

# Corporate & Commercial



18 March 2026

## South Africa

- Non-compliance with section 41(1) of the Companies Act: When you have an issue with an issue
- Replacement policies under the regulatory spotlight: Key notes for financial service providers



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## Non-compliance with section 41(1) of the Companies Act: When you have an issue with an issue

The Companies Act 71 of 2008 (Companies Act) is no stranger to the possibility that the board of a company and its shareholders may not always see eye to eye, and while the board is given the responsibility and power to operate the company, certain protections are afforded to the shareholders in respect of fundamental matters. For instance, the board is empowered by the Companies Act to issue shares, but subject to the limitations contained in section 41. One such limitation is that an issue of shares must be approved by a special resolution of the shareholders if the shares are issued to a director of the company (present or future), prescribed officer (present or future) or a person related or interrelated to the company or a director/prescribed officer. This does not apply to all issues of shares as some are exempted from compliance, such as an issue of shares in the exercise of a pre-emptive right or an issue that is in proportion to existing holdings.

An issue of shares that falls within section 41(1) requires approval by way of a special resolution of the company's shareholders. However, in a scenario where a board has gone rogue, what happens if no approval is given prior to the issue? Can the issue of shares be ratified? Is the issue automatically void?

### **Can the issue of shares be ratified after the fact?**

Section 41 does not contain any language that suggests the issue may be ratified and accordingly, prior approval of the shareholders is most probably required. While the starting point in law is that ratification is generally as good as prior approval, the particular statutory provision needs to be considered in context. If ratification were allowed under section 41, it would raise the conundrum as to whether the subscriber (the director) could vote as shareholder on that resolution. It follows that it is unlikely that the legislature's intention was to allow ratification.

## Are the shares actually issued if shareholder approval was not obtained?

The more intriguing question is whether an issue of shares in the circumstances contemplated in section 41(1), without shareholder approval or subsequent unanimous assent, are in fact issued or whether the entire transaction would be void from the outset. Certain sections of the Companies Act, such as those relating to financial assistance, specifically provide that the action of the board is void if the approval of the shareholders is not obtained beforehand. However, that is not the case with section 41 and, moreover, section 218(1) states that unless the Companies Act specifically renders an action void, no agreement or resolution that is prohibited, voidable or unlawful in terms of the Companies Act may be declared as void unless a court has made a declaration to that effect. Accordingly, the issue of shares would not automatically be void but would need to be declared as void by a court.

The question then becomes whether the court would declare the issue of shares void or whether it would award other remedies to the affected shareholders. Lessons may be learned from case law regarding contraventions of section 41(3) (i.e. the voting power of the shares issued equals or exceeds the voting power of the same shares that were held by the shareholder immediately before the transaction or series of transactions).

A contravention of section 41(3) renders the issuance void for the following reasons:

- section 41(3) protects shareholders from excessive dilution without their consent by limiting the power of directors to issue shares without approval of the shareholders beyond the 30% limitation;
- section 41(3) thereby gives effect to section 7(i) by balancing the rights and obligations of shareholders and directors within companies;
- an issue of shares in contravention of section 41(3) ought to be deemed void so that the section can serve its purpose of protecting shareholders;
- the remedies set out in section 41(5) and section 218(2) (personal liability of directors) provide inadequate relief in instances of a breach of section 41(3);
- damages are also an inadequate form of remedy for shareholders where a person's shareholding is unlawfully diluted; and
- non-compliance with section 41(3) would also not be discouraged if shareholders were only allowed to claim damages in such instances.



Section 41(1) serves a different purpose as it – together with section 75 (which requires disclosures of personal financial interests by directors) – protects shareholders from issues of shares that favour directors or controlling shareholders, which could tilt the balance of power towards the board and away from certain shareholders (particularly minority shareholders). Nevertheless, for section 41(1) to serve its purpose of protecting shareholders in different circumstances to section 41(3), an issue in contravention of that section also ought to be declared void by a court for similar reasons as those above. Neither the remedies set out in section 41(5) and section 218(2) nor damages would provide adequate relief to the shareholders affected, and damages would not be a sufficient deterrence to prevent the board from acting in non-compliance.

