

# Accounting Matters

Vol. 5 Issue 1

February 2015

Wishing you a prosperous 2015.

## SHAREHOLDER RESOLUTIONS - BE CAREFUL OF THE ROUND ROBIN

Shareholders ultimately carry the most power in a company. Decisions are carried out via shareholders' resolutions and it is important that these resolutions are correctly done.

The Companies Act ("the Act") specifically addresses the issue of resolutions. It also allows the Memorandum of Incorporation (MOI) to have a substantial impact on resolutions. The MOI can set the requisite number of votes to pass an ordinary or special resolution. It can also dictate when ordinary or special resolutions are required.

### How to pass resolutions

These can be passed –

- At a shareholders' meeting or other meeting such as the annual general meeting, or
- By round robin resolution, or
- In the case of a sole shareholder, without any of the prescribed formalities.

### A voting anomaly with round robin resolutions

Round robin resolutions are conducted by correspondence, usually by email. Formal notice needs to be given and needs to adequately inform shareholders of the purpose of the resolution. Voting is to take place within 20 business days of the resolution being sent and shareholders are to be informed of the result of the resolution within 10 business days of the resolution being finalised.

The curious aspect of round robin resolutions is that the Act is not clear as to the number of voting rights needed to carry a resolution. In terms of other meetings, there must always be a quorum present – the Act speaks of a quorum as 25% of the voting rights.

With round robin resolutions, there is no such certainty, and a number of contrasting views as to what will suffice. One view (possibly the majority view) is that a 25% voting response is needed. Another is that a majority of those who vote decide – in which event, in an extreme case if only 1% of the voting rights vote, they would make the decision. Other possibilities are decision by a majority of the voting rights of all issued shares, or a requirement of 100% unanimity.

In companies with only a few shareholders this will probably not be an issue but as the shareholder numbers grow, the potential to manipulate decisions via round robin resolutions exists. It is unclear what stance our courts will adopt in the event of any dispute over the validity of a round robin resolution, so take professional advice if you are in doubt.

### Remove all doubt

In any event, in view of this lack of clarity, one solution would be to remove all doubt by specifying in the MOI the number of voting rights necessary to pass a round robin resolution.

## ARE YOU A "PRESCRIBED OFFICER"? IF SO BE AWARE OF YOUR ONEROUS LIABILITIES AND RESPONSIBILITIES

The 2008 Companies Act introduced the concept of "prescribed officers" three years ago. They are senior employees (not directors) deemed by the Act to have the obligations of directors. **As such they are bound by the duties and responsibilities of directors.** They also incur the liabilities imposed by the Act on directors.

**Employees:** If you think you may be a "prescribed officer", ask your directors to urgently take action to protect your position as set out below.

**Directors:** Imagine your senior management make an error which exposes them to civil liabilities. As you have taken out directors' insurance you at least know that directors are not financially exposed. Then you learn that some of your senior managers can be deemed to have the same liabilities as directors. These managers suddenly face litigation without any insurance which could financially ruin them, with potentially devastating consequences for your business.

### What are prescribed officers?

The Act defines a prescribed officer as a person who either –

- a) "Exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company"; or
- b) "Regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company."

This definition applies no matter what title is given to the employee or to his/her functions.

The difficulty with this is that it is not specific and there is no case law to give more concrete meaning to this definition. This is because the Act is still relatively new and the South African definition of "prescribed officer" differs from other countries.



## Managing the risks

If you do have staff who potentially could be “prescribed officers” as defined, it is clearly worth doing the exercise to determine whether they are or not. To do this you will need to look at -

- Their job descriptions
- Their levels of authority – to what extent can they authorise budgets, strategy and expenditure?
- Are they included in on key strategic meetings?
- What committees do they sit on? What do these committees do?
- If they are part of a group, do they manage subsidiaries?
- To what extent are they supervised by the directors?

It is worth seeking professional advice especially as you will have no legal precedents to guide you.

Not only is it in your interests to identify prescribed officers but it is clearly very much in their own interests also. They will need to be advised of their duties, responsibilities and liabilities so they can prepare for what the law requires. Most important, they can be covered with director’s insurance.

Finally, as there are differing roles and expectations for directors as opposed to employees, it is important for the proper workings of the business that prescribed officers are identified.

## TRUSTEES: YOUR RISKS, ROLES AND RESPONSIBILITIES

Over the past generation, greater onus has been placed on people in authority such as directors and trustees. Much attention has been placed on directors following the new Companies Act which became effective in 2011. It is a good time to relook at trustees who are governed by the Trust Property Control Act.

