
KNOWLEDGE

MANAGEMENT

KM ALERT

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Leveraging what we know

Immediate access to information and knowledge is critical in today's fast-changing global marketplace. In an environment where efficiency matters, we invest considerable time and resources in Information Management and Knowledge Management.

Being part of DLA Piper and a member of the DLA Piper Africa Group allows us to share in a wealth of expertise, experience, know-how and knowledge from across the globe.

Our Knowledge Management team supports lawyers in finding and retrieving the right answers from a wide range of systems, information sources and firm best practices.

When it comes to clients, we offer more than just professional legal services.

We partner with our clients in offering a range of value-added services. In offering these services, we hope to work with our clients in reducing risk, enhancing collaboration and sharing information and knowledge.

Our value added services include a range of training sessions, presentations, updates, newsletters and alerts for the benefit of clients.

This KM Alert offers a high level overview of selected recent developments with regard to case law and legislation over the last six months and reflects the position as at date of publication.

Look out for the next KM Alert for more information on recent developments in regard to:

- Amendments to the National Credit Act
- Class actions
- Financial sector reforms
- Infrastructure development
- Mining industry regulation

continued

CASE LAW UPDATE

A selection of recent cases:

CREDIT LAW

Absa Bank Ltd v Mkhize (and two similar cases) **2013 JDR 2187 (SCA)**

This brought back into sharp focus the pre-litigation steps required by sections 129(1) and 130 of the National Credit Act, No. 34 of 2005 ("NCA"). After this decision, the findings in *Sebola v Standard Bank of South Africa and Another* 2012 (5) SA 142 (CC) - which found that it was insufficient for a credit provider to merely provide proof of despatch of a section 129(1) notice to the consumer prior to instituting action - will likely remain good law for the time being. As such a court will not ignore positive proof that a notice in terms section 129(1) was returned undelivered, or was delivered to the incorrect post office, and merely rely on proof of despatch to satisfy itself that the necessary pre-litigation steps have been complied with. On a practical level the credit provider must show that the notice in terms of section 129(1) was sent by registered mail, to the intended post office (evidenced by a "track and trace" printout). However, even so, courts are unlikely to ignore positive proof that the notice was not in fact received.

Casey and Another v Firstrand Bank Ltd 2013 JDR 2118 (SCA)

This dealt with the independence of an irrevocable letter of credit from any underlying obligation due to which it may have been entered into. The SCA referred to the judgment in *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) and stressed the autonomous nature of these letters of credit. It is only in exceptional circumstances - such as fraud (narrowly defined as excluding mere error, misunderstanding or oversight) by the beneficiary in regard to the documents presented to the issuing bank for payment - that a bank might be legitimately restrained from paying in terms of such letter of credit. The allegation that the underlying obligation had prescribed in this particular case was therefore of no relevance since Firstrand had not acted fraudulently in drawing-down on the letter of credit.

Other cases that may be of interest to the *financial services sector*:

- *Firstrand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA) – the independent nature of payment guarantees
- *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182 (29 November 2013) – the independent nature of construction guarantees and the so-called "fraud exception"

- *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) - misrepresentations regarding an illegal 'Ponzi' scheme to pay money into the bank account of a now sequestered fraudster

The plaintiff relied on an enrichment action which, as the court put it, is "available to a plaintiff who innocently transfers money to a defendant under an agreement which, to the knowledge of the defendant, is illegal". The bank in which the funds lay adopted the stance of a neutral stakeholder and awaited the decision of the court. The questions were therefore – (i) did the funds form part of the insolvent estate of the fraudster and (ii) was the bank enriched - it not having to account to the fraudster for the money? The SCA found that where an account-holder transfers money (or more properly 'value' since physical money does not change hands) the right of the account-holder against his bank is extinguished. At the same time, a new right is created for the transferee (in this case the fraudster) against his bank (the owner of the money) despite the tainted *causa*, being the fraudulent agreement between the clients. The funds consequently formed part of the insolvent estate and the claim that the bank was enriched failed.

- *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) – Arbitration clause

The construction/wording of an arbitration clause could inadvertently exclude disputes regarding the validity of the agreement from the arbitration clauses' ambit. Practically one should be particular as to which disputes were envisaged to be caught by the arbitration clause.

