

Corporate & Commercial



ALERT | 22 January 2025

In this issue

KENYA

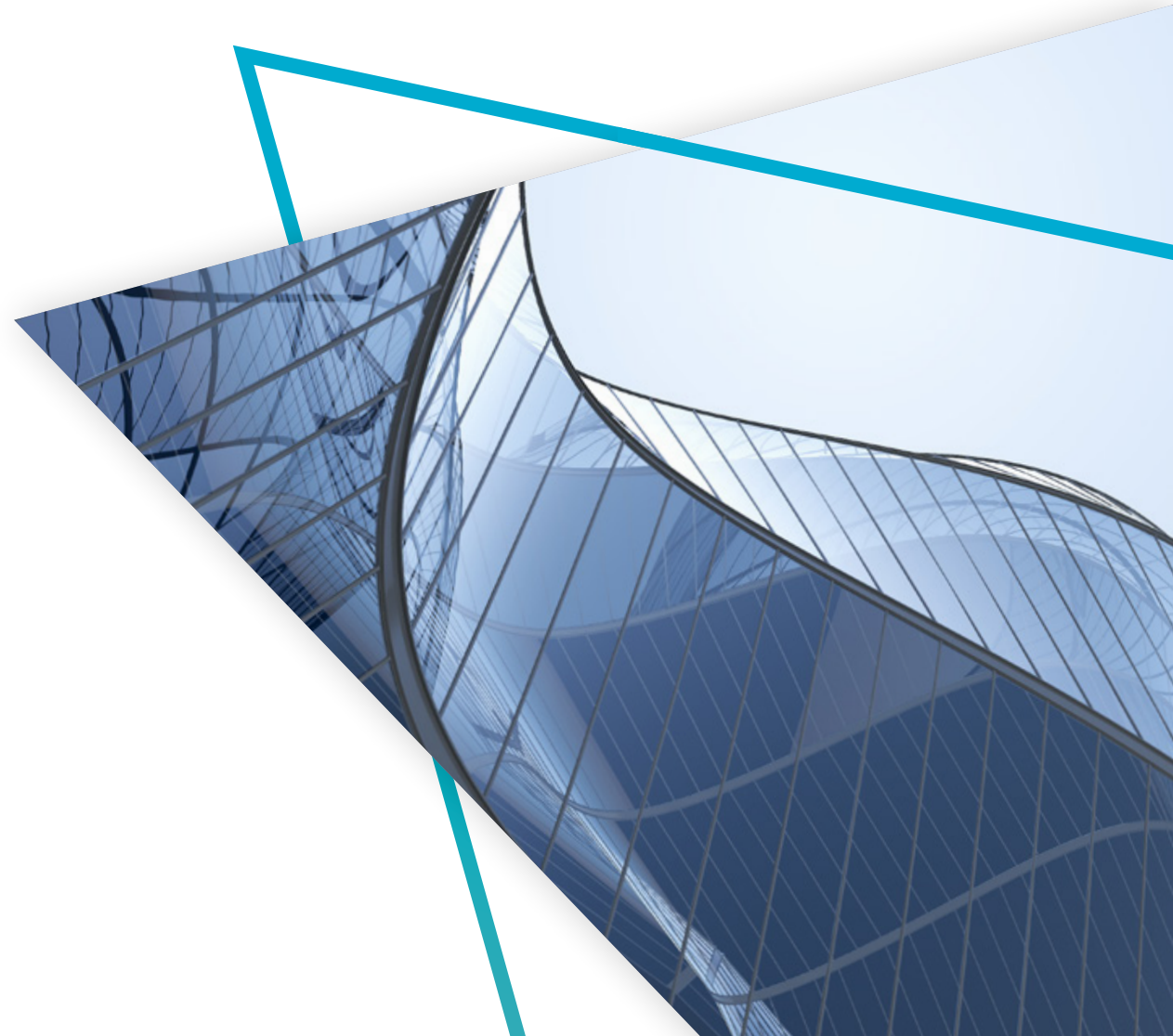
Banking and Finance Amendments introduced by the Business Laws (Amendment) Act 20 of 2024

SOUTH AFRICA

Transnet's final Network Statement published – Privatisation of the rail network will soon be a reality



For more insight into our expertise and services



Banking and Finance Amendments introduced by the Business Laws (Amendment) Act 20 of 2024

The Business Laws (Amendment) Act 20 of 2024 (Act) was enacted on 11 December 2024 and took effect on 27 December 2024. It introduces several amendments to banking and finance laws under the Central Bank of Kenya Act Cap. 491 Laws of Kenya (CBK Act), the Banking Act Cap. 488 Laws of Kenya (Banking Act) and the Microfinance Act Cap. 493C Laws of Kenya (Microfinance Act).

