

# Corporate & Commercial

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## Steering through the legalities of 'on the road' charges

On 12 September 2025, the Supreme Court of Appeal (SCA) delivered a seminal judgment in *National Credit Regulator v National Consumer Tribunal and Others and similar matters* (667/2023) [2025] ZASCA 132. This landmark decision purports to provide an authoritative interpretation of the National Credit Act 34 of 2005 (NCA), specifically concerning 'on the road fees' (OTR fees) often charged to consumers in motor vehicle finance agreements.

The SCA considered whether credit providers could permissibly levy OTR fees on consumers acquiring motor vehicles on credit, and specifically whether the credit providers complied with sections 100, 101, and 102 of the NCA in doing so. Ultimately, the SCA clarified the conditions under which OTR fees may be lawfully included in motor vehicle finance agreements, emphasising transparency and consumer consent.

Unfortunately, while the judgment no doubt intended to provide clarity and certainty, it may have inadvertently introduced more uncertainty into this vexed area of consumer credit law.

### Background

As noted in the judgment, the process for purchasing a motor vehicle generally begins with the consumer selecting a motor vehicle and thereafter submitting an offer to purchase (OTP) to a motor vehicle dealer. The OTP provides for the costs agreed to by the consumer, which include the selling price and the OTR fees. OTR fees are described in the judgment as:

*"[C]omposite fees for various services provided by motor vehicle dealers. They include, among other things, costs for services such as conducting a pre-delivery inspection, obtaining roadworthy certificates, licensing the vehicle, acquiring licence plates, delivery, fuel, and fees charged by the Financial Sector Conduct Authority. This list is by no means exhaustive."*

The case before the SCA originated following the National Credit Regulator's (Regulator) determination, after conducting investigations into the practice of charging OTR fees in credit instalment agreements, that this practice contravened sections 100(1)(a), 101(1), 102(1) and (2) of the NCA. When the Regulator issued compliance notices (under section 55 of the NCA) to the credit providers, they objected and litigation ensued, culminating in this judgment. To comprehend how charging OTR fees could contravene these sections, it is necessary to examine each section individually.

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## Section 100

Section 100(1) prohibits credit providers from charging an amount or imposing a monetary liability on a consumer in respect of: (i) a credit fee or charge prohibited by the NCA; (ii) fees or charges exceeding amounts that may be charged as per the NCA; (iii) interest exceeding the amount that may be charged as per the NCA; or (iv) any fee, charge, commission or other amount payable by the credit provider to any third party except as contemplated in the NCA. Moreover, section 100(2) provides that any charges imposed by a credit provider for any goods or services must not be higher than the price charged for the same or substantially similar goods or services in the ordinary course of business for cash transactions.

## Section 101

Section 101(1) regulates what consideration can be recovered from a consumer under a credit agreement, specifically *"the principal debt, being the amount deferred in terms of the credit agreement, plus the value of any item contemplated in section 102"* and, in addition, other prescribed credit charges and costs (such as an initiation fee, a service fee, interest, the cost of credit insurance, default administration charges and collection costs).

## Section 102

Section 102(1) then provides that if a credit agreement is an instalment agreement (as was the situation in this case), a mortgage agreement, a secured loan or a lease (for instance finance leases for movables), the credit provider may include in the principal debt deferred under the credit agreement any of the items listed in 102(1) to the extent that they are applicable in respect of any goods that are the subject of the credit agreement.

These items comprise: (i) an initiation fee if the consumer has been offered and declined the option of paying that fee separately; (ii) the cost of an extended warranty agreement; (iii) delivery, installation and initial fuelling charges; (iv) connection fees, levies or charges; (v) taxes, licence or registration fees; or (vi) the premiums of any credit insurance payable in respect of that credit agreement.

## The Regulator's argument

The Regulator contended that sections 100(1)(a), 101(1) and 102(1), when read cumulatively, establish a *"closed list"* of permissible fees and charges. Consequently, in the Regulator's view, credit providers who finance motor vehicles on an instalment payment basis (which would include leases) are limited to charging the principal debt plus the value of items expressly contemplated in section 102, rendering those OTR fees not explicitly listed in section 102, an unlawful charge.