- *Sable Place Properties (Pty) Ltd v Bott* case no. 30476/12 (26 October 2012) (GSJ) (unreported) – National Credit Act

The latest decision in a triumvirate of decisions (*Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP); *Grainco (Pty) Ltd v Broodryk NO en Andere* 2012 (4) SA 517 (FB)) to deal with the applicability of the NCA (particularly on the basis of section 8(4)(f)) to settlement agreements and acknowledgments of debt that defer payment and levy a charge, fee or interest. Financial institutions should be mindful of these decisions in deciding whether it is necessary to comply with sections 129 and 130 of the NCA when suing on settlement agreements and acknowledgments of debt. It is to be noted however, that the SCA has yet to formulate a clear answer in this regard.

continued

NEW LEGISLATION - EMPLOYMENT

South African employment legislation is balanced on the very brink of a major overhaul, with the vast majority of the process leading to enactment of amendment legislation already completed.

The *Employment Equity Amendment Act*, 47 of 2013 and the *Basic Conditions of Employment Amendment Act*, 20 of 2013, have already been finally approved and published. These acts will only come into operation on a date fixed by the President by proclamation in the Gazette.

The amendments to the *Labour Relations Act* 66 of 1995 (LRA) are still awaiting finalisation.

A new pending statute that will impact on employment, is the *Employment Services Bill* No 38 of 2012 (ESB). The ESB will (amongst other things) impact materially on the manner in which foreigners are employed in South Africa. In addition, the new *Employment Tax Incentive Act* No 26 of 2013 (ETIB) (a youth incentive initiative) has already taken effect.

The bill amending the LRA was returned to the Portfolio Committee on Labour in the National Assembly for consideration of proposed amendments effected by the National Council of Provinces. If the National Assembly approves it in its current form, it will be sent to the President for signature. The effective date will be published thereafter.

OTHER LEGISLATION

Recently published Acts

1. BBBEE

Broad-Based Black Economic Empowerment Act No 46 of 2013 (Commencement date – to be announced)

This aims to "amend the Broad-Based Black Economic Empowerment Act, 2003, so as to insert certain definitions and to amend others; to clarify interpretation; to provide for the remuneration of Council members; to promote compliance by organs of state and public entities and to strengthen the evaluation and monitoring of compliance; to include the creation of incentive schemes to support black owned and managed enterprises in the strategy for broad-based black economic empowerment; to provide for the cancellation of a contract or authorisation; to establish the Broad-Based Black Economic Empowerment Commission to deal with compliance of broad-based black economic empowerment and to provide for offences and penalties".

Codes of Good Practice

In addition, the revised and long awaited Revised Codes of Good Practice were published in the Government Gazette on 11 October 2013. The Revised Codes will come into operation within a period of 12 months from date of publication.

For more information, please refer to the following BEE Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2013/bee/bee-alert-4-november.html>

2. COURTS

Constitution Seventeenth Amendment Act, 2012 (Commencement date - 23 August 2013)

This aims to "amend the Constitution of the Republic of South Africa, 1996, so as to further define the role of the Chief Justice as the head of the judiciary; to provide for a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal and to provide for the appointment of an Acting Deputy Chief Justice".

This legislation "provides a constitutional axis on which a judicial system, suitable to the requirements of the Constitution, will revolve under the watchful eye of the Chief Justice." The Chief justice is now the head of the judiciary and responsible for the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. The Act also introduces a single High Court of SA which consists of a number of divisions. In Gauteng, for example, the main seat of the Division is in Pretoria and the local seat in Johannesburg. The Constitutional Court now has an extended role in that it has become the highest court for all matters, constitutional and non-constitutional, with the Supreme Court of Appeal as an intermediate court of appeal.

Superior Courts Act, No 10 of 2013 (Commencement date – 23 August 2013)

This aims to "rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to make provision for the administration of the judicial functions of all courts and to make provision for administrative and budgetary matters relating to the Superior Courts".

This legislation repeals the Supreme Court Act, No 59 of 1959 and the Renaming of the High Courts Act No 30 of 2008 in their entirety.

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3. DATA PROTECTION AND PRIVACY

Protection of Personal Information Act No 4 of 2013 (Commencement date – to be announced)

This aims to "promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making and to regulate the flow of personal information across the borders of the Republic".

This Act, also referred to as POPI, was promulgated on 26 November 2013. It marks a significant move by the Legislature to provide for legislative requirements and mechanisms for data protection and privacy in South Africa. It regulates the manner in which personal information must be processed. In doing so, it gives expression to the right to privacy provided for in the Constitution. The right to privacy includes the right to protection against unlawful collection, retention, dissemination and use of anyone's personal information.

