

24 JUNE 2020

# CORPORATE & COMMERCIAL ALERT

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This was the question the Gauteng High Court (High Court) recently had to address in *W & E le Roux Slaghuys (Pty) Ltd and Another v Van Niekerk 2020 (2) SA 624 (GP)*, which was an appeal from the judgment of a single judge.

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## The latest developments on the commencement of the Protection of Personal Information Act, 2013

On 22 June 2020, the President published a statement indicating that further provisions of POPI would come into force.

The Protection of Personal Information Act 4 of 2013 (POPI) was enacted into law on 26 November 2013 with an indication that the President of the Republic of South Africa would determine the date upon which such Act would come into force and effect. From the date of its enactment until now, the only provisions which have come into force relate to the definitions, the establishment of the office of the Information Regulator (as well as its powers, duties and functions) and the introduction of regulations (which came into force on 11 April 2014).

On 22 June 2020, the President published a statement indicating that further provisions of POPI would come into force. These provisions are the following:

- sections 2 to 38; sections 55 to 109; section 111 and section 114(1), (2) and (3) which shall commence on 1 July 2020; and
- sections 110 and 114(4) which shall commence on 30 June 2021.

The sections which are due to commence on 1 July 2020 form the core provisions of POPI and relate to, amongst other things, the application of the Act; the processing of personal information and special personal information (and the conditions under which such processing may occur); the duties and responsibilities of the Information Officer; the rights of data subjects pertaining to direct marketing; the regulation of the transborder flow of information outside of the Republic of South Africa; and the enforcement of the provisions of POPI (including imposing of penalties and administrative fines).

Section 114(1), which is also due to come into force on 1 July 2020, provides that persons have a grace period of one year to ensure that their processing of personal information complies with the provisions of POPI. Although this one-year grace period has

been given, the President has advised that private and public bodies should attempt to comply with the provisions of POPI as soon as possible.

It has been our experience that complying with the various aspects and conditions of POPI takes time, not only to implement within an organisation, but to ensure that the relevant systems provide the necessary security safeguards. We are therefore in agreement with the President's statement that private and public bodies should not delay in kickstarting the process of complying with POPI's procedures. Any delay may result in private and public bodies being in a position that they are unable to implement the necessary changes to their organisation within the grace period provided and as such they may find themselves in a position whereby they are in breach of the legislation as a result of non-compliance.

The President has indicated that the rationale for the delay in sections 110 and 114(4) coming into force, is due to the fact that these sections require the amendment of certain laws (including certain provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA)) and also require the South African Human Rights Commission to consult with the Information Regulator with regards to certain aspects of PAIA.

With the substantial provisions of POPI due to commence on 1 July 2020, it is more important than ever to ensure that your processing of personal information complies with these provisions. Please contact us should you require any assistance in understanding the application of POPI to your organisation and the measures which you will need to put in place in order to ensure compliance.

*Kendall Keanly*

## A brief discussion on the Franchise Association of South Africa Industry Code

This alert serves to provide a brief summary of some of the provisions of the FASA Industry Code and the potential impact on the manner in which disputes pertaining to franchise arrangements have been dealt with in the past.

Franchise arrangements are governed by the Consumer Protection Act, 2008 (CPA), which sets out certain requirements in respect of the agreements being entered into between franchisors and franchisees, and the process which should be followed when a franchise arrangement is entered into.

On 15 June 2020, the Department of Trade, Industry and Competition (DTIC) published a discussion document which includes the Franchise Association of South Africa (FASA) Industry Code as an annexure. The DTIC has indicated that the discussion document is intended to create an informal platform whereby the DTIC and the public may engage on possible areas for consideration in respect of the FASA Industry Code. The DTIC has requested that the public provide their written input by no later than 15 July 2020.

The FASA Industry Code serves to establish an Ombud scheme which the DTIC hopes will ease the application of the CPA on consumer disputes with regards to franchising services. In addition, the FASA Industry Code serves to regularise the interactions between various parties in the supply chain within the franchise industry and thereby ensure proactive compliance with the CPA.

This alert serves to provide a brief summary of some of the provisions of the FASA Industry Code and the potential impact on the manner in which disputes pertaining to franchise arrangements have been dealt with in the past.

