

White Paper

Adventure Motorcycle Guided Tours in the Republic of South Africa, Legislation, Statutory Requirements & Legal Compliance

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1. Purpose

The purpose of this document is to inform and educate prospective customers and tourism service providers within the South African adventure motorcycling market, both foreign and local customers, vendors, service providers and affiliates. The document is intended to inform said market and its end users of the existence of governing legislation, certain responsibilities and legal liabilities associated thereto which affect both the customer and the vendor alike.

2. Scope

Adventure Guiding is the third sector of three main guiding disciplines in South Africa. They are Culture, Nature and Adventure. This document's scope is focussed on legislation surrounding professional ("Registered") as well as unregistered adventure guiding of motorcycle tours, be it leading one customer or a group of customers. The scope is inclusive of any and/or all event organisation surrounding the same activity within the borders of the Republic of South Africa.

Further to the abovementioned, the scope of qualification is that of a Generic Site Adventure Guide (GASG) as recognised by SAQA and managed by CATHSSETA as an established NQF4 Level Qualification which is based on set unit standards.

The scope of this document further relates to the constraints of operation as imposed by the National *Tourism Act No. 3 of 2014*.

3. Best Practice

Best practices are described in this document, within the scope and given context of the document as being the operational practice of vendors and service providers either arranging guided tours, motorcycle rides or sponsoring events which incorporate the same service in a manner which is considered to be legal within the terms and definitions of the Law of The Republic of South Africa.

4. Statutory Bodies

The statutory bodies associated with the legislation in question as well as tasked with both enforcing it as well as administrating it are as follows;

Eastern Cape Province	Eastern Cape Parks & Tourism Agency
Free State Province	Department of Tourism and Economic Affairs
Gauteng Province	Gauteng Department of Economic Development
Kwa-Zulu Natal Province	Department of Economic Development Tourism and Environmental Affairs (EDTEA)
Limpopo Province	Department of Economic Development, Environment and Tourism
Mpumalanga Province	Mpumalanga Tourism and Parks Agency
North West Province	North West Department of Tourism
Northern Cape Province	Department of Economic Development and Tourism

Western Cape Province	Department of Economic Development and Tourism
National	South African Qualifications Authority (SAQA)
National	Culture, Arts, Tourism, Hospitality and Sport Sector Education and Training Authority (CATHSSETA)

In each of the nine provinces appointed departments of the National Department of Tourism (NDT) is managed by a provincial registrar who is appointed with the responsibility of administrating the issuance of tourism guides registration numbers and tourism agency/company numbers within their given province. There is an overarching National Registrar who ultimately reports to the Minister of Tourism.

5. The Act and Applicable Legislation

The Act (*Tourism Act No. 3 of 2014*) serves '*To provide for the development and promotion of sustainable tourism for the benefit of the Republic, its residents and its visitors; to provide for the continued existence of the South African Tourism Board; to provide for the establishment of the Tourism Grading Council; to regulate the tourist guide profession; to repeal certain laws; and to provide for matters connected therewith.*'

Procedure relating to registration of tourist guides

- 50.** (1) (a) Any person who wishes to be registered as a tourist guide must apply to a Provincial Registrar in the prescribed manner. 30
- (b) The application must be accompanied by the prescribed registration fee.
- (2) No person may be registered as a tourist guide in terms of this Act unless he or she shows proof of the competence contemplated in section 51.
- (3) No person may be registered as a tourist guide in terms of this Act if he or she— 35
- (a) has been convicted of an offence in the Republic, other than an offence committed prior to 27 April 1994 associated with political objectives, and sentenced to imprisonment without the option of a fine or, in the case of fraud or any other offence involving dishonesty, to a fine or imprisonment or both;
- (b) subject to subsection (4), has been convicted of an offence in a foreign country and sentenced to imprisonment without the option of a fine or, in the case of fraud or any other offence involving dishonesty, to a fine or imprisonment or both; 40
- (c) loses his or her South African citizenship or right of permanent residence or work permit in the Republic; 45
- (d) has failed to pass the prescribed quality assurance process that a tourist guide must complete not later than two years after the date of his or her last registration as a tourist guide.
- (4) An offence contemplated in subsection (3)(b) must constitute an offence under South African law. 50
- (5) If the Provincial Registrar is satisfied that the applicant complies with the competence for registration as a tourist guide and that the applicant is not subject to any disqualification mentioned in subsection (3), he or she must register the applicant as a tourist guide.
- (6) When the Provincial Registrar registers any person as a tourist guide, he or she must issue to that person a registration certificate and a badge, which must be in the prescribed form. 55

Referring to the above extract from the Act, aside of references to good standing Section 50's subsection (2) "*proof of competence*" and subsection (3), (d) are those deemed to be the most likely to land an unregistered guide or touring company on the wrong side of the Law. It is parts that elude to the Acts purpose in assuring that tourist, customer or end user's best interests are upheld, that quality service is offered and that their safety and wellbeing is observed and protected whilst they are being guided or receiving guiding or tourism related services from a vendor acting as either a guide or tourism company.

