

SOUTH AFRICA

LEGAL GUIDE

FOOD DONATION
LAW AND POLICY

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws on food donation to help address food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe in order to help practitioners understand national laws relating to food donation, compare laws across countries and regions, analyze legal questions and barriers to donation, and share best practices and recommendations for overcoming these barriers. The project is a collaboration between Harvard Law School Food Law and Policy Clinic and The Global FoodBanking Network. To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

FLPC serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods; supporting sustainable food production and food systems; and reducing waste of healthy, wholesome food. For more information, visit www.chlpi.org/FLPC.



About The Global FoodBanking Network

GFN is an international non-profit organization that nourishes the world's hungry through uniting and advancing food banks in more than 40 countries. GFN focuses on combating hunger and preventing food waste by providing expertise, directing resources, sharing knowledge and developing connections that increase efficiency, ensure food safety, and help food banks reach more people facing hunger. For more information visit www.foodbanking.org.



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INTRODUCTION

Purpose of this Guide

Food loss and waste is one of the greatest food system challenges that we face today. An estimated one-third of food produced globally is ultimately lost or wasted along the supply chain;¹ this amounts to approximately 1.3 billion tons of food each year that ends up in the landfill.² Food loss or waste occurs at every stage of the food system: during the initial harvest due to low market prices, because of high labor costs and demand for perfect-looking produce; by grocery stores and restaurants overestimating customer demands; and by consumers who engage in inefficient shopping and cooking practices and lack a clear understanding about date labels.³

These behaviors have significant environmental, economic, and social consequences: food that is ultimately lost or wasted has a huge carbon footprint of 3.3 gigatons,⁴ using roughly 28% of agricultural land⁵ and accounting for 8%, or 70 billion tons, of total global greenhouse gas emissions.⁶ Collectively, this damage costs approximately US\$940 billion per year.⁷ Meanwhile, more than 820 million people are undernourished and one in nine is food insecure.⁸ The international community has sought to address this paradox and mobilize the reduction of food waste, especially within the framework of the *2030 Agenda for Sustainable Development* and Sustainable Development Goal (SDG) 12.3.⁹

In many countries, food donation has emerged as a popular and logical solution to redirect safe, surplus food destined for landfills into the hands of those who need it most. Most food donations are facilitated through food banks or other charitable, nongovernmental organizations that recover surplus, wholesome food and redirect it to local beneficiary agencies (such as soup kitchens, shelters, and community pantries) to feed low-income, food-insecure persons. As food insecurity, food loss, and food waste continue to rise, new, innovative models of food recovery have emerged around the world.

However, there is some uncertainty surrounding the laws and regulations most relevant to food donation. To help address the most pressing questions, the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN) have partnered to create The Global Food Donation Policy Atlas.¹⁰ This innovative partnership maps the laws and policies affecting donations in countries around the world. The project aims to identify and explain national laws relating to food donation, analyze the most common legal barriers to promoting greater food donation, and share best practices and recommendations for overcoming these barriers.

THE PROJECT AIMS TO IDENTIFY AND EXPLAIN NATIONAL LAWS RELATING TO FOOD DONATION, ANALYZE THE MOST COMMON LEGAL BARRIERS TO PROMOTING GREATER FOOD DONATION, AND SHARE BEST PRACTICES AND RECOMMENDATIONS FOR OVERCOMING THESE BARRIERS.

This Legal Guide focuses on South Africa, where an estimated 10 million tons of food goes to waste annually,¹¹ while approximately 20% of households live below the “food poverty line.”¹² FLPC and GFN, in collaboration with partners in South Africa,¹³ developed this resource to help food donors, food banks, and other intermediaries (hereinafter collectively referred to as “food recovery organizations”) understand the relevant legal frameworks that impact food waste and donation efforts. This Legal Guide also serves as a resource for those in other countries that are looking to inform their own food donation laws and policies.

After providing initial commentary on food loss and recovery in South Africa, this Legal Guide provides an overview of the legal frameworks most relevant to food donation at the national and local levels. The subsequent sections look more closely at the laws generally applicable to food donation: food safety laws and regulations, food date labeling laws, “Good Samaritan” or liability protection laws, tax incentives for food donation and/or tax policy disincentives, and waste diversion laws that penalize food waste or require recovery. The extent to

which South Africa has developed and subsequently implemented these legal frameworks compared to other countries may vary.

State of Food Insecurity, Food Loss, Waste, and Recovery in South Africa

Policies to prevent food loss and waste and promote food donation gain new importance when a country's socioeconomic conditions perpetuate food insecurity, especially among the most vulnerable. This is the case in South Africa, where widespread economic inequality has left far too many without sufficient access to nutritious foods and other basic necessities. While the wealthiest 10% of the population owns approximately 70% of the nation's assets,¹⁴ nearly half of all adults (49.2%) live in poverty.¹⁵ Poverty levels differ significantly among population groups, with 46.5% of Black households and 32.3% of Coloured households living in poverty compared to 5% of Indian/Asian households and only 1% of White households.¹⁶ Recognizing that households faced with poverty also face the burden of inadequate access to food,¹⁷ South Africa established a distinct "food poverty line," the level below which an individual cannot afford a safe and nutritious diet.¹⁸ From 2014 to 2015, 20.6% of adults lived below the food poverty line.¹⁹ In 2020 the food poverty line was set at R585 (equivalent to US\$38) per person per month.²⁰

While the most recent hunger statistics show a decrease in hunger from 29.3% in 2002 to 11.3% in 2018,²¹ the COVID-19 pandemic may have negatively impacted this trend and exacerbated food insecurity.²² To contain the spread of the virus, the South African government implemented one of the strictest lockdown measures in Africa,²³ resulting in increased food insecurity²⁴ due to inadequate access to transportation and markets.²⁵ At the height of the pandemic, about 47% of adults reported having inadequate access to food, mainly due to loss of household income.²⁶ To address rising food insecurity, the South African government began providing food relief, delivering food aid to an estimated 12,000 needy families.²⁷

South Africa by the numbers²⁸

Population 58,600,000	Prevalence of food insecurity 20%	World Bank classification Upper middle income
Median age 28 years	Global Food Security Index 57.8	Human Development Index 0.709 (2019)
GDP (US\$) \$351.432 billion	GINI Index 63 (2014)	FLW estimates 10 million tons
Poverty rates 49.2%	Food Security Index 67.3	

Prior to the pandemic, the South African government implemented hunger interventions and prioritized food security at the top of its policy agenda.²⁹ In 2013, the National Policy on Food and Nutrition Security for South Africa was adopted³⁰ and implemented by the Department of Agriculture, Forestry and Fisheries (DAFF).³¹ The National Policy is a legislative mechanism to promote the realization of the right to food in South Africa as set out in the Constitution.³² It aims to ensure access to safe and nutritious food for all South Africans³³ and improve implementation and coordination among existing government programs addressing food insecurity.³⁴ As part of the solution, the National Policy identifies the need to address food waste, which presents one of the greatest challenges to food availability.³⁵

Evidence suggests that the country wastes approximately 10 million tons of food,³⁶ or about a third of food produced each year.³⁷ Approximately 75% of food waste occurs before food is processed and packaged.³⁸ Inadequate food storage and distribution mechanisms such as transport and market infrastructure further contribute to avoidable waste.³⁹ High rates of food waste indicate that South Africa, like much of the world, is falling behind its commitment to cut food waste in half by 2030 under the United Nations' SDG 12.3.⁴⁰ This food waste also imposes an estimated annual financial burden of R61.5 billion⁴¹ (approximately US\$4,175,492).⁴² Despite the potential for surplus, edible food to help alleviate widespread hunger and food insecurity, the country lacks comprehensive legislation that regulates food waste or promotes greater recovery and donation to those who need it most.⁴³