**Ian Hayes, Yaniv Kleitman, Keagan Hyslop and Ridwaan Hassan**



## Chambers Global 2026 Results

### Corporate & Commercial

**2015–2026** ranked our practice in  
**Band 1: Corporate/M&A.**

**2026** ranked our practice in  
**Band 2: Private Equity.**

**2025–2026** ranked our Kenya practice in  
**Band 3: Corporate/M&A.**

### Individual Rankings

**Ian Hayes:** 2021–2026 in  
**Band 1: Corporate/M&A.**

**David Pinnock:** 2025–2026 in  
**Band 2: Private Equity** and in 2026 in  
**Band 4: Corporate/M&A.**

**Peter Hesselings:** 2019–2026 in  
**Band 2: Corporate/M&A.**

**Willem Jacobs:** 2025–2026 in  
**Band 3: Corporate/M&A** and in 2021–2026 in  
**Band 3: Private Equity.**

**Sammy Ndolo:** 2026 in  
**Band 3: Corporate/M&A.**

**Njeri Wagacha:** 2026 in  
**Band 3: Corporate/M&A.**

**David Thompson:** 2024–2026 in  
**Band 5: Corporate/M&A.**

**Vivien Chaplin:** 2023–2026 in  
**Band 5: Corporate/M&A.**

## Replacement policies under the regulatory spotlight: Key notes for financial service providers

In recent months, the insurance industry has seen an increasing number of decisions from the Financial Services Tribunal (FST) and settled complaints from the Financial Advisory and Intermediary Services Ombud (FAIS Ombud) (collectively, the Authorities) reflecting enhanced regulatory scrutiny and oversight applied in relation to financial services providers' (FSPs) compliance with their duties in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act) and the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 (FAIS Code).

This alert highlights the significant pronouncements and related guidance issued by the Authorities regarding the import, materiality, scope and assessment of FSPs' advice, disclosure and record-keeping obligations in terms of FAIS Code and what this could mean in the context of replacement policies.

### **The regulatory framework governing replacement policies**

Replacement policy advice is primarily regulated by the FAIS Act and the FAIS Code (FAIS Regulatory Framework), read together with the Policyholder Protection Rules applicable to insurers (PPR). A "*replacement policy*" arises where a FSP recommends that a policyholder terminate or vary an existing policy in order to take out a new policy, whether with the same or a different insurer. As this process may materially affect the policyholder's rights and benefits, the FAIS Regulatory Framework imposes heightened disclosure, advice and record-keeping obligations on FSPs, which operates in tandem with the Insurance Act 18 of 2017 by imposing complementary and/or 'dovetailed' duties on FSPs and insurers respectively to ensure policyholder protection.

With the aim of ensuring that policyholders fully understand the risks associated with a particular replacement policy recommended by an FSP and are able to provide informed consent in relation thereto, the FAIS Code builds in specific safeguards via the imposition of mandatory compliance obligations on FSPs, including but not limited to, the obligation to:

- Act honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.
- Provide policyholders with appropriate and adequate information, including disclosure of all material risks, obligations and limitations associated with a financial product.
- Disclose not only the **actual** and **potential** financial implications of the replacement policy, including costs and front-end charges, but also the differences in cover (including exclusions, waiting periods, excesses and retroactive dates) and any circumstances in which benefits may **not** be provided under the replacement policy.
- Ensure that the advice given is appropriate to each policyholder's specific financial needs and objectives, based on accurate and complete information.

- Provide a documented comparison schedule of the terminated product and the replacement product, including other requisite information.
- Maintain a proper record of advice provided to the policyholder.

In addition to the FAIS Code, PPR Rule 19 introduces further safeguards via the imposition of obligations on insurers to ensure appropriate procedures are established to identify replacement transactions and obtain confirmation that appropriate disclosure and advice processes were followed by FSPs when attending to a replacement transaction. If an FSP fails to disclose that a transaction constitutes a replacement policy, this may trigger reporting obligations and potential scrutiny by the FAIS Ombud and/or other supervisory authorities depending on the nature and materiality of the FSP's (mis)conduct in question. It should, however, be noted that in certain instances, it is possible for an insurer to be exempted from the provisions of PPR Rule 19.