### FASA Industry Code

The FASA Industry Code provides for the establishment of the Franchise Industry Ombud (FIO), a non-profit company which shall comply with the provisions of the Companies Act, 2008 (Companies Act) as well as the King Code IV. The board of the FIO will consist of at least four and not more than eight persons appointed in accordance with the provisions of the memorandum of incorporation of the FIO as well as the Companies Act. FASA shall be entitled to appoint two persons to the board and franchisors and franchisees (as a group, excluding prospective franchisees) shall be entitled to nominate and appoint three persons each to the board.

The FASA Industry Code provides that the FIO shall determine the level of any contributions which are to be levied on franchisees and franchisors. The payment of these contributions will need to be addressed in franchise agreements in order to ensure that each party is aware that payment of these contributions needs to be made and that neither party is held liable for the contributions due by the other. No indication is provided in the current draft of the FASA Industry Code as to the implications if either the franchisor or franchisee fail to make payment of the contributions. However, as the FASA Industry Code is still subject to change, we anticipate that penalties for non-payment may be included within revised versions thereof.

## A brief discussion on the Franchise Association of South Africa Industry Code...*continued*

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The Ombud bears final responsibility in respect of the resolution of all complaints indicated as being within the jurisdiction of the FASA Industry Code.

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The board of the FIO must, by way of majority vote, appoint a suitably qualified person to act as Ombud. The Ombud, once appointed, will serve a term not exceeding five years and any person who holds the office of Ombud may be reappointed as such at any time before or after the expiry of such person's term as Ombud. The Ombud may only be removed from office in the event of incapacity, gross incompetence or gross misconduct and in terms of any fair administrative process conducted by a person appointed by the Minister of Trade and Industry for such purpose.

The Ombud bears final responsibility in respect of the resolution of all complaints indicated as being within the jurisdiction of the FASA Industry Code. These include the following:

- any dispute by a franchisor or a franchisee and arising from:
  - a franchise agreement or disclosure document, including disputes relating to the interpretation, breach, cancellation and termination of a franchise agreement and payments of money which are alleged to be owing in terms of or arising from a franchise agreement;
  - the supply of any goods or services or failure to supply goods or services in terms of a franchise agreement; or
  - any solicitations of any offer to enter into a franchise agreement;

- any dispute concerning the applicability or interpretation of the FASA Industry Code;
- any dispute relating to the jurisdiction of the FIO; and
- any dispute which would otherwise be outside of the jurisdiction of the FIO where the parties agree to submit a dispute to the FIO for resolution and the FIO agrees to take cognisance of the dispute.

From the above it is clear that the FIO (and thereby the Ombud) has a wide jurisdiction to not only attend to disputes arising from the franchise agreement concluded by a franchisor and a franchisee, but to also attend to any dispute which a franchisor and franchisee wish to refer to the FIO. This may be beneficial to the parties concerned as the dispute resolution process may be finalised quicker and be more cost effective.

The above does not mean that the dispute resolution provisions which may be incorporated in current franchise agreements are invalidated, as the FASA Industry Code specifically stipulates that this is not the case, provided that such dispute resolution clauses comply with and give effect to the CPA, and the applicability of the CPA is not excluded from the resolution of the dispute.

Although franchisors and franchisees are entitled to make use of other alternative dispute resolution mechanisms which may be currently contemplated in their franchise agreements, the FASA Industry

## A brief discussion on the Franchise Association of South Africa Industry Code...continued

Notwithstanding the rejection, the parties are afforded an opportunity to supplement the complaint or to make submissions directly to the Ombud in order to persuade him/her to accept the complaint.

Codes provides that the parties to such dispute are required, upon request, to provide the FIO with the name and contact details of the dispute resolution agent to whom the dispute has been referred as well as to provide the FIO with copies of all pleadings relating to the dispute and a copy of any award made by the dispute resolution agent.

### Ombud Complaint Process

Where a complaint is referred to the Ombud, the Ombud is entitled to reject such complaint on the basis that, among other things, there is a lack of information provided by the parties or the dispute does not fall within the jurisdiction of the FIO as contemplated in the FASA Industry Code. Notwithstanding the rejection, the parties are afforded an opportunity to supplement the complaint or to make submissions directly to the Ombud in order to persuade him/her to accept the complaint.