Even without national legislation to prevent food loss and waste or promote food donation, the government endorses these goals through voluntary partnerships and initiatives. Most notably, in 2020 the Department of Trade, Industry and Competition (DTIC), the Department of Environment, Forestry and Fisheries (DEFF), and the Consumer Goods Council of South Africa (CGSA) developed a Food Loss and Waste Voluntary Agreement.⁴⁴ This public-private initiative, discussed in greater detail later in this Legal Guide, encourages a more efficient and effective reduction in food waste.⁴⁵ The initiative seeks to improve supply chain efficiency and leverage food recovery as a means to alleviate hunger in South Africa.⁴⁶

Implementing the Voluntary Agreement will require the active involvement of private-sector food system actors, including food banks and other food recovery organizations. Over the last two decades, FoodForward South Africa (FFSA) has played a critical role in the collection and delivery of donated and rescued food to communities in need.⁴⁷ As of 2020 FFSA has an established footprint in all nine provinces⁴⁸ and reaches 475,000 beneficiaries daily through a network of 1,005 registered beneficiary organizations.⁴⁹ FFSA makes an impact through various programs, including its Second Harvest initiative, which recovers edible, surplus food from farmers during harvest.⁵⁰ FFSA has also utilized technology-based solutions through its FoodShare digital platform, connecting food donors with beneficiary organizations for daily collection of surplus food.⁵¹ FFSA's impact only increased during the COVID-19 pandemic, with the organization distributing over 29 million meals to communities in need.⁵² Calculations suggest that scaling the current food banking model in South Africa by 50% would result in an additional 35 million meals distributed per year.⁵³

As South Africa seeks to reduce food loss and waste and mitigate food insecurity, it is critical that various stakeholders, including the private sector and nonprofit organizations, recognize and understand the laws that apply to food donation. The remaining sections of the Legal Guide provide an overview of South Africa's food donation legal framework and address the issues most likely to arise for food donors, food recovery organizations, policymakers, and other interested stakeholders.

OVERVIEW OF SOUTH AFRICA'S RELEVANT LEGAL FRAMEWORK

The South African laws impacting food loss, waste, recovery, and donation are predominantly adopted at the national level, where the Constitution is the primary and supreme source of law.⁵⁴ Hierarchically below the Constitution are statutes, judicial precedent (case law), and customary law. The Constitution of South Africa establishes a three-tier government system where power is distributed between the national, provincial, and local governments.⁵⁵ At the national level, legislative power is held by the National Executive (president, deputy president, and ministers, also known as the cabinet)⁵⁶ and the Parliament, which includes the National Assembly and National Council of Provinces.⁵⁷

The National Executive has the power to initiate and implement national legislation and policy and coordinates all the functions of state departments and institutions.⁵⁸ The National Assembly within Parliament has the power

to amend the Constitution, pass legislation, and assign legislative power to other branches of government.⁵⁹ The National Council of Provinces has the power to participate in amending the Constitution and consider legislation passed by the National Assembly and also pass legislation.⁶⁰ The National Council of Provinces may only consider and pass legislation within the functional areas provided for under Schedule 4 of the Constitution.⁶¹ On matters related to food, the National Assembly and National Council of Provinces have concurrent legislative competence in areas of agriculture, consumer protection, environment, and health services.⁶²

The Constitution of South Africa further establishes⁶³ and grants legislative power to the nine provincial governments of Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North West, Northern Cape, and Western Cape.⁶⁴ Provincial governments can pass provincial constitutions and legislation and assign legislative powers to municipal councils in the provinces.⁶⁵ The third tier is the local government, which consists of municipalities that have the power to govern the local government affairs of a given community but are subject to the national and provincial constitutions and legislation.⁶⁶

South Africa Food Loss and Waste Voluntary Agreement

South Africa has recently taken steps to address food loss and waste at the national level. The government, represented by the Department of Trade, Industry, and Competition (DTIC) and the Department of Environment, Forestry and Fisheries (DEFF), partnered with the Consumer Goods Council of South Africa (CGCSA) to develop the public-private Food Loss and Waste Voluntary Agreement.⁶⁷ The Voluntary Agreement adopts a three-part vision and sets forth general principles and objectives to encourage more efficient and effective food loss and waste reduction.⁶⁸ First, it aims to reduce food loss and food waste by 50% by 2030,⁶⁹ which is consistent with South Africa's commitment under SDG 12.3.⁷⁰ Second, it seeks to reduce food loss and waste through promoting the adoption of a food utilization hierarchy that lists ways to limit food waste ranging from the most preferred to the least preferred approaches (i.e., “reducing the volume of surplus food; donating to food banks, soup kitchens and shelters; feeding animals; industrial uses; composting and disposal in a landfill”).⁷¹ Third, the Voluntary Agreement plans to “identify solutions that respond to a circular economy and sustainable food systems agenda.”⁷² Additionally, committed members will work with farmers and other stakeholders to find additional loss centers in the supply chain.⁷³

THE VOLUNTARY AGREEMENT ADOPTS A THREE-PART VISION AND SETS FORTH GENERAL PRINCIPLES AND OBJECTIVES TO ENCOURAGE MORE EFFICIENT AND EFFECTIVE FOOD LOSS AND WASTE REDUCTION.

At the time of this writing this Guide, the Voluntary Agreement was still in the early phases of design and implementation. As of November 2020, 19 South African companies had agreed to the initiative.⁷⁴ These companies are set their own targets and research their own food waste “hot spots” and identify supply chain inefficiencies with technical assistance from the government.⁷⁵ The Voluntary Agreement is designed to culminate in concrete actions over the next decade, and the significant review and analysis required to direct feasible and sustainable changes to the food supply chain have the potential for lasting impact.⁷⁶

Foodstuffs, Cosmetics, and Disinfectants Act

While several national frameworks regulate food products in South Africa, most food safety and date labeling requirements relevant to food donation are set forth in the Foodstuffs, Cosmetics, and Disinfectants Act 54 of 1972 (FCDA) and its accompanying regulations.⁷⁷ The FCDA does not explicitly reference food donation. However, it broadly applies to “foodstuffs” (i.e., any article or substance “ordinarily eaten or drunk by a person . . . purporting to be suitable, or manufactured, or sold, for human consumption”).⁷⁸ As a result, as discussed later in this Legal Guide, the FCDA and the requirements on food safety and date labeling contained therein are presumed applicable to food that is offered for sale and food donated free of charge.

To ensure compliance with its provisions, the FCDA delegates oversight authority to the Department of Health (DOH), granting the Minister of Health extensive permission to issue regulations pursuant to the Act,⁷⁹ and to oversee local enforcement.⁸⁰ DOH's Food Control Division is responsible for managing food hygiene, developing food safety and quality standards, and overseeing labeling requirements.⁸¹

Pursuant to its delegated authority, in 2018 DOH promulgated Regulations Governing General Hygiene Requirements for Food Premises and the Transport of Food and Related Matters.⁸² These Regulations elaborate on the sanitary requirements that apply to the packing, storage, display, sale, or transport of both prepackaged and unprocessed foods, but they do not specifically address food donation.⁸³

DOH also issued Regulations Relating to the Labeling and Advertising of Foodstuffs, which established labeling rules for prepackaged foodstuffs, consistent with the *Codex Alimentarius*.⁸⁴ As discussed later in this Legal Guide, these Regulations, like the FCDA itself, do not feature donation-specific sections or explicitly reference food donation. Nevertheless, the provisions contained therein have practical impacts on food recovery and food donation efforts.