## Practical lessons from FAIS Ombud settled complaints and FST decisions

Recent FAIS Ombud settled complaints and FST decisions illustrate the frequency and practical consequences/implications of FSPs' non-compliance with FAIS Code obligations and what this could mean in the context of replacement policies.

The FAIS Ombud has found that FSPs breached their respective FAIS Code obligations where FSPs had failed to, *inter alia*:

- exercise reasonable care, skill and diligence, and in the interests of the policyholder when providing financial services;
- explain the benefits that would be lost upon cancellation of the existing policy and/or failed to disclose exclusions, waiting periods and/or any restrictions in respect of a recommended policy, to the policyholder;
- properly assess the policyholder's actual circumstances and needs;
- maintain an adequate and consistent record of advice; and/or
- produce documentary proof that the required disclosures had been made and that the policyholder properly understood those disclosures.

These findings are drawn from various settled complaints by the FAIS Ombud, namely:

[FAIS-89422-24/25 GP 4](#),

[FAIS-79818-24/25 KZ 1](#);

[FAIS-50254-23/24 WC 6](#); and

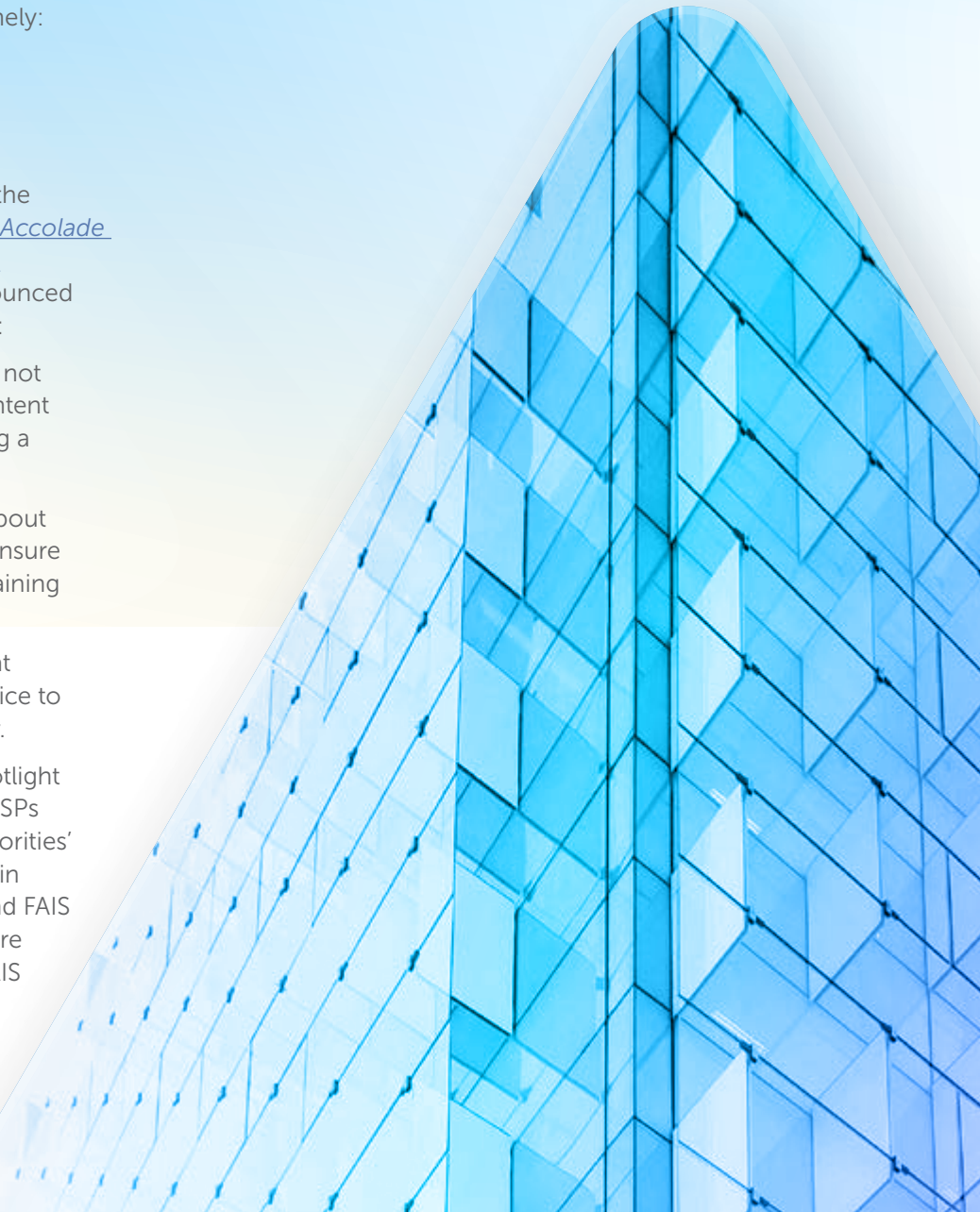
[FAIS-93742-24/25 WC 4](#).