The credit providers, on the other hand, argued that they did not set the OTR fees. These are determined by the dealers in agreement with the consumer (based on freedom of contract) before the request to finance the vehicle. Like all other extras, the consumer may request the dealer to include the OTR fees as part of the principal debt. These all contribute to the total amount which the consumer requests them to finance. The agreement between the dealer and the consumer is then 'carried over' to determine the amount (the principal debt) which the consumer seeks to have the credit provider finance. Furthermore, it was the credit providers' submission that section 102 has limited relevance in this context. Section 102 permits credit providers, if they choose to offer any services listed in section 102, to include these in the principal debt provided that they comply with section 102(2).

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Therefore, the NCA only protects the consumer when credit providers attempt to use their position to supply services, and thus the NCA does not govern the relationship between dealers and consumers, which may be covered by other legislation, such as the Consumer Protection Act 68 of 2008.

Prior to reaching the SCA, the matter was initially heard in the National Consumer Tribunal (Tribunal) where each of the credit providers separately sought orders to review and set aside the compliance notices issued against them; each review being considered by different panels of the Tribunal. Interestingly, the three panels came to two contradictory rulings. In one matter, the Tribunal found that OTR fees constituted fees prohibited under the NCA, whereas in the remaining two cases the Tribunal found that OTR fees were not prohibited.

### High Court ruling

On appeal, a full bench of the High Court ruled that OTR fees, when charged by motor vehicle dealers after having been negotiated with the consumer, did not contravene the NCA. The majority found that the credit providers did not charge consumers the OTR fees separately when these fees and services were included in the credit agreements. These fees, according to the majority, are negotiated between the dealers and consumers. The credit providers only financed the principal debt, which, according to the majority, included the purchase price and other extras, such as OTR fees and additional services. The minority, in reaching a different conclusion, reasoned that the cost of credit includes, among other things, the price and value of items contemplated in section 102. This constitutes the 'principal debt'. Once the dealer charges the consumer the OTR fees, they should not be imposed on the consumer, as this is prohibited by section 100.

### Judgment

After highlighting that the differing conclusions reached in the previous forums were due to certain ambiguities in the NCA, the SCA, in response, distinguished between OTR fees imposed by a credit provider, on the one hand, and OTR fees forming part of the purchase price as agreed between the dealer and the consumer, on the other. The court held that OTR fees are unlawful if imposed as a separate charge by the credit provider unless specifically listed in section 102(1). However, if OTR fees are transparently incorporated into the purchase price and agreed upon by both the dealer and the consumer, they may be financed as part of the credit agreement.

### Consequences

On the surface, this approach appears to facilitate meaningful consumer participation within the credit market, balancing the rights and responsibilities of both credit providers and consumers. However, what may be of concern is that this approach (albeit unintentionally) risks the dilution of the consumer protection mandate enshrined in the NCA.

The judgment, while well-intentioned, presupposes certain conditions in the South African consumer credit market that may not always be true in all cases. Chief among these assumptions are that: purchase negotiations between the dealers and consumers are always conducted on an equal footing with equal knowledge and bargaining power; and requiring transparency in relation to the disclosure of such charges/costs would be sufficient to avoid or mitigate against predatory credit practices or unscrupulous credit providers who would look to potentially exploit the ambiguity created by (i) what charges can legitimately be included in

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the principal debt to be deferred and (ii) the lack of guidance on what would constitute sufficient disclosure for the purposes of ensuring transparency.

These concerns arise because the SCA has, in effect, opened the floodgates for the introduction of unspecified charges not initially contemplated in the NCA that could be included in the principal debt and accordingly form part of the deferred amount on which interest and other charges would be levied under a credit agreement. In the context of credit agreements to which the NCA generally applies, it is not controversial that a consumer could agree on any amounts (i.e. the principal debt) which would be subject to credit financing. However, in the case of mortgage agreements, instalment agreements, secured loans and leases (all as defined in the NCA) these charges/items are circumscribed and limited to those specifically listed in section 102(1). That this is a closed list is confirmed by the SCA, however, in its judgment these and other charges/items can be included in the principal debt by agreement. In so doing, however, section 102 will not find application and, in effect, the protections afforded to consumers in terms thereof (see sections 102(2) and 102(3) enabling consumers to challenge the imposition or quantum of these charges/items) will be nullified.

Although the intention of the SCA may be laudable, the potential consequences of its judgment are far less so. Arguably, and perhaps inadvertently, this judgment has potentially eroded some of the consumer protections envisaged in the NCA and in so doing potentially tilted the scales of equity in the credit market in favour of credit providers in this instance.