Other National Laws

In addition to the aforementioned legal frameworks, other national laws directly or impliedly impact food recovery and food donation in South Africa. For example, the Meat Safety Act⁸⁵ and the Agricultural Products Standards Act⁸⁶ offer specific rules regarding food safety for meat products and agricultural products, respectively. Other relevant law includes the Consumer Protection Act, which sets forth the controlling liability scheme to which food donors and food recovery organizations are subject in the event that a beneficiary is harmed.⁸⁷ Additionally, the Income Tax Act 58 of 1962 and Value-Added Tax Act 89 of 1991, which govern the national tax system are relevant to food donation and are discussed later in this Legal Guide.⁸⁸

Provincial Law

Provincial legislatures can also pass laws that may impact food loss, waste, and recovery within the confines of relevant national laws.⁸⁹ South Africa is divided into nine provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North West, Northern Cape, and Western Cape.⁹⁰ Each province has powers enact their own provincial laws on certain matters, including consumer protection and health, as long as the laws are in accordance with the national Constitution.⁹¹ For example, the province of Gauteng adopted Public Health By-laws, which regulate activities that adversely affect public health.⁹² The By-laws enforced locally by the City of Johannesburg Metropolitan Municipality⁹³ prohibits unsanitary and unhygienic conditions within the municipality.⁹⁴

TO DATE, NO LEGISLATION OR REGULATION AT THE PROVINCIAL OR MUNICIPAL LEVELS ADDRESSES FOOD DONATION DIRECTLY. HOWEVER, THERE ARE NATIONAL FRAMEWORKS THAT IMPOSE REGULATORY RESPONSIBILITY ON LOCAL AUTHORITIES.

To date, no legislation or regulation at the provincial or municipal levels addresses food donation directly. However, there are national frameworks that impose regulatory responsibility on local authorities. For example, as mentioned previously, under the FCDA the Minister of Health may authorize local authorities to enforce compliance with the law within their respective jurisdictions.⁹⁵ Through this delegated authority, municipalities (districts and metros) appoint Environmental Health Practitioners (EHPs).⁹⁶ Environmental Health Practitioners perform a multitude of roles, including monitoring and inspecting foodstuffs and food premises, enforcing laws, controlling provincial food imports, monitoring and investigating foodborne illnesses, and analyzing and addressing all food safety complaints within their jurisdiction.⁹⁷

In addition, South Africa delegates certain waste management oversight to provincial and municipal governments. South Africa controls waste, generally, through the National Environmental Management: Waste Act of 2008 and the National Environmental Management: Waste Amendment Act of 2014, which generally promote environmental health through the reduction, reuse, and recycling of waste.⁹⁸ The Act and its Amendment require provincial departments and municipalities to develop integrated waste management plans.⁹⁹ The integrated waste management plan includes the quantities and types of waste generated in a given municipality and provides for the plan's implementation.¹⁰⁰ Neither the Act nor the Amendment Act explicitly reference food waste, but food waste may fall under scope. At the provincial level, Western Cape put in place an organic waste ban with a goal of diverting 50% of food waste from the landfill by 2022 and a landfill ban on organic waste to landfill by 2027.¹⁰¹ Municipalities are expected to set annual targets to meet the goal of diverting organic waste from landfills.¹⁰²

LEGAL ISSUES RELEVANT TO FOOD DONATION

Food Safety for Donations

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. All donated food should be safe for consumption and comply with applicable food safety laws and regulations. Potential donors, however, are often uncertain about which food safety regulations apply to donated food as opposed to purchased food and about the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills.

Most food safety requirements in South Africa are set forth in the FCDA and its accompanying regulations.¹⁰³ The FCDA prohibits the sale of food containing any prohibited substance that is contaminated, impure, decayed, or deemed harmful to human health.¹⁰⁴ It defines “sell” broadly to include the conveyance or disposal of food to any person “whether for consideration or otherwise.”¹⁰⁵ Thus, while the FCDA does not explicitly reference food donation, this broad definition suggests that the FCDA would indeed apply to donated food offered free of charge, as the Act applies even when there is no payment for foodstuffs.

As previously mentioned, the FCDA gives the Minister of Health power to develop regulations that elaborate on and further explain the provisions of the Act to facilitate its effective implementation.¹⁰⁶ Of relevance to food donation, the Regulations Governing General Hygiene Requirements for Food Premises, the Transport of Food and Related Matters (No. R. 638 of 2018) set forth standards governing general hygiene requirements for food premises and the transport of food. These Regulations give power to local authorities to inspect premises where food is handled.¹⁰⁷ The Regulations expand upon Section 15 (1) of the FCDA and generally require that all places where food is handled should be in a condition that does not create a health hazard and must allow for food to be handled hygienically.¹⁰⁸ They also require places that handle food to obtain a certificate of acceptability¹⁰⁹ and regulate the transportation and handling of food,¹¹⁰ standards for food premises and their facilities,¹¹¹ food containers,¹¹² and temperature and storage conditions.¹¹³

A broad interpretation of No. R. 638 of 2018 implies that the Regulations also apply to food banks and other public benefit organizations that operate in physical locations where food is received, processed, and distributed.¹¹⁴ Presumably, the Regulations also apply to food donors that qualify as food handlers.¹¹⁵ As a result, while the Regulations do not explicitly reference food donations, food donors and food recovery organizations should adhere to the regulatory requirements.

In addition to the FDCA, the Meat Safety Act (MSA) also imposes food safety requirements relevant for food donors and food recovery organizations. The Department of Agriculture, Forestry and Fisheries (DAFF) has the legislative authority to implement the MSA.¹¹⁶ The MSA defines sale broadly to apply to meat products whether paid for or not.¹¹⁷ As a result, donations are likely included in this broad definition. The MSA applies specifically to meat products,¹¹⁸ while the FCDA primarily controls food safety and labeling of food products.

Date Labeling

Date labels affixed to food products are a major driver of food waste and an obstacle to food donation. As explained in the previous section, most food donors and food recovery organizations are appropriately cautious about donating food that meets safety standards, but it is not always clear which standards relate to food safety. And, while fresh products like fruits and vegetables will appear visibly spoiled when they are no longer safe to consume, it can be more difficult to gauge when this is the case for packaged foods. Many donors interpret date labels affixed to such food products as indicators of safety and will therefore throw away food once the “expiration date” has passed; intermediaries may refuse to accept donated food after this date, deeming the food product unfit for human consumption.

Despite this interpretation, for the vast majority of foods, date labels indicate freshness or quality rather than food safety. Manufacturers use a variety of quality-based methods to determine the time frame for date labels, all of which are intended to reflect when the food will be at its “peak quality.”¹¹⁹ Nevertheless, global trends indicate that consumers generally confuse date labels as indicators of safety rather than quality. In the United Kingdom, for example, researchers found that consumers discarded about 22% of food that they could have eaten due to confusion over date labeling.¹²⁰ Similarly, 84% of Americans report that they throw away food after the expiration date passes due to safety concerns, even if there is a minimal risk of foodborne illness at that time.¹²¹

Food donors and food recovery organizations may encounter similar challenges discerning the appropriate meaning and application of date labels in South Africa, despite a detailed and standardized labeling scheme set forth in the Regulations Relating to the Labelling and Advertising of Foodstuffs (No. R.146) (hereinafter “Labelling Regulation”) to the FCDA.¹²² The Labelling Regulation applies to all food that is offered for sale, which is defined broadly to include food that is donated free of charge.¹²³ Specifically, the Labelling Regulation requires all foods to feature a “date of minimum durability,” expressed as “best before,” and/or a “sell by” date, and/or a “use by” date, depending on the type of food product.¹²⁴ The Labelling Regulation does not require manufacturers to select only one of these dates but permits the use of *all* labels concurrently, seeming to defer to the manufacturer to discern which label(s) to choose.

Distinguishing between the labels may be difficult for manufacturers and consumers alike, as the definitions provided in the Labelling Regulation do not present a clear distinction among these three dates. The “sell by” (or “display until”) date is the last date on which the food should be sold to a consumer, after which there remains a “reasonable storage period” at home. This date seems to refer to the quality of the product, as it is still considered safe to consume during that “reasonable storage period” (although the Labelling Regulation does not define this term). Both the “use by” and “best before” dates also seem to refer to quality, and both indicate the last date on which the product, under prescribed storage conditions, will retain certain quality attributes.¹²⁵

While the definitions of the “use by” and “best before” dates vary slightly, the most notable difference between these quality-based dates is that food “should not be regarded as marketable” after the “use by” date, whereas food is still considered marketable if the “best before” date has passed. The Labelling Regulation does not explicitly state whether food is safe to donate after the “best before” date. However, not only is the food still marketable after the “best before” date, but the Labelling Regulation confirms that it may also be “perfectly satisfactory” once the date has passed.¹²⁶ Accordingly, food donors and food recovery organizations are not precluded from donating and distributing food after the “best before” date and should expect that they can safely do so.

