any distribution in respect of the company's securities;

¹ South African Companies Act (act 71 of 2008).

- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
- (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)."

Amendments to the Financial Intelligence Centre (FIC) Act, 2001 (Act 38 of 2001) are currently being reviewed. They aim to incorporate the concept of beneficial ownership. The draft currently defines: "*beneficial owner* in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly:

- (a) owns the legal person; or
- (b) exercises effective control of the legal person."

This draft legislation completed its public consultation cycle and is currently in cabinet process. It is expected to be promulgated in the next 6 to 12 months.

In addition, companies listed on the Johannesburg Stock Exchange (JSE) listing requirements define *beneficial owner* in relation to a security, and means the person or entity holding any one or more of the following: (i) the *de facto* right or entitlement to receive any dividend, interest or other income payable in respect of that security; and/or (ii) the *de facto* right or entitlement to exercise or cause to be exercised, in the ordinary course of events, any or all of the voting, conversion, redemption or other rights attached to such security; and/or (iii) the *de facto* right or entitlement to dispose or cause the disposal of the company's securities or any part of a distribution in respect of the securities.

3. How are legal entities (companies, partnerships, foundations, etc.) formed in South Africa?

The incorporation process of legal persons counts four main steps:

1. Reservation of name (optional)
2. File notice of incorporation
3. File Memorandum of Incorporation (MOI)
4. Payment of the prescribed fee

4. What is the role of Company Registries in South Africa?

The role of the Companies and Intellectual Property Commission is threefold:

1. Regulation of all entities registered by the Commission
2. Keeping record of all entities registered. In that respect, Section 186 of the Companies Act specifies that the objectives of this Commission is to maintain "accurate, up-to-date and relevant information concerning companies, foreign companies and other juristic persons, and concerning intellectual property rights, and the provision of that information to the public and to other organs of state"
3. Monitor compliance and enforcement of the Companies act

5. How is basic information and beneficial ownership information on legal entities obtained and recorded in South Africa?

The law does not require beneficial ownership information to be collected for any legal entity.

The Companies Act of 2008 requires that information on directors be disclosed and that a securities/shareholders register to held. The securities/shareholders register contains information on the identity of each person with a beneficial interest in the securities held, the number and class of securities held by each person with a beneficial interest, and the extent of each beneficial interest. The securities register must also contain the names and addresses of the registered owner of the securities and any holders of a beneficial interest in the securities. Companies are required to update the securities register at every transfer of any certificated securities, including the name of the transferee.

For companies listed on the JSE, there is a requirement for holders of depository receipts (*i.e.*, instruments representing an issuer's securities, where the instrument confers rights in respect of such securities) to disclose the beneficial ownership of the depository receipts on request of the issuer, the depository or the JSE.

6. How are legal arrangements (express trusts and trust-like agreements) formed in South Africa?

In accordance with the Trust Property Act of 1988 in order to register a trust in South Africa, it is necessary to provide certain information about the trust to the Master of the High Court, including *inter alia*:

- a) The names and age of the beneficiaries under the trust, and the relationship of the trustee to the beneficiaries and the probable duration of the trust
- b) The full names and copies of the identity documents of the trustees.
- c) The profession and / or business occupation of the trustee(s).
- d) Information on the practical experience that each trustee has in trust administration, mentioning any specific cases.
- e) If the trust is subject to annual audit: (i) the name and address of the auditor to be appointed; (ii) the undertaking by the auditor to advise the Master (1) should he cease to act in the trust, (2) the name of the new auditor should he be aware thereof and (3) should the trust not have been administered in accordance with the terms and conditions of the will or trust deed.
- f) On any substantial addition to the capital of the trust and the value thereof.
- g) An undertaking by the trustee(s) to instruct the auditor to furnish the Master, when requested to do so, with any information which he may require in connection with the affairs of the trust.
- h) The name of the bank and branch thereof at which the trust banking account will be kept.
- i) What steps will be taken by the trustee(s) to maintain accurate records of the trust; whether he will exercise direct personal control over the trust, if not, what agent or firm has been instructed by him and to what extent.

Upon receipt of all the required documents, the Master may issue the nominated trustees with Letters of Authority, to administer the trust.

7. How is information on legal arrangements obtained and recorded in South Africa?

Pursuant to the provisions of the Trust Property Control Act of 1988, legal arrangements are required to be registered in the national trust registry. The registries are maintained by the Masters of High Court. Trusts are usually registered in the jurisdiction where the trust assets are located. There are about 150 000 trusts registered in South Africa and about 15 000 to 20 000 trusts are registered annually; the large majority of which in Johannesburg and Pretoria. The trust registries contain detailed information on the trusts, including on the settlers (founders), trustees and beneficiaries.