Below we outline the details of the amendments.

Variation of penalties

The Act has varied the penalties prescribed under the Banking Act for non-compliance applicable to financial institutions, credit reference bureaus, corporates and natural persons. Of note is the introduction of a penalty equivalent to three times the gross amount of the monetary gain or loss avoided by non-compliance.

Gradual increase of core capital

Banks will be required to increase their core capital to KES 10 billion by 31 December 2029. The staggered increase is as follows:

Compliance date	Minimum core capital (KES)
31 December 2024	1 billion
31 December 2025	3 billion
31 December 2026	5 billion
31 December 2027	6 billion
31 December 2028	8 billion
31 December 2029	10 billion

We expect to see mergers and acquisitions activity involving smaller financial institutions driven by the need to raise core capital.



Banking and Finance Amendments introduced by the Business Laws (Amendment) Act 20 of 2024

CONTINUED



Regulation of non-deposit taking lending

The CBK Act now provides in section 33(S) that a person cannot carry on any **"non-deposit taking credit business"** unless that person has been licensed by the Central Bank of Kenya (CBK) or is permitted to do so under any other written law. A contravention of that section is an offence for which a person is liable upon conviction to imprisonment for a term not exceeding three years or to a fine not exceeding KES 5 million.

As a result, there is no longer a separate requirement for digital credit providers licensing, and the CBK has replaced **"digital credit business"** with **"non-deposit taking credit business"** to expand its oversight over credit business more generally and without emphasis on the form of channel used to advance a loan.

Non-deposit taking credit business includes granting of loans or credit facilities to members of the public (secured or unsecured), asset financing, pay-as-you-go, buy now, pay later arrangements (excluding hire purchase), credit guarantees and peer-to-peer lending.

The transition period for compliance by non-deposit taking lenders has not been provided, but we expect that the CBK will soon issue guidance on registration and licensing.

Regulation of credit guarantee businesses

Credit guarantee entities are now required to apply for and obtain licenses from the CBK. The Act defines **"credit guarantee"** as the business of providing guarantee by means of absorption of a lender's risk on a credit facility made to a borrower.

The following credit guarantee service providers are excluded from the registration and licensing requirements:

- credit guarantee providers owned by foreign governments that have entered into an agreement with the Government of Kenya for purposes of supporting access to financial services in Kenya;
- credit guarantee providers owned or supported by international financial institutions and that have entered into an agreement with the Government of Kenya to provide services to targeted groups, sectors or regions for a specified period;
- credit guarantee companies registered outside Kenya that have partnered with a financial institution in Kenya to provide those services; and
- banks providing credit guarantees as part of their regular business.

The Act provides for a transition period of five years from 27 December 2024. We expect that the CBK will soon issue guidance on the procedure for registration of credit guarantee companies, but the affected businesses should ensure compliance by December 2029.

Banking and Finance Amendments introduced by the Business Laws (Amendment) Act 20 of 2024

CONTINUED

Regulation of non-deposit taking microfinance companies

The Act provides for the regulation of non-deposit taking microfinance business in connection with the provision of physical credit. Physical credit refers to the provision of loans where a lender takes movable or immovable security but does not include acceptance of cash collateral.

The affected businesses are required to apply for a license within six months from 27 December 2024. Contravention of this requirement is an offence for which a person is liable upon conviction to imprisonment for a term not exceeding three years, or to a fine not exceeding KES 2 million, or both.