The implications of the “use by” date in the context of donation are less clear, as this date’s definition and terms do not align with prevailing guidance under the *Codex Alimentarius*, which the Labelling Regulation recognizes as relevant.¹²⁷ The 2018 update to the *Codex Alimentarius* General Standard for the Labeling of Prepackaged Foods endorses a dual date labeling scheme, with food using either a “best before” label to indicate quality—consistent with the South African date labeling scheme—or a “use by” label to indicate safety. Specifically, this “use by” date is intended to convey the last date on which the product should not be sold or consumed due to *safety and quality* reasons.¹²⁸ The Labelling Regulation, however, suggests that food may not be marketable after the “use by” date but does not clearly state that food is no longer considered safe to consume once this date has passed. The Labelling Regulation further permits manufacturers to express this date as “best consumed before” or “recommended last consumption date”—both of which have quality-based connotations. As a result, food donors and food recovery organizations confirm that the Labelling Regulation is unclear and does not provide sufficient guidance on whether food can be donated past the date.¹²⁹

The *Codex Alimentarius* further advises that the “use by” or “expiration date” only be applied to foods that pose an increased risk to health over time.¹³⁰ For all other foods, it recommends an alternative, quality-based label, expressed as “best before,” *instead of* the safety-based label.¹³¹ In other words, the *Codex Alimentarius* does not provide for multiple labels affixed to a single product, as this likely creates confusion among those selecting and reading the dates. As noted above, the Labelling Regulation does not prohibit manufacturers from affixing multiple dates to a single product but instead defers to the manufacturer to select the appropriate date(s) depending on the product. The Labelling Regulation offers some guidance on when to use the “date of minimum durability,”¹³² listing several types of food that are exempt from featuring this quality-based “best before” label.¹³³ This includes fresh, untreated fruits and vegetables, processed meat products, and certain confectionary products. However, the Labelling Regulation is silent on the appropriate use of the other labels. As a result, food donors and food recovery organizations may find themselves with a product that features a “best before,” “use by,” *and* “sell by” date, none of which necessarily indicate the last date on which the product is safe to consume.

Liability Protection for Food Donations

A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming donated food. This fear is particularly heightened when the applicable law provides for “strict liability” (i.e., a donor or food recovery organization that did not act maliciously or intend to inflict harm may still be held legally and financially responsible for any resulting damage). Other countries, including Argentina and the United States, have established protections for both food donors and food recovery organizations to limit the likelihood that these actors will be held responsible for harm. South Africa does not offer comprehensive liability protections for food donors or food recovery organizations. However, the law does not impose a clear avenue through which to hold these actors liable in the event that a beneficiary alleges harm from donated food.

Most claims of harm arising from food or other goods in South Africa are brought under the Consumer Protection Act (CPA).¹³⁴ The CPA promotes the rights and safety of consumers in South Africa and governs liability in respect to defective or unsafe goods.¹³⁵ When applied, the CPA establishes a strict liability scheme, holding all supply chain actors legally responsible for damage, regardless of whether they were negligent.¹³⁶ To succeed in such a strict liability claim, the harmed consumer must prove that the injury or illness was caused by the supply of an unsafe product; a failure, defect, or hazard in the product; or inadequate instructions or warnings.¹³⁷ If the harmed consumer can meet that burden of proof, then any entity in the supply chain may be held jointly and severally liable for the harm that resulted from the unsafe good.

Food donors and food recovery organizations may nevertheless avoid liability under this scheme, as food donation does not clearly fall within the scope of the CPA. The CPA applies to every “transaction” that occurs in South Africa.¹³⁸ However, it defines a transaction as an “agreement for the supply of goods for consideration in the ordinary course of business,” and “consideration” requires exchanging goods for value.¹³⁹ Most donated

food in South Africa is offered free of charge to beneficiaries and thus does not qualify as a “transaction” under the CPA.¹⁴⁰ There is case law to suggest this interpretation may be used successfully to mitigate liability,¹⁴¹ but this precedent has not been specifically applied to the context of food donation.

Even if food donors and food recovery organizations do face the threat of liability under the CPA, the law enumerates relevant defenses that may help shield food donors from liability.¹⁴² The CPA specifically states that liability for damage caused by goods does not arise in four instances: (1) if it was unreasonable to expect the distributor to discover the unsafe product defect, (2) if the alleged hazard did not exist at the time it was supplied, (3) if it was attributable to compliance with another public regulation, or (4) if the claim is brought more than three years after the harm occurred.¹⁴³ Most relevant to food donation, no liability arises if it was unreasonable to expect the distributor or retailer to discover the unsafe product characteristic, failure, defect, or hazard.¹⁴⁴ While this defense has not been raised in the food donation context, this language suggests that so long as the food donors and intermediaries believed the food product to be safe and did not have reason to know of the defect or hazard, they will likely be protected.

Additionally, the CPA explicitly states that the consumer waives the right to receive goods “reasonably suited for the purposes for which they are generally intended” and which “are of good quality, working order, and free of any defects” when the consumer has been informed that the goods have been offered in a specific condition and has knowingly accepted them anyway.¹⁴⁵ Therefore, by expressly informing beneficiary recipients of the nature of the donated food, food donors and distributors may mitigate their exposure to liability. Thus, while no explicit liability protection for food donation is offered under South African law and claims of harm are unlikely, food donors and food recovery organizations should ensure that donated food complies with applicable laws, including those discussed in this Legal Guide.

Taxes

Reducing food loss and waste results in sizable economic benefits to society, as it minimizes the costs associated with producing and discarding food that is never consumed. Food donation also helps mitigate the costs of hunger and stimulates the economy: food banks and intermediaries provide jobs or sponsor community development, while recipients of donated food are able to spend limited financial resources on other basic goods and services. But food donation can also be expensive, as food donors must allocate time and money to glean, package, store, and transport surplus food that otherwise would be discarded at no cost. As a result, it is often easier and less expensive for farmers, businesses, and private individuals to throw away food rather than donate it. Some countries are addressing this issue by offering tax incentives and removing financial barriers to food donation.

Incentives

Tax incentives can provide significant support for food donation efforts and for the reduction of food loss and waste. For example, corporate donors may be more likely to donate surplus food to food recovery organizations if they receive a charitable deduction or credit to offset the cost of transportation and logistics. These tax incentives could help reduce the burden of the national income tax or other taxes levied on businesses. Income generated by most corporate taxpayers in South Africa, for example, is taxed at a rate of 28%, with slightly lower rates levied on businesses that generate less income.¹⁴⁶ South Africa enables these corporate taxpayers and personal taxpayers to reduce their tax burden by claiming deductions for qualifying donations, including food donations.¹⁴⁷

Under South Africa’s Income Tax Act 58 of 1962, corporate and individual donors are eligible to claim an annual deduction for the total value of charitable donations made to qualifying organizations (monetary and in-kind),¹⁴⁸ up to 10% of their annual taxable income.¹⁴⁹ Livestock and produce is usually valued at fair market value.¹⁵⁰ All other food items are valued at the lower fair market value on the date of donation, or at the cost of the asset.¹⁵¹ Any donation made in excess of the 10% limit may be claimed in the subsequent tax period. To claim a deduction,

a donation must be *bona fide* and made for a purely gratuitous reason to a public benefit organization (PBO), specialized agency, or government department.¹⁵² The donor must obtain a S18A receipt or certificate from the recipient and present the tax receipt or certificate to claim the deduction.¹⁵³