In most cases, trusts are registered by an auditor or accountant (when the trust is established for tax planning purposes), a lawyer (when the trust is established for estate planning purposes) or a person in the trusts services industry (*e.g.*, the banks which have separate trust company businesses).

The trust registry was originally a paper-based system. Each Master's office had a Register of trusts that contained the name of the trust as well as the year in which the trust was registered. A file is opened when a trust is registered and all documents relating to the trust is kept in the file, including the completed forms. Today Masters of the High Court implement an electronic version of the trust registry, which allows searches on the names of founders, trustees, beneficiaries and trust name. This system also allows electronic access to the full trust instrument and any amending documents, and all related documentation (including the trustee application form). Work is still ongoing to fully populate the electronic database with information relating to trusts that were created before the electronic registry was developed.

No customer due diligence (CDD) is conducted on the founder of a trust. A settlor (founder) can be a natural or legal person. If the founder is a legal person, it must be represented by an authorised representative.

CDD is conducted on trustees: before being appointed as a trustee, a person must submit a completed application and disclosure form which collects information on the trustee's name, ID number, address, occupation, the location of the trust assets, whether the trustee has been convicted of a dishonesty offence and details of the trustee's solvency. A trustee may be any natural major person or legal person. If a legal person is acting as trustee, a natural person must be appointed who will be representing the legal person, usually a director or a person designated by a special resolution of the legal person. Only some Masters' offices place copies of the trustee's ID documents in file. Information and documents, such as the trust instrument, the original trust deed (or a notarial certified copy), an undertaking by an auditor (if applicable), a completed 'Acceptance of Trusteeship' form for every trustee and form JM21 are also collected. The 'Acceptance of Trusteeship' form contains detailed information on each trustees (name, ID number, address and the location of the trust assets). The form JM 21 requires the trustee to provide information including:

- the names and ages of the beneficiaries under the trust;
- the relationship of the trustee to the beneficiaries;
- the full names and copies of the identity documents of the trustees, including their profession or business occupation, and what previous practical experience each trustee has in trust administration (mentioning any specific cases);
- the written views of beneficiaries under the trust, as to the possibility of exempting the trustee(s) from furnishing security under the TPC Act;
- whether the trust will be subject to annual audit and, if so, the details of the auditor to be appointed to act in the trust; and
- the name of the bank and branch thereof at which the trust banking account will be kept.

The law does not require that information on the beneficial owner be collected for legal arrangements. The Masters' files are open to the public for consultation. The trust deed and the appointment of the trustees are a matter of public record and can be copied. Law enforcement officers (including those from foreign jurisdictions) have access to the contents of the files held at the Masters office and may make a copy of any document in the file. This includes the names of the founders (settlor), trustees, and beneficiaries of trusts.

II. Types of Legal Entities

There are many types of legal entities able to be formed in **South Africa**. This Guide will provide information on five commonly used entities.

For all companies, the identity of natural persons (shareholders, representatives of bodies corporate and beneficial owners) is verified using identity cards, passports or any other official document.

Private Company (Pty) Ltd

Type of Legal Entity	Private Company (Pty) Ltd	
What is the minimum number of natural persons required for formation?	1	
	Yes	No
Is there a requirement to register with the company registry?	X	
Is there a requirement to provide verification for identity of natural persons (shareholders, representatives of bodies corporate and beneficial owners)	X	
Is there a residency requirement for directors?	X	
Are bearer shares/share warrants permitted?		X
Is a Trust and Company Service Provider required to form?		X
Is a registered agent in the jurisdiction of formation required?		X
Is the entity required to hold financial account(s) in jurisdiction of formation?		X
Are tax filings required in the jurisdiction of formation (even if there are no direct tax liabilities)?	X	
Does the jurisdiction allow for nominee directors?	X	
If so, are they required to disclose their status as nominee directors?	X	
If so, are the nominee directors required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	
Does the jurisdiction allow for nominee shareholders?	X	
If so, are they required to disclose their status as nominee shareholders?	X	
If so, are the nominee shareholders required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	

Public Company Ltd

Type of Legal Entity	Public Company Ltd	
What is the minimum number of natural persons required for formation?	3	
	Yes	No
Is there a requirement to register with the company registry?	X	
Is there a requirement to provide verification for identity of natural persons (shareholders, representatives of bodies corporate and beneficial owners)	X	
Is there a residency requirement for directors?	X	
Are bearer shares/share warrants permitted?*		X
Is a Trust and Company Service Provider required to form?		X
Is a registered agent in the jurisdiction of formation required?		X
Is the entity required to hold financial account(s) in jurisdiction of formation?		X
Are tax filings required in the jurisdiction of formation (even if there are no direct tax liabilities)?	X	
Does the jurisdiction allow for nominee directors?	X	
If so, are they required to disclose their status as nominee directors?	X	

If so, are the nominee directors required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	
Does the jurisdiction allow for nominee shareholders?	X	
If so, are they required to disclose their status as nominee shareholders?	X	
If so, are the nominee shareholders required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	

* Bearer shares are not allowed under the South African law, nor are bearer share warrants. Bearer share warrants were allowed under the Companies Act of 1973, repealed in 2011. The number of bearer share warrants in circulation is estimated to be very low², if not nil³.