### Choosing the right trustees

A trustee must “in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”.

What does this mean? This places a heavy burden on trustees. They are being benchmarked against someone who is a rational, competent trustee who would show the required –

- **Care.** They must put in the necessary hard work to reach reasonable decisions.
- **Diligence.** They must give the necessary attention to matters at hand. This requires that they have the facts and time needed to inform themselves, so they can make a rational decision.

- **Skill.** Trustees must have the experience and qualifications to be able to make a decision **in the best interests of the trust**. They need to understand the terms and intention of the trust deed, the interests of the beneficiaries, the roles and powers of the Master of the High Court and relevant legislation such as the Income Tax Act. **It is vital for trustees to understand this requirement – it means that lack of skill is no excuse.**

*Thus, it is vital to select trustees who fit into the above criteria.*

### The Law - a trustee checklist

A trustee can only act as such “if authorised thereto by the Master”. Thus any action taken by a trustee is void (and our courts have held that such actions cannot subsequently be ratified) if he has not first obtained a “Letter of Authority” from the Master of the High Court.

The trustee is to take control of the assets and keep a separate and identifiable record of them. Assets need to be protected – for example, property needs to be insured where necessary. Annual financial statements are to be produced to accompany the income tax return.

Trustees are to respond to any queries or concerns the Master may have.

All necessary laws need to be complied with.

If and when the trust is wound up, the trustee must be very careful to do this correctly.

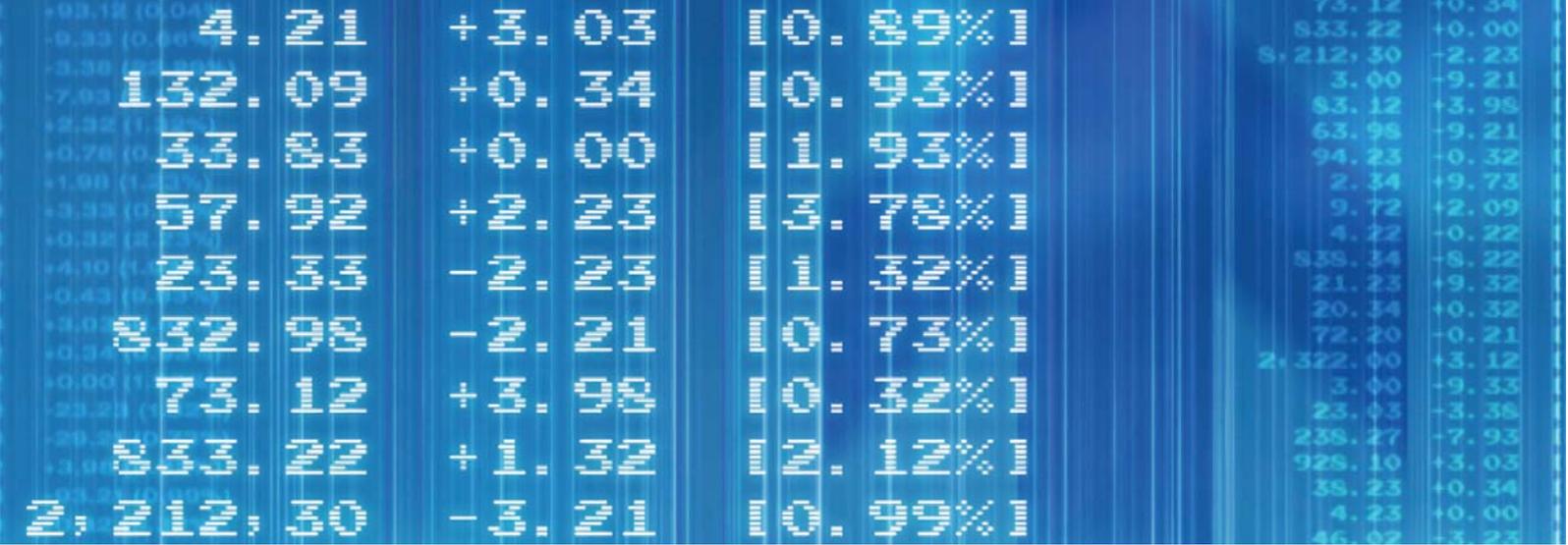
### Investing the Assets

Once familiarised with the provisions of the trust deed (in particular powers of investment) and taking into account the interests of the beneficiaries, the trustee(s) must invest the assets. As this is often the cause of dispute between trustees and beneficiaries, it is important that trustees keep a record to demonstrate they have acted with “care, diligence and skill” in executing their duties.