Not all receiving organizations can provide this certification, as donors may only claim the deduction for donations made to registered PBOs, specialized agencies, and government departments that are approved under Section 18A of the Income Tax Act.¹⁵⁴ PBOs include not-for-profit organizations that have received tax-exempt status from the South African Revenue Service (SARS).¹⁵⁵ Section 18A-approved PBOs conduct a public benefit activity, which includes promoting welfare and humanitarianism, health care, conservation, and environment.¹⁵⁶ FFSA, for example, is an approved Section 18A PBO. Other PBOs that help facilitate food donation qualify for this tax-exempt status.¹⁵⁷ Donations made to and by these PBOs are also exempt from a separate donations tax set forth in Section 56 of the Income Tax Act.¹⁵⁸

Barriers

While certain tax schemes may encourage food donations, they may also be potential deterrents. In many countries the value-added tax (VAT), in particular, presents a financial barrier to donating food. As a general rule, VAT is levied on the final consumer of goods. The VAT is levied on goods at each stage of the supply chain, through a system of debits (an output VAT) and credits (an input VAT). The output VAT is the amount that a VAT-registered business, or vendor, will charge on its own sale of the good, whereas the input VAT is the amount invoiced to the vendor upon the good's purchase.

In South Africa, for most commercial transactions, including the sale of food, vendors must incorporate the VAT, which is levied at a standard 15% rate.¹⁵⁹ Yet the country's VAT scheme is far from uniform, featuring several exemptions and variations in tax rates—many of which impact food donation.¹⁶⁰ In some situations, adjusting the standard VAT scheme may help remove the VAT as a barrier to donation. Nevertheless, the country's complex taxation scheme may still deter some taxpayers from donating food that is still suitable for consumption.

Many countries have carved-out exemptions to the standard VAT scheme that confer benefits on nonprofit organizations that are promoting a public good, such as receiving and distributing food donations. In South Africa the VAT Act confirms that "associations not for gain" do not owe an output tax on any donations received, or on the sale of donated goods if the donation constitutes at least 80% of the value of the supply.¹⁶¹ The VAT scheme is even more favorable for "welfare organizations" (i.e., not-for-profit organizations that qualify for PBO exemption status under the Income Tax Act and are also involved in activities related to welfare and humanitarianism; health care; land and housing; education and development; or conservation, environment, and animal welfare; among others).¹⁶² As noted above, food recovery organizations and other donation-receiving entities qualify as Section 18A-approved PBOs and are further likely to qualify as welfare organizations for purposes of the VAT.

In addition to the benefits enjoyed by "associations not for gain," a welfare organization may deduct any VAT that it incurs while carrying out welfare-related activities. For example, food recovery organizations with welfare organization status do not have to pay the VAT on any expenses associated with the acquisition and distribution of safe, surplus food. SARS elaborated on the application of this exemption in the context of donation, explaining that such voluntary provision of an in-kind or monetary donation does not involve a direct valuable benefit to a donor.¹⁶³ Accordingly, welfare organizations, like "associations not for gain," generally are not responsible for paying the output VAT on the donated good, which the VAT Act characterizes as "supplies for no consideration."¹⁶⁴

While this VAT exemption benefits donation-receiving entities that voluntarily register under the scheme, it shifts the financial burden to food donors, as they cannot deduct the input VAT on the donated food.¹⁶⁵ For example, if a food retailer purchases food from a wholesaler and pays the VAT on that food, the retailer will claim the amount of output tax paid as input VAT since it is not the final consumer.¹⁶⁶ However, if the retailer donates the food to a food bank (or another welfare organization or "association not for gain"), the retailer is deemed to be the final consumer.¹⁶⁷ Accordingly, the retailer, perceived as the final consumer, will have to pay

a VAT levy equal to the tax fraction (15/115) times the open market value of the donated goods.¹⁶⁸ Meanwhile, if the business throws away the food, it is entitled to retain the input VAT without the corresponding VAT levy.¹⁶⁹ Accordingly, many taxpayers may simply prefer to discard rather than donate surplus food.

The aforementioned exemption to the VAT may actually be of little relevance to many donations, as South Africa applies a zero VAT rate to several types of food. Goods that are “zero rated” under the South African VAT are essentially exempt from the taxation scheme. Therefore, the vendor does not charge an output VAT on the sale of the good. Since the VAT was first adopted, the South African government has introduced 19 categories of “zero rated” foods, including¹⁷⁰ “brown bread, maize meal, samp, mealie rice, dried mealies, dried beans, lentils, pilchards/sardinella in tins, eggs, rice, vegetables, fruit, vegetable oil, milk, cultured milk, milk powder, dairy powder blend, edible legumes and pulses of leguminous plants, and brown wheaten meal.”¹⁷¹ As there is no VAT attached to these basic foods items, taxpayers may offer this food for donation without concern about transferring and reclaiming the VAT since they will not have paid and input VAT upon procuring such products.¹⁷² While the list of food items that qualify as “zero rated” is quite expansive, it is not absolute. The complex VAT exemption scheme may stand as a barrier to greater donation.

Donation Requirements or Food Waste Penalties

Some countries have created food donation requirements or impose monetary penalties for food that is sent to landfills (often known as organic waste bans or waste taxes) to influence business behavior and promote sustainable food systems. At the time of this writing, South Africa had not adopted a donation requirement or an organic waste ban relating exclusively to food waste. Food waste is controlled by the National Environmental Management: Waste Act of 2008 and the National Environmental Management: Waste Amendment Act of 2014, which generally promote environmental health through the reduction, reuse, and recycling of waste.¹⁷³ The National Waste Management Strategy facilitates the implementation of the Act and its Amendment, with the ultimate goal of promoting the diversion of organic waste from landfills through composting. At the time of this writing, the Department of Environmental Affairs was developing National Norms And Standards For Organic Waste Composting aimed at limiting the amount of food waste that ends up in landfills and may offer more stringent requirements for food waste in the future.¹⁷⁴

National Grants and Incentives

Grants and incentive programs funded at the national or local level offer another important resource for food donation initiatives. This is particularly true in countries where donors consider tax incentives insufficient to offset the costs of donation or where a lack of infrastructure limits food recovery efforts. For example, government grants can help food donors and food recovery organizations acquire equipment and resources necessary for recovering, storing, processing, and transporting food for donation. Government funding can also support new innovations and emerging technologies that will make food donation more efficient and sustainable. At the time of this writing, South Africa did not offer national grants for food donation; however, the investments are likely to fall within the scope of the authority of the Department of Trade, Industry, and Competition (DTIC) and may be created in the future.¹⁷⁵

CONCLUSION

This Legal Guide is intended to identify South Africa’s current laws, policies, and programs that relate to food waste or food donation. While the national government is primarily responsible for guaranteeing food security and sustainable food systems, food recovery organizations acting in a private capacity and food manufacturers and retailers can provide an additional social safety net that reaches the most remote and food-

insecure communities. In 2020, the Department of Trade, Industry, and Competition (DTIC), the Department of Environment, Forestry and Fisheries (DEFF), and the Consumer Goods Council of South Africa (CGCSA) developed a Food Loss and Waste Voluntary Agreement,¹⁷⁶ an initial collaborative step to address food loss and waste in South Africa. These organizations can only succeed in doing so, however, if the government establishes supportive legal frameworks. As this Legal Guide indicates, gaps in the legal framework—particularly those with respect to food safety, liability protection, and clear tax incentives—have the potential to create unintended obstacles to food donation.

This Legal Guide provides a starting point from which policymakers, private-sector actors, and civil society may better understand the current laws and policies relevant to food donation. It also offers a foundation for a dialogue about food loss and waste prevention and the value of food recovery to South Africa’s food security, economic stability, and environmental sustainability. A separate document produced under The Global Food Donation Policy Atlas project sets forth policy recommendations specific to South Africa to contribute to this discussion. In the meantime, food donors and food recovery organizations should take into account the laws, policies, and legal issues discussed in this Legal Guide when donating food or facilitating the distribution of donated food to those in need. To better understand the regulation of food donation in South Africa, donors, intermediaries, and policymakers should investigate the laws identified in this Legal Guide and seek additional legal counsel, if necessary.