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## Section 48 overhauled: Simplifying buybacks, but not without hurdles

For years, section 48 of the Companies Act 71 of 2008 (Act) has been the fussy relative of corporate law, transforming a simple share buyback into a full-scale family meeting, complete with special resolutions and expert reports. The recent amendments to the Act have given section 48 a welcome refresh. However, while the section takes two steps forward, by dispensing with the dreaded section 114 and 115 procedures, it has also taken one step back as now almost every buyback requires a special resolution of shareholders.

The Companies Amendment Act, 2024 introduced important changes to section 48(8) of the Act, which regulates the circumstances under which a company may repurchase its own shares. While the previous regime automatically linked repurchases exceeding 5% of a particular class of shares (repurchase threshold) to the procedural requirements of a scheme of arrangement, this linkage has now been removed, fundamentally altering the compliance framework for share buybacks. While this is a helpful change, under the amended section 48(8), almost all share repurchases (save for two exceptions) now require shareholder approval, regardless of the percentage of shares being repurchased.

This article unpacks the practical and legal implications of the amendments to section 48(8) of the Act and outlines key considerations for companies in adapting their practices to ensure continued compliance with the Act.

### Old section 48

Under the previous regime, share buybacks came with significant procedural hurdles. While buybacks below the repurchase threshold only required board approval, unless the memorandum of incorporation (MOI) of a company or the Johannesburg Stock Exchange (JSE) Listing Requirements provided otherwise, any repurchase from a director, prescribed officer, or a related party of a director or prescribed officer required shareholder approval by special resolution. In addition, if the repurchase exceeded the repurchase threshold, it automatically triggered the scheme-of-arrangement procedures in sections 114 and 115 of the Act, a process more suited to major restructurings and fundamental transactions than routine share repurchases.

In order to comply with the provisions of sections 114 and 115 of the Act, the repurchase needed to have been (i) approved by a special resolution of shareholders and (ii) accompanied by an independent expert's report setting out, among other things, the material effects of the repurchase on the rights and interests of the class of shareholders affected. In addition, where the company qualified as a regulated company, being, *inter alia*, a public company or a private company that has had more than 10% of its issued securities transferred within the preceding 24 months (other than to related persons), the repurchase would constitute an "affected transaction" (as defined in section 117(1)(c) of the Act) and would thus be subject to Part B and C of the Act and the accompanying regulations (takeover regulations). If the repurchase constituted an "affected transaction" the company would either have to comply with the takeover regulations or obtain an exemption from the Takeover Regulation Panel.

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### Amended section 48

Under the amended section 48(8) of the Act, other than in two narrow circumstances (at least insofar as private companies are concerned), a company may repurchase its own shares only if the decision has been approved by a special resolution of shareholders. Unlike the previous regime, this requirement now applies to almost all share repurchases, irrespective of the size of the transaction or the percentage of shares being acquired. The only exceptions are where the repurchase is effected (i) pursuant to a pro rata offer made to all shareholders of a particular class, or (ii) through a recognised stock exchange on which the company's shares are traded.

The amendments also preserve an important safeguard: any repurchase of securities from a company's directors, prescribed officers or their related persons remains subject to special shareholder approval.

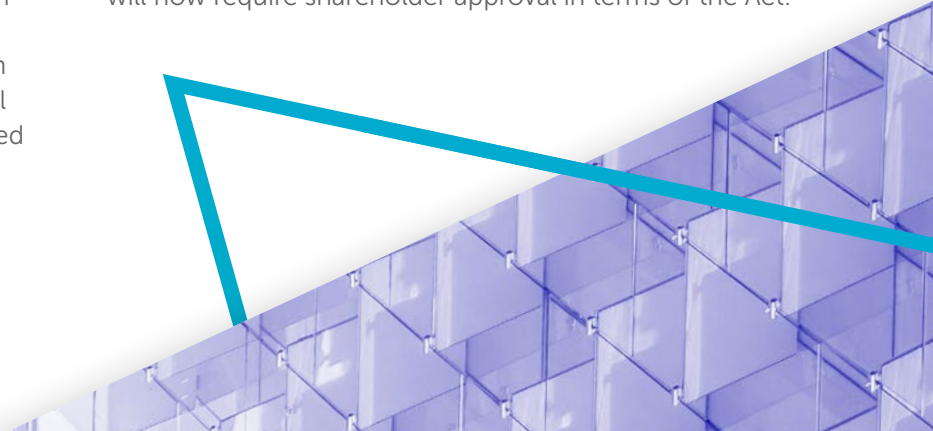
Significantly, the amended section 48(8) no longer subjects share repurchases that exceed the repurchase threshold to the procedural requirements applicable to schemes of arrangement under sections 114 and 115 of the Act. This change simplifies the regulatory framework by eliminating the need for an independent expert report and other procedural formalities previously triggered by larger repurchases. However, where a share repurchase in substance constitutes a scheme of arrangement (being a repurchase which, once approved by special resolution in accordance with sections 114 and 115 of the Act, binds all shareholders to the transaction, including those who voted against the repurchase), such repurchases will continue to be governed by sections 114 and 115 of the Act.