Conclusion

While the CBK may have good intentions, these provisions likely mean more pain for borrowers as the credit market may contract, with lenders preferring not to conduct business in Kenya due to the requirement to obtain licensing to lend. If the intention was to protect consumers, in the general public interest, then the law could easily limit itself to consumer credit. As it stands, the regulation of non-deposit taking lending is so broad that even multilateral and bilateral lenders are required to be licensed.

Regulation of credit guarantee companies may, on the other hand, be a win for traditional lenders as they may be more confident in guarantees issued, which will unlock the market for sectors such as energy.

Sammy Ndolo and Deborah Sese



Transnet's final Network Statement published – Privatisation of the rail network will soon be a reality

The finalisation of Transnet's Network Statement (Network Statement) marks a pivotal moment in the reform of South Africa's rail sector, signalling that access to the rail network by private train operator companies (TOCs) will soon be a reality.

Published on 20 December 2024, following the promulgation of the Economic Regulation of Transport Act (ERT Act), the final Network Statement sets out the practicalities for TOCs to use the South African rail network with its own customers, subject to governance by the ERT Act, and economic oversight by the Transport Economic Regulator (Economic Regulator).

As previously discussed in our article of [Embracing privatisation of the rail industry in South Africa: Transnet's Network Statement](#), the Network Statement, if implemented properly, presents a means to reduce Transnet's debt, which reported a loss of R7,3 billion in its most recent financial year, improve the condition of South Africa's rail network, efficiencies and connectivity, encourage both local and international investment and boost the South African economy, as it will benefit the larger supply chain reliant on rail and transport in general.

To date, there has been no economic regulation of the rail sector.

The regulatory structure is simple: TOCs, and Transnet are subject to an independent infrastructure manager (IM) who manages the network, and the Economic Regulator who sets access tariffs, on a transparent, equitable and

non-discriminatory basis.

The coupling of the ERT Act, and the Network Statement, to give effect to South Africa's Rail Policy for reform provides effective means to regulate access to South Africa's rail network, and to eliminate Transnet's historical monopoly. We have discussed the implications of the ERT Act in our article of [The Promulgation of the Economic Regulation of Transport Act is a marked step towards rail reform and privatisation](#).

Access Tariff

The publication of the draft Network Statement in March 2024 drew substantial criticism regarding the affordability and nature of the access fee, initially contemplated as a singular amount applying across commodities and corridors. The final Network Statement's tariff is decidedly more affordable.

In a departure from the proposed minimum access fee of 19,79 cents/gross ton per kilometre, the Network Statement has imposed a differentiated and multi-tiered access tariff regime, similar to international practice, with variations for commodities and corridors, and a two-part tariff based on (i) train kilometres and (ii) the gross ton per kilometre.

The access fee has been reduced significantly, which may be more attractive to the industry and which levels the playing field substantially. For example, the transport of Manganese Ore is subject to a minimum access fee of R650 per train kilometre, and 5.3 cents per gross ton per kilometre. Despite industry criticism and even criticism from Transnet's Freight Rail Operator declaring the tariff based on gross ton per kilometre to be unaffordable, the gross ton per kilometre tariff

Transnet's final Network Statement published – Privatisation of the rail network will soon be a reality

CONTINUED



has remained, which includes the weight of the train, rather than net weight. This has the potential to increase transport costs and costs across the supply chain.

However, it should also be remembered that the tariff structure must still go through a process of review, involving consultation by the public and industry stakeholders, and ultimate approval by the Regulator to determine the minimum access fees. Thereafter, the minimum access fee for the 2025/2026 financial year shall be implemented by 1 April 2025.

Notably, the tariff is also intended to be determined for a multi-year period. The review determination has been removed from the Network Statement, as this lies with the Economic Regulator.

How can TOCs access the rail network?

TOCs must go through a formal application and bid process, following which, an adjudication process will take place. Bidders are also required to pay a non-refundable application fee of R125,000. Again, in a welcome departure from the high costs proposed in the draft Network Statement, this has been reduced from R500,000.

The Network Statement includes a comprehensive step-by-step guide on the application process.