ENDNOTES

- 1 FOOD & AGRIC. ORG. OF THE U.N., GLOBAL FOOD LOSSES AND FOOD WASTE—EXTENT, CAUSES, AND PREVENTION 4 (2011).
- 2 *Id.*
- 3 HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC, KEEPING FOOD OUT OF THE LANDFILL: POLICY IDEAS FOR STATES AND LOCALITIES 1 (2016).
- 4 FOOD & AGRIC. ORG. OF THE U.N., FOOD WASTAGE FOOTPRINT: IMPACTS ON NATURAL RESOURCES 6 (2011).
- 5 *Id.*
- 6 FOOD & AGRIC. ORG. OF THE U.N., FOOD WASTAGE FOOTPRINT & CLIMATE CHANGE 1 (2015), <http://www.fao.org/3/a-bb144e.pdf>.
- 7 *Id.*
- 8 FOOD & AGRIC. ORG. OF THE U.N., ET AL., THE STATE OF FOOD SECURITY AND NUTRITION IN THE WORLD: SAFEGUARDING AGAINST ECONOMIC SLOWDOWNS AND DOWNTURNS 6 (2019), <http://www.fao.org/3/ca5162en/ca5162en.pdf>.
- 9 G.A. Res. 70/1 at 22. “By 2030, to halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses.”
- 10 The Global Food Donation Policy Atlas project would not be possible without the support of the Walmart Foundation. The Walmart Foundation is not responsible for the content of this document or the views contained herein. The content of this document should not be interpreted as legal advice; those seeking legal advice should speak to an attorney licensed to practice in the applicable jurisdiction and area of law.
- 11 WORLD WILDLIFE FUND, FOOD LOSS AND WASTE: FACTS AND FUTURES, 8 (2017).
- 12 DEP’T OF STAT. S. AFR., MEN, WOMEN AND CHILDREN: FINDINGS OF THE LIVING CONDITIONS SURVEY 2014/15 13, <http://www.statssa.gov.za/publications/Report-03-10-02%20Report-03-10-02%202015.pdf>.
- 13 FLPC would like to express its gratitude to FoodForward South Africa and to many other NGOs, businesses, and government agencies that shared input with the FLPC team.
- 14 Aryn Baker, *What South Africa Can Teach Us as Worldwide Inequality Grows*, Time (May, 2 2019), <https://time.com/longform/south-africa-unequal-country>.
- 15 DEP’T OF STAT. S. AFR., MEN, WOMEN AND CHILDREN: FINDINGS OF THE LIVING CONDITIONS SURVEY 2014/15 13, <http://www.statssa.gov.za/publications/Report-03-10-02%20Report-03-10-02%202015.pdf>.
- 16 *Id.* at 17.
- 17 DEP’T OF STAT. S. AFR., *The Extent of Food Security in South Africa* (May 2019), <http://www.statssa.gov.za/?p=12135>; NASTASCHA HARDUTH, DISCUSSION PAPER PROPOSING A LEGAL FRAMEWORK: FOOD DONATIONS AS A MECHANISM TO LIMIT THE WASTAGE OF SURPLUS FOOD, FOOD INSECURITY AND MALNUTRITION, 1 (Nov. 2017).
- 18 DEP’T OF STAT. S. AFR., MEN, WOMEN AND CHILDREN: FINDINGS OF THE LIVING CONDITIONS SURVEY 2014/15 13, <http://www.statssa.gov.za/publications/Report-03-10-02%20Report-03-10-02%202015.pdf>.
- 19 *Id.*
- 20 DEP’T OF STAT. S. AFR., NATIONAL POVERTY LINES 2020 3, <http://www.statssa.gov.za/publications/P03101/P031012020.pdf>.
- 21 DEP’T OF STAT. S. AFR., GENERAL HOUSEHOLD SURVEY 66 (2018), <http://www.statssa.gov.za/publications/P0318/P03182018.pdf>.
- 22 See DEP’T OF STAT. S. AFR., *Five Facts about Poverty in South Africa* (April 2019), <http://www.statssa.gov.za/?p=12075>; AMNESTY INTERNATIONAL, *Southern Africa: Government intervention required as millions face hunger under COVID-19 lockdown regimes* (April 17, 2020), <https://www.amnesty.org/en/latest/news/2020/04/southern-africa-government-intervention-required-as-millions-face-hunger-under-covid19-lockdown-regimes>.
- 23 Mogomotsi Magome, *South Africa Eases One of World’s Strictest Lockdowns*, U.S. NEWS (May 1, 2020, 8:42 am), <https://www.usnews.com/news/world/articles/2020-05-01/south-africans-walk-outside-as-country-eases-virus-lockdown>.
- 24 AMNESTY INTERNATIONAL, *Southern Africa: Government intervention required as millions face hunger under COVID-19 lockdown regimes* (April 17, 2020), <https://www.amnesty.org/en/latest/news/2020/04/southern-africa-government-intervention-required-as-millions-face-hunger-under-covid19-lockdown-regimes>.
- 25 CHANNING ARNDT, SHERWIN GABRIEL, AND SHERMAN ROBINSON, ASSESSING THE TOLL OF COVID-19 LOCKDOWN MEASURES ON THE SOUTH AFRICAN ECONOMY 31, <https://www.ifpri.org/publication/covid-19-and-global-food-security>; AMNESTY INTERNATIONAL, *Southern Africa: Government intervention required as millions face hunger under COVID-19 lockdown regimes* (April 17, 2020), <https://www.amnesty.org/en/latest/news/2020/04/southern-africa-government-intervention-required-as-millions-face-hunger-under-covid19-lockdown-regimes>.
- 26 GABRIELLE WILLS, LEILA PATEL, SERVAAS VAN DER BERG, AND BOKANG MPETA, HOUSEHOLD RESOURCE FLOWS AND FOOD POVERTY DURING SOUTH AFRICA’S LOCKDOWN: SHORT-TERM POLICY IMPLICATIONS FOR THREE CHANNELS OF SOCIAL PROTECTION 20, National Income Dynamics Study (NIDS) – Coronavirus Rapid Mobile Survey (CRAM) (2020), <https://cramsurvey.org/wp-content/uploads/2020/07/Wills-household-resource-flows-and-food-poverty-during-South-Africa%E2%80%99s-lockdown-2.pdf>.
- 27 REUTERS, *Aerial footage shows miles-long queue for food aid in South Africa* (April 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-safrica/aerial-footage-shows-miles-long-queue-for-food-aid-in-south-africa-idUSKBN22C1TU>.
- 28 Sources: GFN 2020
- 29 In 2002 South Africa adopted the Integrated Food Security Strategy for South Africa to align and coordinate all the country’s food security government programs. DEP’T OF AGRICULTURE, THE INTEGRATED FOOD SECURITY STRATEGY FOR SOUTH AFRICA (2002), https://www.gov.za/sites/default/files/gcis_document/201409/foodpol0.pdf.
- 30 DEP’T OF SOCIAL DEV. AND DEP’T OF AGRIC., FORESTRY AND FISHERIES, NATIONAL POLICY ON FOOD AND NUTRITION SECURITY, 1 (2013), <https://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>.
- 31 *Id.*
- 32 *Id.* at 18.
- 33 *Id.* at 6.
- 34 *Id.*
- 35 *Id.* at 13.
- 36 WORLD WILDLIFE FUND, *supra* note 11.
- 37 *Id.* at 4.
- 38 *Id.* at 5.
- 39 DEP’T OF SOCIAL DEV. AND DEP’T OF AGRIC., FORESTRY AND FISHERIES, NATIONAL POLICY ON FOOD AND NUTRITION SECURITY, 13 (2013), <https://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>.
- 40 S. AFR., SOUTH AFRICA’S IMPLEMENTATION OF THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, VOLUNTARY NATIONAL REVIEW (VNR) REPORT (2019), https://sustainabledevelopment.un.org/content/documents/23402SOUTH_AFRICA_RSA_Voluntary_National_Review_Report_Final__14_June_2019.pdf.
- 41 WORLD WILDLIFE FUND, *supra* note 11, at 9.
- 42 *Id.* at 5.
- 43 *Id.*
- 44 DEP’T OF AGRIC., FORESTRY AND FISHERIES, *Consumer Goods Council of South Africa (CGCSA) launches the South African food loss and waste voluntary agreement*

(Sept. 29, 2020), https://www.environment.gov.za/mediarelease/consumergoodscouncil_launchesfoodloss_wastevoluntaryagreement.