### Intra-group repurchases for listed companies

The new section 48 framework creates a notable tension with the JSE Listing Requirements, which were amended in 2022 to facilitate intra-group share repurchases. Paragraph 5.67B of the JSE Listings Requirements provides that no shareholder approval is required when a company repurchases securities from wholly-owned subsidiaries (known as treasury shares), Schedule 14 share incentive schemes, or non-dilutive share incentive schemes controlled by the issuers, where such repurchased shares are to be cancelled, save as may be required in terms of the Act. The challenge is that the Act, as primary legislation, takes precedence over any conflicting regulatory provisions.

The exception in section 48(8) of the Act applicable to repurchases implemented on a recognised stock exchange would not apply to intra-group repurchases contemplated in paragraph 5.67B of the JSE Listing Requirements, as these are not implemented through the JSE's public trading platform.

As a result, transactions that could previously proceed without shareholder approval under the JSE Listings Requirements, such as the repurchase of treasury shares (provided the repurchase threshold was not exceeded), will now require shareholder approval in terms of the Act.



## Section 48 overhauled: Simplifying buybacks, but not without hurdles

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### What can companies do?

#### Review of MOI

Many companies' MOIs still hard-code and incorporate the provisions of the old section 48(8), including the automatic application of section 114 for buybacks exceeding the repurchase threshold. If not updated, companies risk inadvertently triggering the scheme of arrangement procedures under sections 114 and 115 of the Act. A careful review, and where necessary, amendment of the MOI, is therefore essential to ensure alignment with the updated section 48(8) and to avoid unnecessary procedural complications.

#### Upfront approvals

While special resolutions authorising share repurchases are generally easier to obtain in a private company context than in public or listed companies, private companies may nevertheless wish to include, in the notice of their annual general meeting, an upfront authority for the board to repurchase shares under predefined conditions.

In addition, both private and public (including listed) companies may consider obtaining an upfront, standing authority to repurchase shares held by wholly owned subsidiaries, subject (where required) to appropriate and applicable restrictions. Although shareholder approval for a broad repurchase mandate may sometimes be difficult to secure, an authority limited to the repurchase of treasury shares is typically non-contentious, given its minimal impact on other shareholders and the routine nature of such transactions.

#### Conclusion

While the amendments to section 48(8) are generally positive, companies must recognise that almost all share buybacks now require shareholder approval. Transactions that could previously be carried out quickly and with minimal formalities, such as small-scale buybacks, now require a special resolution. This shift underscores the importance of careful planning to ensure that buybacks are executed efficiently and in compliance with the Act.

**Andrew Giliam, Jesse De Jager and Jenny Harwin**

## Implications of the Draft Companies (Annotation and Rectification) Regulations, 2025 for companies

The Draft Companies (Annotation and Rectification) Regulations, 2025 (Draft Regulations) introduce a structured framework for correcting, updating or annotating errors or omissions in company registers and official filings. They aim to operationalise the powers granted to the Registrar (pursuant to section 862 of the Companies Act (Cap 486)) to provide a clear and consistent mechanism for rectification of corporate records.