State Owned Companies (SOC)

Type of Legal Entity	State Owned Companies (SOC)	
What is the minimum number of natural persons required for formation?	3	
	Yes	No
Is there a requirement to register with the company registry?	X	
Is there a requirement to provide verification for identity of natural persons (shareholders, representatives of bodies corporate and beneficial owners)	X	
Is there a residency requirement for directors?	X	
Are bearer shares/share warrants permitted?		X
Is a Trust and Company Service Provider required to form?		X
Is a registered agent in the jurisdiction of formation required?		X
Is the entity required to hold financial account(s) in jurisdiction of formation?		X
Are tax filings required in the jurisdiction of formation (even if there are no direct tax liabilities)?	X	
Does the jurisdiction allow for nominee directors?	X	
If so, are they required to disclose their status as nominee directors?	X	
If so, are the nominee directors required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	
Does the jurisdiction allow for nominee shareholders?	X	
If so, are they required to disclose their status as nominee shareholders?	X	
If so, are the nominee shareholders required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	

* A public company must issue a prospectus which is a public document.

Personal Liability Companies (INC)

Type of Legal Entity	Personal Liability Companies (INC)	
What is the minimum number of natural persons required for formation?	1	
	Yes	No
Is there a requirement to register with the company registry?	X	
Is there a requirement to provide verification for identity of natural persons	X	

² http://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-south-africa-2013_9789264205901-en;jsessionid=tevn8b5q9ap7.x-oecd-live-02

³ <http://www.sars.gov.za/AllDocs/LegalDoclib/SecLegis/LAPD-LSec-TAdm-PN-2013-05%20-%20Notice%20421%20GG%2036565%2014%20June%202013.pdf>

(shareholders, representatives of bodies corporate and beneficial owners)		
Is there a residency requirement for directors?	X	
Are bearer shares/share warrants permitted?		X
Is a Trust and Company Service Provider required to form?		X
Is a registered agent in the jurisdiction of formation required?		X
Is the entity required to hold financial account(s) in jurisdiction of formation?		X
Are tax filings required in the jurisdiction of formation (even if there are no direct tax liabilities)?	X	
Does the jurisdiction allow for nominee directors?	X	
If so, are they required to disclose their status as nominee directors?	X	
If so, are the nominee directors required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	
Does the jurisdiction allow for nominee shareholders?	X	
If so, are they required to disclose their status as nominee shareholders?	X	
If so, are the nominee shareholders required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	

* A public company must issue a prospectus which is a public document.

Non Profit Company (NPC)

Type of Legal Entity	Non Profit Company (NPC)	
What is the minimum number of natural persons required for formation?	3	
	Yes	No
Is there a requirement to register with the company registry?	X	
Is there a requirement to provide verification for identity of natural persons (shareholders, representatives of bodies corporate and beneficial owners)	X	
Is there a residency requirement for directors?	X	
Are bearer shares/share warrants permitted?		X
Is a Trust and Company Service Provider required to form?		X
Is a registered agent in the jurisdiction of formation required?		X
Is the entity required to hold financial account(s) in jurisdiction of formation?		X
Are tax filings required in the jurisdiction of formation (even if there are no direct tax liabilities)?	X	
Does the jurisdiction allow for nominee directors?	X	
If so, are they required to disclose their status as nominee directors?	X	
If so, are the nominee directors required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	
Does the jurisdiction allow for nominee shareholders?	X	
If so, are they required to disclose their status as nominee shareholders?	X	
If so, are the nominee shareholders required to obtain information on and/ or disclose the identity of natural person(s) on whose behalf they are acting?	X	

III. How to Access Information

This guide will address the ability to access information on entities formed in **South Africa** available in 1) registries and 2) other channels.

Registries

The registry in **South Africa** is called the Companies and Intellectual Property Commission.

Contact information for the registry is provided here:

Name: Mr. Joey MATHEKGA
Agency: CIPC
Address: Sunnypark, 150 Steve Biko Road, Sunnyside, Pretoria, 0132
Phone: 2712 3943990
Email: JMathekg@cipc.co.za

The Companies and Intellectual Property Commission is available online at www.cipc.co.za.