It provides for a one year transition period to comply with the legislation. Responsible parties are required to comply with specific conditions when processing personal information.

It is therefore important that all staff members responsible for obtaining, processing and securing personal information are provided with the necessary training as soon as possible.

For more information, please refer to the following Data Protection and Privacy Alert on our website: <http://www.cliffedekkerhofmeyr.com/en/news/publications/2013/technology/data-protection-and-privacy-alert-27-november.html>

4. EMPLOYMENT

Basic Conditions of Employment Amendment Act No 20 of 2013 (Commencement date – to be announced)

This aims to "amend the Basic Conditions of Employment Act, 1997, so as to substitute certain definitions; to prohibit employers from requiring employees to make payments to secure employment and from requiring employees to purchase goods, services or products; to prohibit anyone from requiring or permitting a child under the age of 15 years to work; to make it an offence for anyone to require or permit a child to perform any

work or provide any services that place at risk the child's well-being; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to provide for the Director-General to apply to the Labour Court for an employer to comply with a written undertaking by the employer; to provide for a compliance order; to delete certain obsolete provisions; to provide the Labour Court with exclusive jurisdiction in respect of certain matters; to provide for certain offences and penalties and to increase the penalties for certain offences".

Employment Equity Act No 47 of 2013 (Commencement date – to be announced)

This aims to "amend the Employment Equity Act, 1998, so as to substitute or amend certain definitions; to further regulate the prohibition of unfair discrimination against employees; to further regulate the certification of psychometric testing used to assess employees; to provide for the referral of certain disputes for arbitration to the Commission for Conciliation, Mediation and Arbitration; to make further provision regarding the evidentiary burden of proof in allegations of unfair discrimination; to further regulate the preparation and implementation of employment equity plans and the submission of reports by designated employers to the Director-General; to further regulate undertakings by designated employers to comply with requests by labour inspectors; to further regulate the issuing of compliance orders; to provide afresh for the assessment of compliance by designated employers with employment equity and the failure of those employers to comply with requests and recommendations made by the Director-General; to extend the powers of commissioners in arbitration proceedings; to provide for that fines payable in terms of the Act must be paid into the National Revenue Fund; to extend the Minister's power to issue a code of good practice and to delegate certain powers; to increase and provide for the increase by the Minister of certain fines which may be imposed under the Act; and to amend and to provide for the amendment by the Minister of annual turnover thresholds applicable to designated employers".

For more information, please refer to the following Employment Alert on our website: <http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2014/employment/downloads/EmploymentAlert-3-February-2014.pdf>

Employment Tax Incentive Act No 26 of 2013 (Commencement date - 1 January 2014)

This aims to "provide for an employment tax incentive in the form of an amount by which employees' tax may be reduced and to allow for a claim and payment of an amount where employees' tax cannot be reduced".

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5. FINANCIAL SERVICES

Banks Amendment Act No 22 of 2013 (Commencement date - 10 December 2013)

This aims to "amend the Banks Act, 1990, so as to define certain expressions and to amend certain definitions; to extend the use of the name bank to representative offices; to provide that a contravention of the Financial Intelligence Centre Act, 2001, is a cause for suspension or cancellation of registration as a bank; to align the Banks Act, 1990, with the Companies Act, 2008; and to comply further with the requirements of the Basel Committee of Banking Supervision".

6. SHIPPING

Merchant Shipping (International Oil Pollution Compensation Fund) Act, No 24 of 2013 (Commencement date – to be announced)

This aims to "enact the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971 into law".

Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act, No 35 of 2013 (Commencement date – to be announced)

This aims to "provide for administrative matters in connection with the levy imposed in terms of the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act, 2013".

Merchant Shipping (Civil Liability Convention) Act, No 25 of 2013 (Commencement date – to be announced)

This aims to "enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 into law".

Other recently published Acts include:

1. Deeds Registries Amendment Act No 34 of 2013 (commencement date – to be announced)

This aims to "amend the Deeds Registries Act, 1937, so as to provide discretion in respect of the rectification of errors in the name of a person or the description of property mentioned in deeds and other documents; to provide for the issuing of certificates of registered title taking the place of deeds that have become incomplete or unserviceable; to substitute an obsolete reference; to substitute an outdated heading; to delete reference to the repealed Agricultural Credit Act, 1966; to further regulate the updating of deeds in respect of the change of names

of companies, close corporations and the surnames of women".