Under the provision of the Companies Act, the Registrar is empowered to remove any entry relating to a company from the register, based on very specific grounds upon application by a person with a legitimate interest. However, the act fails to provide clarity on what constitutes a "legitimate interest". The Draft Regulations address this gap by defining "legitimate interest", thereby establishing clear locus standi for persons entitled to apply for rectification – a notable inclusion from the act. These include directors or former directors, shareholders or former shareholders, administrators or executors of a shareholder's estate, and beneficial owners of a company. This provision is significant as it creates legal certainty by expressly identifying who has the right to seek the remedy, thereby reducing ambiguity and the risk of frivolous applications.

The Draft Regulations also set out the Registrar's annotation powers, which is a new mandate that empowers the Registrar to place a note on the register to clarify misleading or outdated information, make corrections, and record the date of entry to address any confusion that may arise from such misleading information. It is worth noting, however, that they do not clarify the legal effect of annotations, such as whether third parties can place reliance on them in commercial transactions.

### Grounds for amendments

Similarly, the Draft Regulations mirror the grounds provided in section 862 of the Companies Act for an application for rectification, including an entry that:

- derives from anything invalid or ineffective;
- derives from anything that was done without the authority of the company; or
- is factually inaccurate or is derived from something factually inaccurate; or
- is derived from something that is forged.

However, this scope may be regarded as narrow in that rectification applies only to very limited circumstances and does not extend to material that is simply disputed, subjective, or made in good faith under proper authority. In summary, the mechanism is designed to correct clear errors or wrongful acts rather than to reopen legitimate exercises of discretion or bona fide administrative decisions.

Significantly, rectification is restricted to a period of 12 months from the date of the entry in the register, a restriction which may be viewed as limiting for companies that may only discover errors after this period has lapsed. The limitation may prove particularly problematic where errors or unauthorised filings are uncovered later, for instance during due diligence or financing processes. Such delayed discoveries, falling outside the 12-month window, raise legitimate concerns about the applicability and overall effectiveness of the proposed regulations.

# Implications of the Draft Companies (Annotation and Rectification) Regulations, 2025 for companies

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Nonetheless, the essence of the Draft Regulations lies in the procedure prescribed for rectification upon an application to the Registrar. Once an application is made, the Registrar is required to issue a written notice of intention to rectify the register, addressed to the company and the public. This notice must set out the company's details, the omitted or erroneous information, the recipients' right to object (underpinning the right to fair administrative action guaranteed under the Constitution of Kenya), the potential effect of the rectification, and the date of issuance. In addition, the notice must specify the deadline for lodging written objections, being within 28 days from the date of the notice.

Consistently, the right to object is limited to persons with a legitimate interest, who must file the prescribed form setting out their details, identifying the rectification application, and stating the grounds of objection. Where objections are filed, the Registrar is obliged to acknowledge receipt and notify the affected parties accordingly.

Significantly, the Registrar is barred from effecting any rectification once an objection has been lodged whose purpose is to ensure that due process is followed and prevent any administrative discretion by the Registrar. Importantly, however, the Draft Regulations do not preclude the Registrar from referring an application for rectification to the courts and seeking appropriate orders which, by way of extension, broaden the scope of remedies available.

## Conclusion

While the Draft Companies (Annotation and Rectification) Regulations, 2025 are a welcome step in clarifying the rectification framework and embedding safeguards aligned with constitutional standards of fair administrative action, their practical impact will depend on how flexibly and efficiently they are applied. Striking the right balance between protecting stakeholder rights and ensuring timely, cost-effective corrections will be critical to avoiding procedural bottlenecks that could undermine the very certainty and reliability the Draft Regulations seek to promote.

**Sammy Ndolo and Michelle Kibui**

## A landmark shift in rights, compliance and inclusion with Kenya's new Persons with Disabilities Act

The Persons with Disabilities Act 4 of 2025 (the PWD Act), which was assented to on 8 May 2025 and commenced on 27 May 2025, represents an overhaul of Kenya's disability rights framework. The PWD Act gives effect to Article 54 of the Constitution of Kenya on the rights of persons with disabilities (PWDs) with an approach that has significant implications for every business operating in Kenya. The PWD Act repeals the Persons with Disabilities Act, 2003 (the Repealed Act).

The PWD Act restructures the National Council for Persons with Disabilities (the Council) and expands its functions and powers. To encourage compliance, the PWD Act introduces various incentives and reliefs. Conversely, it also provides for offences and penalties in cases of non-compliance. While ambitious, the PWD Act leaves open questions on how the new powers will be co-ordinated and whether the enforcement mechanism is sufficient to match the breadth of obligations it creates for employers and businesses. This article focuses on the effects of the PWD Act on private sector employers and businesses in Kenya.