### Risk and Liability

**If trustees fail in their duties and responsibilities, they risk personal liability for the losses suffered.** They also risk personal liability to SARS for any failure to pay taxes due by the trust. That it is why it is important for trustees to be able to show that they acted with the required “care, diligence and skill” and in good faith in performing their duties.

Being a trustee is not something for the faint-hearted. There is much to consider as trustees are held to a high standard, there are many grey areas and many potential pitfalls. It is worth seeking professional help.



## THE REVISED EMPLOYMENT EQUITY ACT: WHERE DOES IT LEAVE YOU?

Changes to the Employment Equity Act (“EEA”) became effective on 1 August. They will force businesses to focus more on transformation in their businesses and to carefully review their human resource policies.

### The main changes

- **Discrimination:** Employers (all employers are subject to the unfair discrimination provisions of the EEA) may not discriminate, either directly or indirectly, against an employee on “the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground”.

A difference in pay or conditions of work between “employees of the same employer performing the same or substantially the same work or work of equal value” is now also specifically declared by the revised EEA to be unfair discrimination, if it is based on any of the above criteria.

Should an employee take you to court alleging discrimination on the above grounds (excluding arbitrary grounds) the **onus is on the employer** to prove no such discrimination has taken place.

- Greater powers have been given to the authorities to get employers to comply with the EEA. Apart from increased enforcement mechanisms, fines for non-compliance have been tripled and linked to business turnover. These could be as much as R2,7m or 10% of turnover (whichever is greater) for serial offenders which effectively could cripple a small or medium sized business
- The threshold turnovers to be a designated employer (only “designated” employers are subject to the affirmative action provisions of the EEA) have been tripled which is positive. However it depends on which industry you belong to - for example, the construction industry threshold is R15 million in turnover which is low for that industry (see the table below for all the new thresholds). Note that if you have 50 or more employees, you are a designated employer regardless of turnover.
- Designated employers with less than 150 staff reported every second year but will now be required to submit an annual report.
- Employees falling within the protections of the Basic Conditions of Employment Act – below gross annual salary of R205,433-30, may go to the CCMA for discrimination complaints against their employer. This makes it easier for employees and more cost effective to have

such complaints heard. As an aside, it is also worth noting that any case of sexual harassment will be heard by the CCMA.

- Any psychometric testing of employees must be approved by the Health Professions Council of South Africa.

Note also that the controversial demographic regulations that targets for staff be representative at a national level, as opposed to a regional level, have been withdrawn.

Turnover Thresholds Applicable to Designated Employees*		
Sector or subsectors in accordance with the Standard Industrial Classification	Total Annual Turnover	
	Old Threshold	New Threshold
Agriculture	R2m	R6m
Mining and Quarrying	R7.5m	R22.5m
Manufacturing	R10m	R30m
Electricity, Gas and Water	R10m	R30m
Construction	R5m	R15m
Retail and Motor Trade and Repair Services	R15m	R45m
Wholesale Trade, Commercial Agents and Allied Services	R25m	R75m
Catering, Accommodation and other Trade	R5m	R15m
Transport, Storage and Communications	R10m	R30m
Finance and Business Services	R10m	R30m
Community, Special and Personal Services	R5m	R15m

**\*Note that if you have 50 or more employees, you are a designated employer regardless of turnover.**

### One important implication

Apart from the increased policing and punitive powers introduced into the EEA, employers need to carefully re-examine their human resource policies in terms of the new discrimination clause (see above). If an employee takes you to the CCMA for discriminatory policies, the burden of proof lies with you. The way to establish this proof is through clear policies (remember the wording includes “indirect” discrimination which means you will need to be very careful in your policies) which will stand up to scrutiny.

You will thus need to consider why you pay more for experience, responsibilities of the job, skill and qualifications. Depending on your business you may need to consider job grading and other personnel policies. This will clearly be a burden for SMEs who do not have formal guidelines or policies.

The amendments to the EEA are now law and need to be carefully analysed and considered.