2. Financial Services Laws General Amendment Act No 45 of 2013 (commencement date - to be announced)

This aims to "amend and update the Pension Funds Act, 1956, the South African Reserve Bank Act, 1989, the Financial Services Board Act, 1990, the Long-term Insurance Act, 1998, the Short-term Insurance Act, 1998, the Inspection of Financial Institutions Act, 1998, the Financial Institutions (Protection of Funds) Act, 2001, the Financial Advisory and Intermediary Services Act, 2002, the Collective Investment Schemes Control Act, 2002, the Co-operative Banks Act, 2007, and the Financial Services Laws General Amendment Act, 2008, in order to close regulatory gaps, to effect improvements to certain provisions, to provide for increased supervisory capabilities, to rationalise and align the supervisory functions afforded to the Registrar; and to align the aforementioned Acts with the Companies Act, 2008; to amend the National Payment System Act, 1998, the Medical Schemes Act, 1998, and the Co-operatives Act, 2005, to the extent that those laws impact on the stability of the financial services sector and impede on a holistic regulatory approach and effective supervision".

3. Lotteries Amendment Act No 32 of 2013 (commencement date to be announced)

This aims to "amend the Lotteries Act, 1997, so as to amend certain definitions; to provide for the establishment of a National Lotteries Commission; to provide for the extension of the powers of the board; to provide for the licensing of an organ of state to conduct the National Lottery; to provide for a clear accountability process for the distributing agency; to provide for the professionalisation of the distributing agency; to eliminate overlapping of functions between the Minister and the board; to provide for the removal of the reconstruction and development programme as a category entitled to be allocated money of the fund".

4. Sectional Titles Amendment Act No 33 of 2013 (commencement date to be announced)

This aims to "amend the Sectional Titles Act, 1986, so as to amend certain definitions; to further regulate notification of the intended establishment of schemes and the sale of units to lessees; to provide for the cancellation of registered sectional plans in a prescribed manner; to regulate the issuing of a certificate of registered sectional title in respect of a fraction of an undivided share in a section; to provide for the deletion of an obsolete reference; to provide for the registration of a transfer of a part of the common property with the consent of the owners of the sections and the holders of registered real rights; to provide for the endorsing of title deeds to reflect amended participation quota schedules; to regulate the alienation of a portion of land over which a real right of extension or part thereof

continued

is registered; to provide for the consent of holders of registered real rights over exclusive use areas to the alienation of common property; to provide for the cession of a mortgage real right of extension and a mortgage real right of exclusive use area; to provide for the cancellation of part of a section pursuant to an expropriation; to further provide for the consent of bondholders with the registration of a sectional plan of extension; to provide for the issuing of more than one certificate of real right of extension and more than one certificate of real right of exclusive use area".

Important Bills passed by Parliament and awaiting signature

1. Protection of State Information Bill

This aims to "provide for the protection of certain information from destruction, loss or unlawful disclosure; to regulate the manner in which information may be protected and to repeal the Protection of Information Act, 1982".

Recently introduced Bills/Bills currently before parliament (further debates to be scheduled in 2014)

1. Development Bank of Southern Africa Amendment Bill

The Bill amends the Development Bank of Southern Africa Act, 1997. The strategic focus of the Amendment Bill is to enable the extension of operations of the Development Bank of Southern Africa to any national territory on the African continent and its oceanic islands. This will enable the Bank to participate in large scale infrastructure and other strategic projects outside the SADC region which have the potential to enhance trade and economic growth on the continent and support South Africa's bi-national commissions and commitments to regional integration.

2. Infrastructure Development Bill B 49 of 2013

This provides for "the facilitation and co-ordination of public infrastructure development which is of significant economic or social importance to the Republic; to ensure that infrastructure development in the Republic is given priority in planning, approval and implementation; to ensure that the development goals of the State are promoted through infrastructure development and to improve the management of such infrastructure during all life-cycle phases, including planning, approval, implementation and operations etc".

3. Legal Practice Bill B20B of 2012

This provides a "legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Regional Councils in order to regulate the affairs of legal practitioners, and to set norms and standards; to provide for the admission, enrolment and registration of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud; to provide for an Attorneys Fidelity Fund and an Attorneys Fidelity Fund Board of Control and to provide for the establishment, powers and functions of a Transitional South African Legal Practice Council".

This draft legislation will have a significant impact on the governance, structure and regulation of the legal profession. It has been criticized as posing a serious threat to the independence of the profession. Once implemented, it will repeal, for example, the whole of the Attorneys Act No 53 of 1979, the Admission of Advocates Act, No. 74 of 1964 and the Right of Appearance in Courts Act No 62 of 1995.