45 CONSUMER GOODS COUNCIL OF S. AFR., DEP'T OF TRADE, INDUS. & COMPETITION, DEP'T OF ENV'T, FORESTRY & FISHERIES, *South Africa's Food Loss and Waste Voluntary Agreement: Implementation Plan*, Environment, Forestry, & Fisheries, 5 (Oct. 2020), <https://www.cgcsa.co.za/wp-content/uploads/2020/11/South-African-Food-Loss-Waste-Agreement-2.pdf>.

46 *Id* at 4.

47 FOODFORWARDSA, *Measurable Impact*, <https://foodforwardsa.org>.

48 FOODFORWARDSA, *Our Work*, <https://foodforwardsa.org/our-work>.

49 FOODFORWARDSA, *Focus on FoodForward SA Beneficiary Organisations* (Dec.8, 2020), <https://foodforwardsa.org/news/focus-on-foodforward-sa-beneficiary-organisations>.

50 FOODFORWARDSA, *Our Work*, <https://foodforwardsa.org/our-work>.

51 *Id*.

52 FOODFORWARDSA, *Measurable Impact*, <https://foodforwardsa.org>.

53 Fayrene Langson, *How Surplus Food Can Reduce the Food Insecurity Burden in South Africa* (Food Forward SA 2018).

54 S. Afr. Const., 1996. Preamble.

55 *Id* § 40 (1).

56 *Id* § 85.

57 *Id* § 42.

58 *Id* § 85(2).

59 *Id* § 44(a).

60 *Id* § 44(b).

61 *Id*; S. Afr. Const., 1996. Schedule 4: Functional Areas of Concurrent National and Provincial Legislative Competence.

62 *See* S. Afr. Const., 1996. Schedule 4.

63 *Id* § 103.

64 *Id*.

65 *Id* § 104.

66 *Id* § 151; *Id* § 156.

67 DEP'T OF AGRIC., FORESTRY AND FISHERIES, *Consumer Goods Council of South Africa (CGCSA) launches the South African food loss and waste voluntary agreement* (Sept. 29, 2020), https://www.environment.gov.za/mediarelease/consumergoodscouncil_launchesfoodloss_wastevoluntaryagreement.

68 CONSUMER GOODS COUNCIL OF S. AFR., *supra* note 45, at 6.

69 *Id* at 9.

70 G.A. Res. 70/1 at 22. "By 2030, to halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses."

S. AFR. VOLUNTARY NATIONAL REVIEW (VNR) REPORT 2019 102, https://sustainabledevelopment.un.org/content/documents/23402SOUTH_AFRICA_RSA_Voluntary_National_Review_Report_Final__14_June_2019.pdf.

71 CONSUMER GOODS COUNCIL OF S. AFR., *supra* note 45, at 9.

72 *Id*.

73 *Id* at 10.

74 *Id* at 14.

75 *Id* at 10.

76 *Id*.

77 Foodstuffs, Cosmetics, and Disinfectants Act No. 54 of 1972 (S. Afr.).

78 *Id* § 1 (xxiii) (S. Afr.).

79 *Id* § 15 (S. Afr.).

80 *Id* § 23 (S. Afr.).

81 DEP'T OF HEALTH, *Food Control* (last visited Mar. 26, 2021), <http://www.health.gov.za/food-control/#:~:text=The%20food%20control%20section%20within,food%20choices%20without%20being%20misled>.

82 N.R.638 2018.

83 *Id*.

84 No. R.146-2012.

85 Meat Safety Act No. 40 of 2000 (S. Afr.).

86 Agricultural Products Standard Act No. 119 of 1990 (S. Afr.).

87 National Consumer Protection Act 68 of 2008 § 61 (S. Afr.).

88 Value Tax Act No. 89 of 1991 (S. Afr.), Value Tax Act 58 of 1962.

89 S. Afr. Const., 1996. §103.

90 *Id*.

91 *Id* § 104.

92 Public Health Bylaws 2011, Gauteng Provincial Gazette No. 179 § 3 (21 May 2004).

93 *Id* § (1) (a).

94 *Id* at § 5.

95 Foodstuffs, Cosmetics, and Disinfectants Act, *supra* note 77 § 23.

96 DEP'T OF HEALTH DIRECTORATE: FOOD CONTROL, GUIDELINES FOR ENVIRONMENTAL HEALTH PRACTITIONERS ON FOOD SAFETY CONTROL AT SPECIAL EVENTS 8 (2004), http://www.fao.org/fileadmin/user_upload/gmpf/docs/Guidelines%20on%20food%20safety%20control%20at%20special%20events.pdf.

97 *Id* at 9.

98 National Environmental Waste Act 59 of 2008 (S. Afr.); National Environmental Management: Waste Amendment Act of 2014.

99 *See* National Environmental Waste Act, § 11.

100 *Id* at § 12.

101 WESTERN CAPE GOV'T, DIVERSION TARGETS FOR ORGANIC WASTE IN THE WESTERN CAPE 2, <https://orasa.org.za/wp-content/uploads/2016/11/DEADP-organic-waste-landfill-ban-letter-July-2018.pdf>

102 WESTERN CAPE GOV'T, A GUIDE TO SEPARATION OF WASTE AT THE SOURCE 26 (Sept. 2019), https://www.westerncape.gov.za/eadp/files/atoms/files/WCape%20Govt%20Municipal%20S%40S%20E-Guide_%2010%20-9%20-19Final.pdf.

103 *See* Foodstuffs, Cosmetics, and Disinfectants Act, *supra* note 77 § 23.; N.R.638 2018 (regulations governing general hygiene requirements for food premises and the transport of food and related matters).

104 *See* Foodstuffs, Cosmetics, and Disinfectants Act, § 2(1)(b)(i).