### Guiding values and principles

Unlike the Repealed Act, the PWD Act establishes fundamental laws that must be followed by all state organs, public officers and persons, including business associations and civil society organisations, emphasising the need for respect for the inherent dignity and individual autonomy, equality and non-discrimination, full and effective participation and inclusion in society, accessibility, and equality of opportunity of PWDs. These principles form the foundation for all obligations and rights established under the PWD Act, creating a framework that extends far beyond traditional disability accommodations.

While these values are important, they are framed broadly and may create uncertainty for employers on how to operationalise them in everyday workplace policies. Without clear benchmarks, businesses risk compliance gaps or over-investment in measures that may not be recognised by regulators.

### Key obligations for employers

The PWD Act imposes various obligations on employers which were not previously substantively provided for in the Repealed Act. For instance, the PWD Act now imposes an express obligation on employers not to discriminate against a PWD in job application procedures, hiring, advancement and other terms, conditions and privileges of employment. Further, employers are required to take the measures outlined below

# A landmark shift in rights, compliance and inclusion with Kenya's new Persons with Disabilities Act

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## Employment quota of 5%

Where an employer has at least 20 employees, 5% of direct employment opportunities must be reserved for PWDs to secure employment. This is a bold inclusion measure but may be difficult for small and medium enterprises (SMEs), micro, small and medium enterprises (MSMEs) or specialised industries to meet in practice. Additionally, the PWD Act does not provide for phased implementation or exemptions, exposing non-compliant firms to penalties even where qualified candidates may be scarce.

## Policies

Employers need to formulate policies and programmes to promote basic human rights, improve working conditions, and enhance employment opportunities for PWDs. While this is a positive initiative, the challenge lies in the fact that the PWD Act does not prescribe minimum policy content, leaving employers to guess what will satisfy regulators and creating a risk of inconsistent enforcement across sectors.

## Zero tolerance for discrimination

When recruiting, employers are not permitted to discriminate on account of disability. This aligns with constitutional equality guarantees. However, the PWD Act does not provide clear guidance on when it may be lawful to impose reasonable limitations e.g. in roles that require certain physical capabilities, such as emergency services or manual labour. This lack of clarity may give rise to disputes.

## No disability testing

Employers may not conduct any test or examination to establish whether an applicant is a PWD or as to the nature or severity of a person's disability. This protects candidates from intrusive practices but may create tension where employers legitimately need medical fitness assessments for safety-sensitive roles. The PWD Act does not clarify this distinction.

## Reasonable accommodation

Employers are required to carry out appropriate modifications in their work premises to accommodate the employment of PWDs. While consistent with international standards, the absence of financial support for all businesses (beyond the proposed tax incentives under the PWD Act) means that SMEs and MSMEs may face disproportionate compliance costs.

## Obligations during the usual course of employment

The PWD Act further provides that no PWD shall be dismissed or suffer any reduction in rank on the grounds of disability or acquiring any disability. If any employee with a disability is placed under undue stress or disadvantage in the usual course of employment as a result of their disability, that employee shall be eligible for a position at the same rank with adequate support. Such an employee may, if required by the nature of disability, be deployed to another post with the same pay scale and service and, if it is not possible to adjust the employee against any post, the employee may be kept on a supernumerary post until a suitable post is available or they attain the age of retirement, whichever is earlier.

## A landmark shift in rights, compliance and inclusion with Kenya's new Persons with Disabilities Act

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While the provision is well-intentioned, it places the full burden of accommodation and employment continuity on the employer without providing flexibility to adapt to business realities. In practice, it may lead to challenges in implementation and potential disputes over compliance.

The PWD Act sets the age of retirement for PWDs to be 5 years above the mandatory age of retirement set by the Government of Kenya.

In order to confirm compliance with the above requirements, employers are now required to submit an annual report on the status of employment of PWDs within their establishments to the Council. However, as the PWD Act is still quite new, it remains to be seen how these obligations will be implemented in practice. In addition, the PWD Act does not prescribe the reporting format and frequency of audits, leaving gaps that could undermine compliance certainty. These details may, however, be addressed in regulations issued pursuant to the PWD Act.