If the Ombud decides not to reject the complaint, the FIO shall be required to notify the respondent of the complaint and provide the respondent with 15 days (or such longer period as the Ombud might afford) to submit its response.

After receipt of the response from the respondent, the Ombud may request any person who he/she reasonably considers to be in possession of information which may be of assistance in resolving the dispute, to provide such information either in writing or orally. Where oral evidence is required, the parties may be required to attend a hearing and, with the permission of the Ombud, may be entitled to be represented by any person of their choice, including legal representation.

The Ombud may, at any time, provide the parties to the dispute with his/her view and recommendations. If the parties accept such recommendations, it is

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## A brief discussion on the Franchise Association of South Africa Industry Code...continued

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Whether the Ombud will actually manage to achieve this objective remains to be seen, but it does appear to be a move in the right direction.

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recorded in writing by the Ombud and the parties are required to implement such recommendations. However, if the parties are unwilling to accept the recommendations provided by the Ombud, the Ombud may close the complaint or take any other step contemplated in the FASA Industry Code.

The Ombud may at any time close a complaint if, among other things, the Ombud reasonably believes that the complaint is being pursued in an unreasonable, frivolous, vexatious, offensive, threatening or abusive manner or the complaint is referred to any court or any other forum or tribunal or dispute resolution process.

The complainant is entitled to withdraw the complaint at any time provided that written notice of such withdrawal is

provided to the other party to the dispute and the FIO. In addition, should the parties resolve the dispute on their own, after the complaint has been submitted to the Ombud, the complainant may withdraw such complaint within five days of resolution, provided that it notifies the FIO of such resolution.

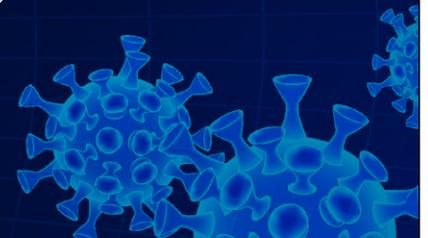
It is clear from the provisions of the FASA Industry Code that it is intended to provide franchisors and franchisees with an alternative dispute resolution mechanism which is hopefully quicker and more cost effective than the traditional alternative dispute resolution mechanisms which are currently employed to attend to such matters. Whether the Ombud will actually manage to achieve this objective remains to be seen, but it does appear to be a move in the right direction.

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*Kendall Keanly and Justine Krige*

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## When is an irrevocable offer in fact revocable?

Notwithstanding that the offer was stated to be irrevocable, the High Court ruled in favor of the purchaser, Van Nierkerk, and he was accordingly entitled to withdraw his offer to purchase.

This was the question the Gauteng High Court (High Court) recently had to address in *W & E le Roux Slaghuis (Pty) Ltd and Another v Van Niekerk 2020 (2) SA 624 (GP)*, which was an appeal from the judgment of a single judge (First Judgment).

### The Facts

Van's Auctioneers, acting on behalf of W & E le Roux (Pty) Ltd (W & E), conducted a public auction at which Mr Van Niekerk made a bid and signed a sale agreement to purchase Lot 1, a property including a building, a bakery and a "butchery with cold room and freezer rooms" (the relevant part for this case) for the total sum of R3.3 million. The sale terms included a provision that the agreement was an offer to purchase and that Van Niekerk as purchaser was "irrevocably bound" for a period of 14 days, during which time the offer was open for acceptance by the seller, W & E.

Four days after making the offer, it came to Van Niekerk's attention that two cold rooms and a freezer room, forming a substantial part of the butchery premises, were being demolished and parts of the cool rooms and freezer rooms were being removed. As a result, Van Nierkerk withdrew his offer on the basis that what remained of the premises was no longer the premises which he offered to purchase, and by removing/demolishing parts of the cool rooms and the freezer rooms, W & E had repudiated the sale agreement.

In response, W & E and Van's Auctioneers argued that Van Niekerk's withdrawal of his offer was ineffective on the basis that the offer made was irrevocable and had not yet been accepted and Van Nierkerk was accordingly not entitled to withdraw his offer to purchase. In fact, the auctioneer paid to remedy certain demolition and removal work due to his error in listing the items being removed as a separate lot at the auction.

However, complexities of the relationships created between the auctioneer and each of the seller and the purchaser are not relevant to this note, which deals with the agreement/s between seller and purchaser. This analysis is not affected by whether or not the seller or purchaser act directly or through an agent.