It is this section, subsections and clauses that encompass the principals of "Duty of Care" and closely linked thereto "Negligence" when duty of care has not been upheld by a party. It is when an event, incident or accident occurs and parties begin to establish or seek liability that the aforesaid principals of the Law are tested and/or implemented in a punitive manner. The most common manner in which this occurs is prosecution by the responsible statutory body and/or through litigation in civil courts of law.

There are many a tourism operator who believe that an indemnity form or waiver signed by their customer/client safe guards or limits their personal liability, however, said waiver or indemnity is in fact only as good as the ability of the operator/guide to prove their competence which is ultimately tested against compliance with sections 50 and 51 of the *Tourism Act No. 3 of 2014*.

Further to the above the prohibitions and clear instruction with regards to providing tourism or guiding services is detailed in section 57 of the Act as follows in the extract hereunder.

Prohibitions

57. (1) No person who is not a registered tourist guide or whose registration as a 35
tourist guide has been suspended or withdrawn, may for reward, whether monetary or
otherwise, act as a tourist guide.

(2) No person who has become subject to any disqualification referred to in section
50(3) may for reward, whether monetary or otherwise, act as a tourist guide.

(3) No person, company or close corporation may for the promotion of any business 40
undertaking conducted by him, her or it, employ or continue to employ as a tourist guide
any person who is not a registered tourist guide or whose registration as a tourist guide
has been suspended or withdrawn or who has become subject to a disqualification
contemplated in subsection (2).

It is noteworthy to mention that in the eyes of the Law and within the context and scope covered by this document that a company or person(s) employing and/or soliciting the services of an unregistered guide or tourism company are complicit by way of *'Ignorantia juris non excusat or ignorantia legis neminem excusat'*, the aforesaid legal principal in Law which states *'that a person who is unaware of a law may not escape liability for violating that Law merely because one was unaware of its content.'*

6. Requirements for Legal Compliance by a Tourist Guide and/or Tourism Company

1. What is required before a person may make application to their local Registrar:
 - a) The applicant must be at least 17 years of age (18 for assessment).
 - b) Speak and understand the English language at NQF level 3.
 - c) The applicant must already be competent at the technical aspects of your activity. In the instance of this scope, the applicant must hold a valid full motorcycle licence.
 - d) In terms of routing, an applicant has two options with regards to gaining the required qualification which is required in order to make application to either a Provincial or National Registrar. The first route is to enrol in courses which are aligned to the agreed curriculum for GASG and where training is offered by CATHSSETA registered training providers, and more recently also the Quality Council for Trades and Occupations (QCTO). The second route is that of Recognised Prior Learning (RPL), where an applicant is required to not only meet and achieve the unit standards set out for a

GASG qualification but to also prove a requisite level of experience in the given sector, field and scope.

- e) The applicant must have proven their competence academically by way of successfully achieving certain NQF4 level unit standards under the mentorship of a registered Assessor. Assessors noted as being registered with CATHSSETA and thus recognised by the Registrars as bona fide trainers, auditors and persons capable of vetting applicants.

Unit Standard Number	Unit Standard name	NQF Level	Credits
246740	Care for customers	4	3
255914	Minimise and manage safety and emergency incidents	4	6
262246	Set up and operate a camping site	4	5
262305	Plan and implement minimum environmental impact practices	4	5
262317	Lead participants through an outdoor recreation and adventure activity	4	10
262320	Manage and organise groups	4	10
335801	Conduct a tourist guiding activity	4	8
335803	Research and design a guided experience at a prominent tourism site	4	5
335816	Conduct a guided adventure experience	4	8

Unit Standard Number	Unit Standard name	NQF Level	Credits
Module 1	Planning		
335801 – SO1-2	Conduct a tourist guiding activity	4	3
246740 – SO1	Care for customers	4	1
335816 – SO1	Conduct a guided adventure experience	4	3
335803 – SO1-3	Research and design a guided experience at a prominent tourism site (Optional)	4	5
Module 2	CONDUCTING		
335801 – SO3-5	Conduct a tourist guiding activity	4	5
335816 – SO2-3	Conduct a guided adventure experience	4	5
246740 – SO2-4	Care for customers	4	2
262317 – SO1-2	Lead participants through an outdoor recreation and adventure activity	4	10

262320 – SO1-5	Manage and organise groups	4	10
262305 – 1-3	Plan and implement minimum environmental impact practices (Optional)	4	5
Module 3	INCIDENTS		
255914 – SO1-3	Minimise and manage safety and emergency incidents	4	6
262317 – SO3	Apply safety practices to ensure participant's physical well-being	4	3
Module 4	CAMPING (Optional)		
262246	Set up and operate a camping site (Optional)	4	5