### Substantial financial incentives

The PWD Act doesn't just impose obligations, it rewards compliance with significant tax benefits. To incentivise compliance and support workplace inclusion, private employers who engage a PWDs and who improve or modify their physical facilities or provide special services to accommodate employees with disabilities are entitled to substantial tax benefits, as set out below.

### Tax deduction of 25% on salaries and wages paid to employees with disabilities

A private employer that engages a PWD either as a regular employee, apprentice or learner will be entitled to apply for a deduction from its taxable income equivalent to 25% of the total amount paid as salary and wages to such employee. For example, if an employer pays KES 1 million in annual wages to a PWD employee, it can claim an additional KES 250,000 (25%) deduction from taxable income, over and above the standard wage expense deduction.

### Tax deduction of 50% on costs for workplace modifications and reasonable accommodations

An employer that improves or modifies its physical facilities or avails special services in order to provide reasonable accommodation for employees with disabilities shall be entitled to apply for additional deductions from its net taxable income equivalent to 50% of the direct costs of the improvements, modifications or special services. For example, if an employer spends KES 500,000 to install ramps, lifts or accessible bathrooms, it may claim an additional KES 250,000 (50%) deduction from taxable income, in addition to the normal business expense deduction. However, the reimbursement scheme lacks detailed procedures, leaving uncertainty on timelines, eligibility, and funding availability. The high cost of retrofitting may also strain smaller developers, risking partial compliance or project delays.

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These tax incentives extend to workplace modifications, assistive technology costs and reasonable accommodation expenses, creating a financial framework that rewards inclusive employment practices while simultaneously addressing the business case for disability inclusion. Although the incentives reflect a progressive policy shift, their robustness depends on clear implementing regulations, which have yet to be issued. In their absence, the business case remains partly theoretical.

### **Accessibility and infrastructure requirements**

The PWD Act establishes accessibility standards for all buildings, transport modes, pedestrian infrastructure and public transport systems, with no building permitted to receive completion certificates without compliance. These standards require suitable entries and exits, universal design standards, accessible facilities at transport hubs, and proper building access features including ramps, elevators, railings and accessible bathrooms.

The Council may also issue adjustment orders for inaccessible premises, services or amenities, requiring owners to undertake necessary modifications at their own expense within specified timeframes. An adjustment order will describe the premises or service, explain why it is inaccessible, and require the owner or provider to make changes at their own expense within a set period. Before issuing an order, the Council must first give notice, specify the changes needed, and allow representations from the affected party. Aggrieved persons may appeal to the High Court within 30 days. Failure to comply with an adjustment order is an offence punishable by a fine of up to KES 5 million or imprisonment for up to 5 years.

This framework is strong on paper but may prove challenging in practice. The requirement that adjustments be carried out *"at the owner's expense"* imposes heavy compliance costs, especially for SMEs, MSMEs and service providers. Although the PWD Act allows appeals, litigation could delay projects and increase costs. The effectiveness of this tool will depend on how consistently the Council consults county governments and regulatory agencies, and whether sufficient technical guidance is given to businesses on what constitutes accessibility

### **What organisations need to do**

The PWD Act requires immediate attention from all organisations operating in Kenya, as non-compliance carries severe penalties, while compliance offers both legal protection and significant financial incentives. In practice, the scope covers both employment settings (quotas, workplace policies and reporting) and everyday life contexts (public transport, infrastructure and service delivery). Businesses must separate obligations linked to employment from those tied to customer or public access, as compliance strategies differ significantly.

The interconnected nature of the PWD Act's provisions means that successful compliance requires a holistic approach that addresses employment practices, physical accessibility, service delivery, information provision and staff training. The lack of guidance from regulators means early adopters will be navigating untested ground, facing both compliance costs and uncertainty over enforcement priorities.

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## Immediate steps for employers

To ensure compliance with the new legal requirements under the PWD Act and to promote an inclusive workplace for PWDs, employers should take the following immediate steps:

- conduct an internal audit of PWDs' representation to assess compliance with the 5% quota;
- update human resource policies to include non-discrimination, accommodation procedures and reporting obligations;
- budget for workplace modifications and explore available tax deductions;
- establish a reporting mechanism to prepare annual returns for the Council; and
- train managers and human resource staff on the PWD Act's provisions and how they differ from everyday non-employment obligations.

**Njeri Wagacha, Arnold Mutisya, and Ian Ounoi**

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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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