### The High Court's decision

The High Court dismissed the appeal and confirmed the First Judgement in favour of the purchaser, Van Niekerk. Van Niekerk was entitled to withdraw his offer notwithstanding that the offer was stated to be irrevocable.

The High Court held that the irrevocable offer constituted an option to sell granted to the seller, which option agreement was in existence and conferred contractual obligations and rights on both the seller and purchaser. This agreement must be distinguished from the sale agreement, which would come into effect when the seller accepted the purchaser's offer and exercised the option. While the sale agreement was not yet in existence and

## When is an irrevocable offer in fact revocable?...continued

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An offer may be revoked at any time before the offer is accepted by the offeree. Even an offer stated to be irrevocable may be revocable in certain circumstances.

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therefore could not be breached, the option agreement was in existence and could be breached by the seller and (depending upon the nature of that breach) might entitle the purchaser to revoke the offer, notwithstanding that it was expressed to be "irrevocable".

In short, the High Court found that the option agreement placed an implied duty on the seller to preserve the merx (the asset which is the subject matter of the option and of the sale) and should the merx be sold to another, undergo material damage or change its fundamental character, the seller will have repudiated the option agreement on the basis that the asset is no longer the same asset which the offeror intended to purchase. The purchaser may accept the repudiation and revoke the irrevocable offer, as was done by the purchaser in this case.

### Conclusions

Generally, an offer may be revoked at any time before the offer is accepted by the offeree. Even an offer stated to be irrevocable may be revocable in certain

circumstances. In particular, where it is an offer to purchase and an act or omission of the seller (or its agent) changes the character of the merx or breaches the seller's implied duty to preserve the merx.

Accordingly, the terms of agreements which contain irrevocable offers should be carefully considered regarding matters such as: time periods for acceptance and methods of acceptance; when risk and benefit passes; whether what constitutes material damage can or should be defined, and whether force majeure may excuse either party.

It seems clear on the facts of this case that the butchery cold room and freezer room were a material part of the merx (Lot 1) which suffered material damage clearly caused by the seller or its agent. More difficult questions may arise where the merx is something like a share in a company.

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**David Thompson, Maserato Motloun  
and Lebone Matshitse**



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<p><b>2019</b> M&amp;A Legal DealMakers of the Decade by Deal Flow: 2010-2019. 1<sup>st</sup> by BEE M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow. 2<sup>nd</sup> by M&amp;A Deal Value. 2<sup>nd</sup> by M&amp;A Deal Flow.</p>	<p><b>2018</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by M&amp;A Deal Value. 2<sup>nd</sup> by General Corporate Finance Deal Flow. 1<sup>st</sup> by BEE M&amp;A Deal Value. 2<sup>nd</sup> by BEE M&amp;A Deal Flow. Lead legal advisers on the Private Equity Deal of the Year.</p>	<p><b>2017</b> 2<sup>nd</sup> by M&amp;A Deal Value. 1<sup>st</sup> by General Corporate Finance Deal Flow for the 6th time in 7 years. 1<sup>st</sup> by General Corporate Finance Deal Value. 2<sup>nd</sup> by M&amp;A Deal Flow and Deal Value (Africa, excluding South Africa). 2<sup>nd</sup> by BEE Deal Flow and Deal Value.</p>	<p><b>2016</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow. 2<sup>nd</sup> by M&amp;A Deal Value. 3<sup>rd</sup> by General Corporate Finance Deal Value.</p> <p><b>2015</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow.</p>
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## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Vivien Chaplin**  
Director  
T +27 (0)11 562 1556  
M +27 (0)82 411 1305  
E vivien.chaplin@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselting**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselting@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Rachel Kelly**  
Director  
T +27 (0)11 562 1165  
M +27 (0)82 788 0367  
E rachel.kelly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jerain Naidoo**  
Director  
T +27 (0)11 562 1214  
M +27 (0)82 788 5533  
E jerain.naidoo@cdhlegal.com



CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Francis Newham

Executive Consultant  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

### Allan Reid

Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

### Megan Rodgers

Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E megan.rodgers@cdhlegal.com

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

### Chart Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E chart.williams@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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### 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@cdhlegal.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@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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