- f) The applicant must have proven that they are physically capable of performing the tasks required of them in the field in due course of performing a service to their Clients
 - g) Accrued and recorded experience in a logbook where the same experience can be ratified through written feedback or certificates supplied by CATHSSETA qualified trainers and/or previous Clients with regards to the specific activity or scope.
 - h) The applicant must have enrolled for first aid training by competent and qualified persons and successfully achieved a *Level 3 1st Aid Certificate*. Said certificate is mandatory document to be supplied when making application and for adventure guides already registered, their registration is only deemed to be current or valid where they hold a valid *Level 3 1st Aid Certificate*. Each and every 1st Aid Certificate has a finite period of validity and as such must be renewed periodically by guides.
 - i) The applicant must comply with Section 50 of the Act.
 - j) The applicant must sign and swear to uphold a code of conduct as set out in the Act.
 - k) Given that all of the above points are successfully achieved the applicant's or applicants registered Assessor may then make submission to CATHSSETA (through the Training Provider) upon which CATHSSETA will issue a certificate with a certificate number which is both unique to the applicant's credentials, identity and scope of qualification.
 - l) Once the applicant has received their certificate number from CATHSSETA they may take the same to either a Provincial or National Registrar for processing in order that the Registrar might issue a I guide registration number which is recorded in the provincial and national tourism guides register.
2. The process detailed in *Point 1* above has to be successfully completed in order for an adventure guide or adventure tourism company/agency employing registered guides to gain access to public liability insurance (PLI) and/or 3rd party cover.
 3. The above *Points 1 & 2* pertain to guide registrations, in the instance of appointing a single entity to plan, arrange and coordinate events such as outride events, tours or weekends away for groups of riders where said entity is responsible for maintaining safety, marshalling and arranging accommodation, hospitality etc. then the company being employed strictly speaking

needs to be a 'registered tour operator' which utilises the services of 'registered adventure guides.'

4. All of the above *Points 1 – 3* amount to a business or person(s) exercising "Duty of Care" when arranging such events as mentioned above. To provide a hypothetical scenario or case study regarding the liabilities and risks involved for an individual or company arranging events, rides, tours and away weekends, let us consider a hypothetical worst case scenario where a rider and/or their pillion are seriously hurt, maimed or killed as well as where public property may have been damaged or 3rd parties injured, affected or killed i.e. other motorists or pedestrians involved in an accident.

The first thing that any ambulance chasing attorney will do is to go after the organiser or sponsor of the event, attempt to establish whether all necessary precautions were taken into account in order to limit or mitigate the chance and risk of an incident/accident occurring and whether said mitigating actions involved people deemed to be competent to lead, coordinate or facilitate such an activity.

It is usually at this point that a litigator will look to what is the nearest and most applicable legislation that applies to the incident which in this instance is essentially a tourism based activity or event as you are leading people to pre-arranged destinations by way of a guided activity, as such the *Tourism Act No. 3 of 2014* will come into play or there will at least be reference made thereto.

If a claimant or claimant's lawyer/attorney pursue a case against the Road Accident Fund (RAF) then the RAF's defending counsel (which is likely to be well versed in similar cases) will invariably seek to take action which sees the focus of their defence heading in the direction of "*negligence on the basis of abrogation of duty of care*" In proving that duty of care was not exercised by the parties concerned the Claimant's counsel will more than likely turn to the *Tourism Act*. In turning to the *Tourism Act* the national Registrar for South Africa guides will be contacted in order to verify whether or not the individual or company guiding a person or group was registered, qualified and deemed to be competent etc.

You then possibly have all sorts of arguments being made by a claimant's counsel along the lines of, "the organiser did not brief or explain to the Claimant what sort of road surfaces would be encountered" or "the organiser did not ensure that the riders had an adequate level of competence to participate in the event and as such led an unsuspecting customer into a dangerous situation" or "the organiser(s) did not thoroughly brief the group before embarking on the activity."

5. Further to *Point 4* above, it is also not impossible that underwriters and insurers may seek compensation for losses and damages incurred as a result of negligence proven through a court case and ruling.
6. The requirements for legal compliance of a Tourism Company or Tourism Agency are as follows:
 - a) That the company is registered with a tourism association.
 - b) That the company employs registered, qualified and competent tourist guides for the given scope of their intended activities and services offered to customers and clients.
 - c) That the company holds current and active public liability / 3rd party insurance.

- d) That the company is registered by the Registrar in the province in which the company is registered and based.
 - e) That the company and its registered guides are in good standing with the Act's *Code of Conduct*, ethics and any other applicable statutory bodies of the Republic of South Africa.
7. A number of operators in the given market list membership and/or association with tourism associations and/or bonding agents such as SATSA, some even cite pseudo qualifications by way of training or certificates offered by large brands such as BMW Motorrad, however, membership with such associations, agencies or 'training' received from large corporate brands does not constitute recognised legal registration with the Department of Tourism and its various provincial department offices and their Registrars.

8. Compliance Statistics

The data represented hereunder has been collected through personal research via the internet, Google searches and by of word of mouth, thus, said data has not been audited or vetted by the respective provincial Registrars.

1. The total number of companies and/or single operators identified in the country as offering motorcycle tour guiding, tours or similar services to the market is forty one (41)
2. Of the forty one (41) operators identified, only three are noted as being legally registered with the Department of Tourism
3. Points 2 & 3 above imply that only 7.32% of operators in the market can be considered as being legally compliant