8,212.30	-0.32	[5.32%]	8,214.30
3.00	+9.73	[0.02%]	1.32
83.12	+2.09	[1.87%]	9.02
63.98	+9.32	[1.56%]	332.48
234.22	+0.32	[0.32%]	86.38
2.32	-0.21	[3.10%]	4.21
24.13	+3.33	[0.32%]	132.06
74.75	+0.32	[2.23%]	33.82
89.43	+4.10	[1.93%]	87.92
92.42	-0.43	[9.83%]	23.33
9329.32	+3.03	[0.89%]	832.98
23.32	+0.34	[0.93%]	73.12
9329.10	+0.00	[1.93%]	832.32
			8,212.30
			3.00
			83.12
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			234.22
			2.32
			24.13
			74.75
			89.43
			92.42
			9329.32
			23.32
			9329.10

## EMPLOYERS: TAKE NOTE OF THE NEW REMUNERATION THRESHOLDS

From 1 July 2014 the Minister of Labour amended the remuneration an employee earns to fall under certain protections (listed below) of the Basic Conditions of Employment Act (BCEA) to R205,433-30 per annum (R17,119-44 per month) - this is up from R193,805-00 per annum (R16,150-42 per month).

**This figure is before deductions like PAYE, medical aid etc – in other words the gross amount paid.**

**This threshold is significant for businesses as most employees falling below it are afforded the BCEA protections listed below. It is worth checking how many of your employees now fall under the BCEA.**

**Note that certain employees such as senior management, some sales staff, and employees working less than 24 hours a month aren't eligible for some of these protections – take advice on specifics.**

### What are the protections?

In essence the significant ones are -

- The number of hours your employee works a week (45 hours)
- How much overtime they are allowed to work (10 hours a week)
- How much they get for overtime – at least one and a half times their normal wage
- Limitations provided for a compressed week (up to twelve hours per day including meal times) and averaging of a work week (allowable for a period up to four months)
- On Sundays employees get double time and on public holidays the hours worked plus a full day's pay
- Employees working night shift are entitled to an additional allowance (to be negotiated or their weekly working hour limit of 45 hours to be reduced), plus the employer is to pay for transport to and from work

If your employee works consecutively for 5 hours, the employee is entitled to a one hour lunch break.

### SARS AND THE "SINGLE REGISTRATION" PROCESS

SARS now has a single registration and updating of details process for all taxpayers. This covers income tax, VAT, all payroll taxes and customs and duties. All information will be stored in one central point. So, if your bank account details change, you will only need to do this once as opposed to updating each type of tax.

This increased efficiency will assist taxpayers – for example, getting tax clearance should be faster. Previously many taxpayers found that, say, their PAYE bank details have not been updated, necessitating delays in obtaining the tax clearance as you have to "correct" your bank details.

As with many new systems, single registration has had teething problems – if you experience difficulties speak to your accountant.

### MERGING TAX PROFILES WILL REDUCE YOUR ADMIN TIME

In a commendable effort to reduce the cost of doing business particularly in small and medium sized entities (SMEs), SARS recently introduced a single registration process whereby a taxpayer now only needs to register once to be able to register for Income Tax, VAT, PAYE and Customs and Excise.

Now SARS has built on this via the merging of tax profiles. In effect this means that the person responsible for the taxpayer's affairs (be it an individual taxpayer, a public officer or a tax practitioner) can merge all of the taxpayer's affairs under the representative's profile.

This will reduce administration time and will make it easier for SARS to manage taxpayers' affairs.

### SARS GOES GLOBAL INVESTIGATING YOUR TAX AFFAIRS

SARS has extended its ability to query, interrogate and find out about our tax matters. What isn't so well known is that these powers are rapidly extending across the globe.

South Africa has signed multilateral and bilateral taxation agreements with over 60 nations (and counting). This is part of a global trend as countries seek to maximise the tax revenues due to them by fighting tax evasion and avoidance across international borders.

### What can SARS do?

In South Africa, SARS can gather information from taxpayers to ensure compliance. It can also obtain information from third parties. It can compel third parties who owe a taxpayer (or who hold assets for a taxpayer) to pay SARS for tax liabilities unpaid by the taxpayer. SARS can aggressively pursue legal avenues to recover tax liabilities.

By signing the multilateral and bilateral agreements, SARS is seeking to be able to operate globally as it does within South Africa's borders. These agreements thus include for example –

- Routine exchange of information on taxpayers,
- Examining taxpayer affairs in these foreign countries,
- Freezing of taxpayer assets in these countries and
- Getting the assistance of foreign courts to collect tax debts owed to SARS.