The Explanatory Memorandum on the objects of the Bill states that: "Current legislation pertaining to advocates and attorneys is fragmented as it is regulated by different laws which apply in different parts of the country. The legal profession is also not representative of the demographics of South Africa and entry into the profession is, in many instances, determined by outdated, unnecessary, and overly restrictive prescripts. Access to legal services, especially by the poor, is limited. The Bill seeks to correct these shortcomings through a legal profession that is regulated by means of a single national regulatory body in terms of one statute. While seeking to attain these objectives, the Bill recognises the independence of the legal profession and seeks to strengthen this independence".

4. Property Valuation Bill B 54 of 2013

This provides for "the establishment, functions and powers of the Office of the Valuer-General; to provide for the appointment and responsibilities of the Valuer-General; to provide for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by a department etc".

continued

5. Public Administration Management Bill B55 of 2013

This aims to "promote the basic values and principles governing the public administration referred to in the Constitution; to provide for the transfer and secondment of employees in the public administration; to regulate conducting business with the State; to provide for capacity development and training; to provide for the establishment of the National School of Government; to provide for the use of information and communication technologies in the public administration; to establish the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit; to provide for the Minister to set minimum norms and standards for public administration and to establish the Office of Standards and Compliance to ensure compliance with minimum norms and standards".

6. Rental Housing Amendment Bill B 56 of 2013

This amends the Rental Housing Act, 1999, so as to "substitute and insert certain definitions; to set out the rights and obligations of tenants and landlords in a coherent manner; to require leases to be in writing; to extend the application of Chapter 4 to all provinces; to require MEC's to establish Rental Housing Tribunals; to extend the powers of the Rental Housing Tribunals; to provide for an appeal process; to require all local municipalities to have Rental Housing Information Offices; to provide for norms and standards related to rental housing and to extend offences".

7. State Attorney Amendment Bill B52 of 2013

This amends the State Attorney Act, 1957, so as to provide for "the establishment of offices of State Attorney; to provide for the appointment of a Solicitor-General and State Attorneys; to provide for the powers of the Minister relating to the functions of the offices of State Attorney and to provide for the powers and functions of the Solicitor-General".

[Draft Bills published for comment](#)

1. Draft Promotion and Protection of Investment Bill

This provides for "the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith".

2. Draft Mine Health and Safety Amendment Bill

This amends the Mine Health and Safety Act, 1996, so as to "streamline administrative processes; to strengthen enforcement provisions and to reinforce offences and penalties".

3. Draft Land Management Commission Bill

This aims to "establish the Land Claims Commission; to provide for the composition; appointment; qualification and remuneration of members of the Land Management Commission; to provide for the functions and powers of the Commission; to provide for the delegation of powers by the Minister and the Commission; to provide for the submission of information of state land to the Commission; to provide for the adjudication of disputes in respect of which two or more title deeds have been issued in respect of the same land parcel; to provide for the administrative assistance to the Commission and to make provision for support to the Commission".

4. Draft International Health Regulations Bill, 2013

This provides for the repeal of "the International Health Regulations Act, 1974 (Act No. 28 of 1974); to incorporate the International Health Regulations, 2005, into the domestic law in order to apply the International Health Regulations in the Republic".

5. Draft Financial Sector Regulation Bill

This aims to "establish regulatory authorities for the purposes of strengthening financial stability and the fair treatment of financial customers in the interest of a safer financial sector; to establish and provide for the Financial Stability Oversight Committee, the Prudential Authority, and the Market Conduct Authority; to provide for co-operation between the regulatory authorities, including co-operation in rule making; to provide for co-operation between regulatory authorities and other financial regulators; to promote the maintenance of financial stability; to provide for the management and mitigation of financial crisis; to provide for administrative penalties; to provide for the establishment of the Financial Services Tribunal to hear appeals; to provide for regulations and codes of good practice; to provide for transitional provisions; and to provide for matters connected therewith".

continued

LEGAL DEVELOPMENTS

Recent developments – corporate and commercial

New JSE Rules on hybrid financial instruments -
For more information, please refer to the following
Corporate and Commercial Alert on our website:
<http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/corporate/corporate-and-commercial-alert-29-january.html>

We value training and skills development as an important part of our corporate culture.

We offer various training sessions, presentations, updates and workshops on a range of topics.

Please visit our website for more information about upcoming events.

The KM Team

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dcladh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dcladh.com