105 *Id* § 1 (xxiii).
106 *Id* § 15.
107 N.R.638, *supra* 82, §3 (2).
108 See generally *Id*.
109 *Id* § 3.
110 *Id* § 4.
111 *Id* § 5; *Id* § 6.
112 *Id* § 7.
113 *Id* § 8.
114 *Id* §1 defining “handle”; N.R.638 2018 §1 defining “serve”; N.R.638 2018 §1 defining “serve” broadly to include the provision of food, whether for consideration or otherwise.
115 *Id* §1 defining “food handler.”
116 Meat Safety Act No. 40 of 2000 §1(xx) (S. Afr.).
117 *Id*.
118 *Id*.
119 HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC AND NATURAL RESOURCES DEFENSE COUNCIL, DON’T WASTE, DONATE: ENHANCING FOOD DONATIONS THROUGH FEDERAL POLICY 19 (2017).
120 US GAO, DATE LABELS ON PACKAGED FOODS: USDA AND FDA COULD TAKE ADDITIONAL STEPS TO REDUCE CONSUMER CONFUSION, GAO-19-407 (SEPT. 2019), <https://www.gao.gov/assets/710/701238.pdf>.
121 See HARVARD LAW SCHOOL, *supra* note 119.
122 No. R.146 (Regulations relating to the labeling and advertising of foodstuffs).
123 *Id* § 12 (1).
124 *Id* § 12 (1) - (2).
125 *Id* generally.
126 *Id*.
127 CODEX ALIMENTARIUS: INTERNATIONAL FOOD STANDARDS, FAO-WHO, <http://www.fao.org/fao-who-codexalimentarius/en> (last visited Feb. 12, 2021).
128 Food & Agric. Org. of the U.N., World Health Org., CODEX GENERAL STANDARD FOR THE LABELLING OF PREPACKAGED FOODS, CODEX STAN 1-1985 (Rev. 1-1991) at 2.
129 GLOBAL FOOD DONATION POLICY ATLAS, Stakeholder Interviews (November 2020).
130 Food & Agric. Org. of the U.N., *supra* note 128.
131 *Id*.
132 No. R.146(1) (Regulations relating to the labelling and advertising of foodstuffs).
133 *Id*.
134 Consumer Protection Act 68 of 2008 § 4 (S. Afr.).
135 *Id*. § 3.
136 *Id*. § 61.
137 *Id*. § 61(1).
138 *Id*. § 1.
139 *Id*.
140 *Id* § 61(1).
141 See *Eskom Holding Ltd. v. Halstead-Cleak* 2017 (1) SA 333 (SCA), evaluating whether the supplier of electricity could be held strictly liable under section 61 of the CPA for harm caused to the respondent that was injured by the defendant’s electrical lines while bicycling. The court held the defendant was not liable to the plaintiff for injuries caused because the plaintiff was not a consumer of the electricity. The respondent did not enter into any transaction with the defendant as a supplier or producer of electricity in the ordinary course of business and the respondent was not utilizing the electricity, nor was he a recipient or beneficiary.
142 Consumer Protection Act, *supra* note 134, §61(4)(b).
143 *Id* § 61(4)(b).
144 *Id* § 61(4)(c).
145 *Id* § 55(6).
146 SARS, *Companies, Trusts and Small Business Corporations (SBC)* (Feb. 23, 2021), <https://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Companies-Trusts-and-Small-Business-Corporations.aspx>.
147 The Income Tax Act 58 of 1962, Act 58 § 18(A); SARS Basic Guide to Section 18A Approvals 12 (March 2020), <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G17%20-%20Basic%20Guide%20to%20Section%2018A%20Approval.pdf>.
148 See Income Tax Act No. 58 of 1962 § 18A(2)(a)(v); Johann Hattingh, *South Africa-Corporate Tax*, IBFD, 1.4.1.1 (Mar. 2020), https://research-ibfd-org.ezp-prod1.hul.harvard.edu/#/doc?url=/collections/cta/html/cta_zs_001.html#cta_zs_1.4.1.1.
149 DELOITTE, *International Tax: South Africa Highlights 2020* (Jan. 2020), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-southafricaliahighlights-2020.pdf?nc=1>; Johann Hattingh, *South Africa-Corporate Tax*, IBFD, 1.4.9.1 (Mar. 2020), https://research-ibfd-org.ezp-prod1.hul.harvard.edu/#/doc?url=/collections/cta/html/cta_zs_001.html#cta_zs_1.4.9.1.
150 Livestock and produce have an additional schedule in the Income Tax Act that clarifies the valuation on an individual item level. The valuation is typically fair market value, but there can be variations. Income Tax Act 58 of 1962, First Schedule; Johann Hattingh, *South Africa-Corporate Tax*, IBFD, 1.2.1.2.6, (Mar. 2020), https://research-ibfd-org.ezp-prod1.hul.harvard.edu/#/doc?url=/collections/cta/html/cta_zs_001.html#cta_zs_1.2.1.2.6.
151 See Income Tax Act No. 58 of 1962 § 18A (3); Johann Hattingh, *South Africa-Corporate Tax*, IBFD, 1.4.1.1 (Mar. 2020), https://research-ibfd-org.ezp-prod1.hul.harvard.edu/#/doc?url=/collections/cta/html/cta_zs_001.html#cta_zs_1.4.1.1.
152 SARS, INTERPRETATION NOTE 112 3, <https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2019-05%20-%20IN%20112%20Section%2018A%20-%20Audit%20certificate.pdf>.
153 SARS, BASIC GUIDE TO SECTION 18A APPROVAL 13, <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G17%20-%20Basic%20Guide%20to%20Section%2018A%20Approval.pdf>.
154 The Income Tax Act 58 of 1962 § 18(A).
155 *Id* § 30(1).
156 *Id* Ninth Schedule.
157 *Donations*, Food Forward South Africa (Oct. 26, 2020, 9:07 AM), <https://foodforwardsa.org/donate-2>.
158 The Income Tax Act, *supra* note 154, § 56(1)(h).
159 SARS Value-Added Tax Notices, <https://www.sars.gov.za/Legal/Secondary-Legislation/Pages/VAT-Notices.aspx> (South Africa has implemented a VAT tax since 1991, which has been regularly updated since its enactment); SARS, *VAT Refunds for Vendors* (Feb. 23, 2021), <https://www.sars.gov.za/TaxTypes/VAT/Pages/VAT-Refund-for-vendors.aspx>.

- 160 B.D.O. S.A., *Review of VAT Zero Rate of Food Items* (June 8, 2018), <https://www.bdo.co.za/en-za/insights/2018/tax/review-of-vat-zero-rate-of-food-items>.
- 161 See SARS, Legal & Policy, Value-Added Tax, VAT 414, Guide for Associations Not for Gain and Welfare Organisations 16, <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G07%20-%20VAT%20414%20Guide%20for%20Associations%20not%20for%20Gain%20and%20Welfare%20Organisations.pdf>; Value-added Tax 1822. Supplies for no consideration, February 2010 – Issue 126, https://www.saica.co.za/integritax/2010/1822_Supplies_for_no_consideration.htm.
- 162 SARS, Interpretation Note: No. 70, 34 (2013), <https://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2013-03%20-%20IN70%20Supplies%20made%20for%20no%20consideration.pdf>.
- 163 *Id* at 17.
- 164 *Id* at 28.
- 165 *Id*.
- 166 SARS, Legal counsel Value-added Tax, VAT 404 55, <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf>.
- 167 *Id* at 16.
- 168 *Id* at 77.
- 169 SARS Legal Couns. Mem. 404 79 (Dec. 12, 2019), <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-VAT-G02%20-%20VAT%20404%20Guide%20for%20Vendors.pdf>; Marlene Botes, *South Africa – Value Added Tax*, INT’L BUREAU OF FISCAL DOCUMENTATION, Sep. 1, 2020, at 9.4.2, https://research-ibfd-org.ezp-prod1.hul.harvard.edu/#/doc?url=/linkresolver/static/evat_za_s_9.1.&refresh=1602213077084#evat_za_s_9.4.2.
- 170 B.D.O. S.A., *Review of VAT Zero Rate of Food Items* (June 8, 2018), <https://www.bdo.co.za/en-za/insights/2018/tax/review-of-vat-zero-rate-of-food-items>.
- 171 *Id*.
- 172 *Id*.
- 173 National Environmental Waste Act 59 of 2008 (S. Afr.); National Environmental Management Waste Amendment Act No. 26 of 2014.
- 174 Draft National Norms and Standards for Organic Waste Composting, GN 1135 of GG 42681 (4 September 2020).
- 175 DTIC is charged with achieving SDG 12.3. It has already initiated a voluntary agreement among food retailers to require donation. However, there is no government funding associated with entering this program. For more details, see Section II A, *Consumer Goods Council of South Africa (CGCSA) Launches the South African Food Loss and Waste Voluntary Agreement*, Department Environment, Forestry, and Fisheries South Africa (Sep. 2020), https://www.environment.gov.za/mediarelease/consumergoodscouncil_launchesfoodloss_wastevoluntaryagreement.
- 176 CONSUMER GOODS COUNCIL OF S. AFR., *supra* note 45.



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