These agreements work in both directions – for example South Africa will automatically hand over data on interest earned by United States taxpayers in South Africa and the US will reciprocate with information on South African taxpayers.

#### Two recent court cases illustrate this –

1. South African courts recently froze South African assets of an Australian taxpayer who owed Australian tax authorities R235 million.
2. An English court gave English tax authorities permission to collect tax debts owed in South Africa.

**As the net closes, local taxpayers with undeclared offshore assets should consider entering the Voluntary Disclosure Programme with SARS to get their tax affairs in order. Speak to your accountant!**

#### THE NEW TAX DISPUTE RESOLUTION RULES: BETTER RIGHTS FOR TAXPAYERS

Taxpayers have often felt helpless in disputes with SARS when they have been left waiting for responses to queries or objections. Going to court is not an option for most taxpayers but new rules recently gazetted relating to disputes between taxpayers and SARS will give taxpayers hope.

These new rules cover issues such as objections, appeals, the Tax Court and alternative dispute resolution.

One interesting aspect covered is that SARS have finally accepted electronic communication as a means of submitting documents, objections and notices to SARS. Taxpayers will need to monitor their eFiling profile as SARS can post items on it without notifying the taxpayer. Note here that if you use eFiling to submit your return, you are required to use form N001 for an objection.

#### Be careful!

If you want to dispute anything with SARS, it is critical that you follow the steps and time frames laid down by tax law. Should you fail to comply, SARS will end the dispute, leaving you liable to pay taxes they have raised.

#### The time frames and the process

The new rules allow either party to apply to Tax Court for summary judgment. One of the parties has to be in default in terms of the time frames laid down or in relation to a commitment to provide the other party with documentation.

To start the process, the “wronged” party gives notice that they intend applying to the Tax Court for summary judgment – this means if, say, SARS has not given a decision on an objection in the required time period, then the Tax Court can set this aside and SARS can proceed no further with the matter.

The other party has fifteen business days to remedy the default, failing which the matter goes to the Tax Court. Should the other party oppose this, it has ten business days to submit an affidavit to the Tax Court.

The Tax Court will convene a hearing and may either issue a summary judgment or give the other party more time to redress the default, failing which the process will be set aside.

Thus, the taxpayer now has a concrete way of reaching finality in a dispute with SARS.

Note that there is a lot of documentation required for a Tax Court application – it pays to take advice from a registered tax practitioner as soon as any dispute arises.

#### INVESTORS: BE CAREFUL WHEN BUYING INTO A BUSINESS WITH AN ASSESSED LOSS

The economic difficulties seen over the past couple of years will certainly have led to many businesses incurring losses. This creates an opportunity for investors to acquire either the whole or part of the equity of a business at a discount.

Many if not most of these businesses will also have run up tax losses.

Investors need to be extra careful as our tax law aggressively tries to prevent tax losses being used in these circumstances. **In essence, they should discount getting any benefit from using tax losses in the loss-making entity they buy (or buy a stake in).**

#### What does the anti-avoidance legislation say?

Anti-avoidance tax legislation regarding the use of assessed losses has been around for a long time. The assessed loss avoidance clauses are triggered by a business, which has an assessed loss, either **entering into an agreement or acquiring new shareholders** whereby new income is injected into the entity which is offset against the assessed loss. This results in no or reduced tax being paid by the loss-making organisation.

Note it is wider than equity changing hands – an agreement between two parties can also invoke the legislation. For example, company A has an assessed loss and manufactures toys. Company B does a deal with company A whereby Company B’s toys are manufactured by Company A.

Company A cannot realistically expect that the additional sales from manufacturing Company B’s toys can be set-off against its tax loss.

#### What would trigger SARS invoking these anti-avoidance clauses?

Businesses affected are trusts, close corporations and companies.

Should a business as above enter into an agreement or have a change of shareholding and both –

1. As a “direct or indirect result of” the agreement or change of shareholding, income is received or accrued by the entity, and
2. The “sole or main purpose” of the receipt of injected income (trading or capital) is to reduce the tax liability of the entity; then

SARS will disallow the set-off of the income against the organisation’s assessed loss.

The onus lies with the assessed loss entity to prove that the “sole or main purpose” was not to use the assessed loss.

## The Bottom line

It is foolhardy to enter into a deal and expect to be able to use an assessed loss. It only makes sense if there is a compelling business rationale for the deal.