TOCs must meet minimum requirements to be eligible, including completing self-screening checklists, conducting site visits and providing undertakings to participate in the IM's "Community and Social Development initiatives",

"Supplier Development Plans" and "Skills Development Plans". TOCs are also assessed based on their legislative compliance and safety track record. Successful TOCs must submit a "Risk Analysis" of their intended operations and sign the TOC-IM Rail Access Agreement in respect of slot capacity and Transport Services, and Interface Agreement. Importantly, TOCs must have a "Railway Safety Regulator Rail Safety Permit" issued by the Railway Safety Regulator, submit an Annual Safety Improvement Plan and have a "License to Operate".

The provisions of the License to Operate are not included in the Network Statement and implies there is an additional process to follow prior to access being granted. The basis for this is uncertain and will require clarification from Transnet, from which stakeholder engagement will likely follow.

It is also envisaged that TOCs enter into interface agreements with PRASA in the future, given the convergence with the passenger rail network.

Slots and Capacity Allocation

Capacity shall be allocated by the IM in a "fair, transparent and equitable manner" and based on the objectives to

CORPORATE & COMMERCIAL
ALERT

Transnet's final Network Statement published – Privatisation of the rail network will soon be a reality

CONTINUED



maximise Transnet's rail network utilisation; enable growth objectives of critical strategic economic sectors; migrate traffic from road to rail; achieve full cost recovery; and inject infrastructure investment through access tariffs. Unfortunately, how the "fair, transparent and equitable manner" principle shall be implemented in practice remains to be seen as they are not given further context or detail.

Slots and capacity are to be specifically applied annually for by TOCs pursuant to the application process and will be subject to evaluation, consultation and review.

There are also penalties imposed for failure to comply with allocated slots, and the IM is also entitled to take away capacity not used at 75% over a three-month period and to allocate such capacity to the next ranked TOC based on the outcome of the evaluation of applications for capacity.

Conditions of the Network and Security issues

Two major industry concerns regarding the Network Statement and open access relate to the condition of the network, which requires significant investment, and security issues plaguing the network.

In a welcome departure from the draft Network Statement,

"acts of theft" have been excluded as an event of *Force Majeure*. This effectively allowed any train to be cancelled due to "acts of theft" and Transnet's (and the IM's) obligations to be suspended.

However, access is provided to the network on an "as is", or "voetstoots", basis, meaning that no warranties are given in respect of the network's fitness for purpose. Whilst expected at this grassroots stage, should the state of the rail network improve following investment by TOCs, industry stakeholders may look to Transnet to providing certain warranties or guarantees as to the network's fitness and condition, providing a means to hold Transnet accountable.

Further, the minimum access fee is payable despite *Force Majeure* Events, or the TOC incurring "Declined Slots", or cancelling slots. This presents challenges given the current condition of the rail network and persistent electricity supply challenges in South Africa, as major breakdowns or

CORPORATE & COMMERCIAL
ALERT

Transnet's final Network Statement published – Privatisation of the rail network will soon be a reality

CONTINUED



2023 DealMakers

2023 1st by M&A Listed Deal Flow.
 2nd by M&A Unlisted Deal Flow.
 by M&A Unlisted Deal Value.
 by M&A Listed & Unlisted BEE Deal Flow.
 by General Corporate Finance Deal Value.
 4th by General Corporate Finance Deal Flow.

design flaws in machinery or equipment, or accidents in relation to or stoppages of the Transport Services, as well as shortages or delays, interruptions or failure in supply of electricity are *Force Majeure* Events.

The Rail Access Agreement imposes quite substantive duties on TOCs in respect of security measures, including the requirement to have their own security plans that cover cargo. This, in effect, may mean that non-compliance or inadequacies may result in breach of the Rail Access Agreement, which is a significant concern given the prevalent security issues in the rail network. No reciprocal obligations are imposed on the IM in terms of the Rail Access Agreement, and the Network Statement does not stipulate adequate measures to be taken by Transnet to address security concerns.

Whilst access is intended to start in April, due to the maintenance backlogs of the rail network, it is inevitable that this may be subject to delay.

Conclusion

In summary, Transnet's final Network Statement, alongside the Economic Regulation of Transport Act, represents a significant step toward opening South Africa's rail network to private operators and reforming South Africa's rail sector.