In general, the following information is not available online, but may be available through another form of public access (i.e. in person only or via a pre-registration requirement) or to law enforcement, through specific procedures listed in further detail below:

1. Name of Legal Entity
2. Entity Number (if any)
3. Type of Legal Entity
4. Date of Incorporation
5. Current Status (active, etc.)
6. Principal Address of Business
7. Principal Purpose of Business
8. Registered Capital
9. Registered Agent Information
10. Memorandum
11. Articles of Incorporation
12. Application/Certification of Formation
13. Historical Document

Registry update

Legal persons and arrangements are required to notify the CIPC/Master within 14 days of any change or modification of the information provided at the time of the registration. However, the South African authorities advised that companies do not always comply with this obligation. The registries for companies and trusts currently do not have sanction / enforcement powers to ensure that the data recorded in the register is correct.

	Online Access (free or for nominal fee, no log-in requirements)	Other Public Access (available in person only or via pre-registration requirement)	Law Enforcement Access only	For Information/ documents accessible only by Law Enforcement, please describe how an investigator may access information
Name of Legal Entity		X		
Entity Number (if any)		X		
Type of Legal Entity		X		
Date of Incorporation		X		
Current Status (active, etc.)		X		
Principal Address of Business		X		
Principal Purpose of Business		X		
Registered Capital		X		
Registered Agent Information		X		
Officer/ Director Information (incl. power of representation)				
Shareholder/ Member Information				
Memorandum		X		
Articles of Incorporation		X		
Application/ Certificate of Formation		X		
Annual/ Biennial Reports				
Shareholder Register				
Register of Charges				
Bank Account Information				
Payment Records				
Historical Documents (example: past annual filings)		X		

Other Channels

The explanation below outlines the channels by which foreign authorities may obtain information on legal entities, legal arrangements, or relevant persons from different sources in **South Africa**.

South Africa is party to a range of mechanisms that allow for exchange of information. The Exchange of Information Conventions/Agreements/Standards are divided into these categories:

- USA FATCA Intergovernmental Agreement – which allows for automatic exchange of information with US Treasury department as of 2015
- Multilateral Mutual Administrative Assistance (MAA) Conventions / Agreements (current status: <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-05%20-%20Status%20Summary%20of%20all%20Multilateral%20Mutual%20Administrative%20Assistance%20Conventions%20or%20Agreements.pdf>)
- Bilateral Tax Information Exchange Agreements (TIEAs) (list of all bilateral agreements: <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2013-01%20-%20Status%20Summary%20of%20all%20Tax%20Information%20Exchange%20Agreements.pdf>)
- Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS) which will come into effect in 2017.

Channels through which foreign authorities may obtain information

Legal entities/ Relevant Individuals

(directors, shareholders, managers, associates, family members, etc.)

	Information/ Intelligence Sharing Inquiry		Explanation	Mutual Legal Assistance Request		Explanation
	Yes	No		Yes	No	
Interviews with relevant Individuals		X			X	
Records/ documents	X			X		MLA

Legal arrangements/ relevant individuals

(trustees [nonprofessional], settlers, beneficiaries, protectors, etc.)

	Information/ Intelligence Sharing Inquiry		Explanation	Mutual Legal Assistance Request		Explanation
	Yes	No		Yes	No	
Interviews with relevant Individuals		X			X	
Records/ documents	X		Trust registry	X		MLA

Financial Institutions

	Information/ Intelligence Sharing Inquiry	Explanation	Mutual Legal Assistance Request	Explanation
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	Yes	No		Yes	No	
Interviews with personnel		X				
Accounts records/ documents	X		FIC Suspicious Transaction Reports and Terrorist Property Reports			

Trust and Company Service Providers

	Information/ Intelligence Sharing Inquiry		Explanation	Mutual Legal Assistance Request		Explanation
	Yes	No		Yes	No	
Interviews with personnel		X			X	
Accounts records/ documents	X		Trust registry	X		MLA/MOUs

Other Designated Non-Financial Businesses and Professions

	Information/ Intelligence Sharing Inquiry		Explanation	Mutual Legal Assistance Request		Explanation
	Yes	No		Yes	No	
Interviews with personnel		X			X	
Accounts records/ documents	X		Trust registry	X		MLA/MOUs

IV. Other Useful Sources of Information

Resource Name	Web Link
Companies and Intellectual Property Commission (CIPC)	http://www.cipc.co.za http://www.cipc.co.za/index.php/register-your-business/business-support-and-other-registrations/ http://www.bdo.co.za/documents/BDO%20CoAct08e.pdf
South African Revenue Service (SARS)	www.sars.gov.za/home
Financial Intelligence Centre (FIC)	www.fic.gov.za
Master of the High Court Office	https://icmsweb.justice.gov.za/mastersinformation/
The website of the Master of the High Court Office provides information on trust, liquidation, curator and insolvency.	
Department of Social Development	http://www.dsd.gov.za/npo/
The website of the Department of Social Development provides information about non-profit organisations.	