**No one wants to enter into an argument with SARS which you are not likely to win. Seek expert advice.**

## FINANCE 101: THE MEDIUM TERM BUDGET – THERE'S HOPE BUT THERE WILL ALSO BE PAIN

The new Minister of Finance, Nhlanhla Nene, delivered his maiden budget speech in late October. It was the Medium Term Budget speech which looks at government finances over the next three years.

Setting the scene – a difficult task

The Minister faced a difficult task with gloom over our disappointing economic performance (forecasted GDP growth has been cut from 2.7% in February to 1.4% now), industrial unrest, electricity shortages, growing government debt and ratings downgrades on South Africa's ability to repay its debt.

Just five years ago as the first world entered a severe recession, emerging markets like South Africa were in a strong position – low debt and good economic growth. We responded to the global recession by stimulating economic activity via rapidly increasing government expenditure.

This policy is clearly no longer affordable. 56% of government expenditure is on social welfare and salaries and if the country continued on its spending path, these costs would consume 100% of state spend in the next ten years.

Ratings agencies have downgraded our debt and we are now just above junk status – if South Africa's debt rating falls to this level it could potentially add 1.5% cost to our debt.

In essence we are at a tipping point.

## The Budget

Minister Nene has recognised the difficulties the economy is facing and has unveiled measures to improve government finances. These include-

- Freezing the government headcount – new posts will have to come from current staffing
- In addition, unfilled government posts have been abolished
- A reduction in spend on entertainment, travel, communications, catering and consultants
- Government salaries can rise by no more than 6.6%
- Funding to State Owned Entities such as Eskom, SAA and SABC will be viewed differently. Stricter controls will be placed on them and any funding required by them will be debt neutral as it will come from the sale of government assets
- There will be tax increases. These will be announced in the February budget. These will come from recommendations from the Davis Committee on taxation
- Social spend on grants, health care and education will stay as is.

The effect of these actions will be to reduce government expenditure by R25 billion and increase revenue (tax increases) by R27 billion. This will reduce the budget deficit to below 3% of the budget by 2017. Economic growth will rise to 3% in this timeframe.

## Tax deadline for Provisional Tax and Company Year End Returns is 27th February 2015 – Please diarise

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## Hope amidst difficulties

- The fact that the bond market improved and the Rand remained stable indicates that global markets approved of the budget
- The Minister stressed that the budget was drawn up within the framework of the National Development Plan. This is accepted as a credible long term plan to improve investment, economic growth and jobs in South Africa
- The consumption spend economic stimulus programme is being replaced by one that emphasises investment – in the medium to long term this will enhance economic growth
- It has been a long time since government mentioned privatisation and it will be interesting to see what flows from government's commitment to sell assets to fund parastatal entities like Eskom
- The budget is "collectively owned", so the Minister has government consensus which gives more credibility to the budget
- The first big test will be government salaries next year. Unions are pushing for a 15% increase but the Minister clearly stated that salaries cannot go up by more than 6.6%.

Although no one likes tax increases, this budget was a strong statement based on common sense and reality.

## SARS – LATEST TAX STATS LOOKING GOOD

Preliminary statistics from the 2014 tax year (up to November 2014) show that compliance from taxpayers is improving whilst the efficiency of SARS is similarly increasing. Here are some highlights –

- 94.49% of eligible taxpayers submitted returns on time – an increase of 10.1% from the 3.7 million submitted in 2013
- A total number of 5.32 million returns were received timeously by 21 November 2014  
99.91 % of returns were submitted electronically
- 94.98% of returns were assessed within 3 seconds
- 98.0% of refunds were paid in 72 hours
- Over R15.2 billion in tax refunds were paid to 2.1 million taxpayers
- 1.02 million tax returns from previous years were submitted
- SARS collected R436 million in outstanding penalties.

## SOUTH AFRICA: DID YOU KNOW?

- South Africa is the second largest exporter of fruit. It is behind China but ahead of the USA and Brazil.
- We invented coal to oil technology. Sasol took over research done by Germany in World War 2 and now produces 28% of South Africa's fuel. It has also set up plants in the Middle East and the USA.
- The most diverse and iconic fossils are found in South Africa. 80% of mammalian fossils were found in the Karoo Supergroup rocks which cover two thirds of the country.
- Two Nobel Peace Prize winners lived on the same street in Soweto – Nelson Mandela and Archbishop Tutu both lived in Vilikazi Street.
- We are the only country to have both built and dismantled our own nuclear weapons.

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