By opening access to private operators, Transnet's debt burden may be reduced, critical infrastructure investment may be introduced, and logistics efficiency can be improved. These changes have the potential to boost trade competitiveness, lower transport costs, and create jobs – key drivers of economic growth. However, successful implementation will essentially depend on addressing security risks, modernising infrastructure, and fostering investor confidence through transparent, equitable, and well-regulated market access. If implemented effectively, this reform could position rail as a catalyst for sustainable economic revitalisation in South Africa.

Vivien Chaplin and Gaby Wesson

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Ian Hayes

Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

David Thompson

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

Kate Anderson

Director:
Corporate & Commercial
T +27 (0)11 562 1105
M +27 (0)82 418 3784
E kate.anderson@cdhlegal.com

Tessa Brewis

Director:
Corporate & Commercial
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Vivien Chaplin

Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director:
Corporate & Commercial
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Johan de Lange

Deputy Practice Head:
Banking, Finance & Projects
Director: Projects & Infrastructure
T +27 (0)21 481 646
M +27 (0)78 642 5573
E johan.delange@cdhlegal.com

Andrew Giliam

Director:
Corporate & Commercial
T +27 (0)21 481 6363
M +27 (0)83 359 7069
E andrew.giliam@cdhlegal.com

John Gillmer

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Allan Hannie

Director:
Corporate & Commercial
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Amelia Heeger

Director:
Corporate & Commercial
T +27 (0) 11 562 1562
M +27 (0)82 850 9811
E amelia.heeger@cdhlegal.com

Peter Hesseling

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey

Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Willem Jacobs

Director:
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

Rachel Kelly

Director:
Corporate & Commercial
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director:
Corporate & Commercial
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Dane Kruger

Director:
Corporate & Commercial
T +27 (0)21 481 6362
M +27 (0)74 914 1402
E dane.kruger@cdhlegal.com

André de Lange

Sector Head: Agriculture, Aquaculture
& Fishing Sector
Director: Corporate & Commercial
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Martha Mbugua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E martha.mbugua@cdhlegal.com

Alex Muchira

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 726 472 788
E alex.muchira@cdhlegal.com

Jaco Meyer

Director:
Corporate & Commercial
T +27 (0)11 562 1749
M +27 (0)83 477 8352
E jaco.meyer@cdhlegal.com

Anita Moolman

Director:
Corporate & Commercial
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Wayne Murray

Director:
Corporate & Commercial
T +27 (0)21 405 6018
M +27 (0)79 691 0137
E wayne.murray@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Francis Newham

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

David Pinnock

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Vivek Ramsaroop

Director:
Corporate & Commercial
T +27 (0)11 562 1015
M +27 (0)82 668 2111
E vivek.ramsaroop@cdhlegal.com

Allan Reid

Executive Consultant:
Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers

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

Ludwig Smith

Sector Head: Financial Institutions,
Services & Fintech
Director: Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tayyibah Suliman

Sector Head: Technology & Communications
Director: Corporate & Commercial
T +27 (0)11 562 1667
M +27 (0)71 602 6224
E tayyibah.suliman@cdhlegal.com

Tamarin Tosen

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

Roxanna Valayathum

Joint Sector Head: Pharmaceuticals
Director: Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Andrew van Niekerk

Head: Projects & Infrastructure
Director: Corporate & Commercial
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Charl Williams

Director:
Corporate & Commercial
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Christelle Wood

Director:
Corporate & Commercial
T +27 (0)11 562 1372
M +27 (0)83 498 2850
E christelle.wood@cdhlegal.com

Alistair Young

Director:
Corporate & Commercial
T +27 (0)11 562 1258
M +27 (0)84 676 1171
E Alistair.young@cdhlegal.com

Emma Hewitt

Practice Management Director:
Corporate & Commercial
T +27 (0)11 562 1635
M +27 (0)82 896 1332
E emma.hewitt@cdhlegal.com

Alecia Pienaar

Counsel:
Environmental Law
M +27 (0)82 863 6272
E alecia.pienaar@cdhlegal.com

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.

PLEASE NOTE

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.

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

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

NAMIBIA

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

STELLENBOSCH

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

©2025 14267/JAN