These principles were reinforced in the recent 2026 FST decision of [Dube v Accolade Financial Planning Services \(Pty\) Ltd](#) (FSP57/2025) wherein the FST pronounced upon FSPs' FAIS Code obligations to:

- act with honesty and integrity by not acting with commission-driven intent or by deliberately misrepresenting a client's income;
- obtain appropriate information about a client's financial situation and ensure affordability by, for example, obtaining proof of income; and
- conduct an analysis based on that information before providing advice to ensure sustainability in the policy.

Given the Authorities' regulatory spotlight focusing on compliance breaches, FSPs are advised to take heed of the Authorities' cautionary pronouncements issued in terms of the recent FST decisions and FAIS Ombud's settled complaints to ensure compliance with their mandatory FAIS Code compliance obligations.

**Charl Williams, Parusha Chetty  
and Julia Roelofse**



## OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa, Kenya and Namibia 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](mailto: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](mailto:sammy.ndolo@cdhlegal.com)



### Patrick Kauta

Managing Partner | Namibia  
T +264 833 730 100  
M +264 811 447 777  
E [patrick.kauta@cdhlegal.com](mailto:patrick.kauta@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](mailto:david.thompson@cdhlegal.com)

### Shameegh Allen

Director:  
Corporate & Commercial  
T +27 (0)21 481 6399  
M +27 (0)79 967 0871  
E [shameegh.allen@cdhlegal.com](mailto:shameegh.allen@cdhlegal.com)

### Kate Anderson

Director:  
Corporate & Commercial  
T +27 (0)11 562 1105  
M +27 (0)82 418 3784  
E [kate.anderson@cdhlegal.com](mailto:kate.anderson@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](mailto: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](mailto:clem.daniel@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](mailto:andre.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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto:dane.kruger@cdhlegal.com)

### Ilda Lomba

Director | Namibia  
Corporate & Commercial  
T +264 081 125 0996  
E [ilda.lomba@cdhlegal.com](mailto:ilda.lomba@cdhlegal.com)

### Alex Muchira

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 726 472 788  
E [alex.muchira@cdhlegal.com](mailto:alex.muchira@cdhlegal.com)

### Brian Muchiri

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [brian.muchiri@cdhlegal.com](mailto:brian.muchiri@cdhlegal.com)

### Jaco Meyer

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

### Carmen Mckinlay

Director:  
Corporate & Commercial  
T +27 (0)11 562 1406  
M +27 (0)71 332 1408  
E [carmen.mckinlay@cdhlegal.com](mailto:carmen.mckinlay@cdhlegal.com)

## OUR TEAM

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

### 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

### James Ross

Director:  
Corporate & Commercial  
T +27 (0)21 481 6424  
M +27 (0)71 304 0513  
E james.ross@cdhlegal.com

### Eben Smit

Director:  
Corporate & Commercial  
T +27 (0)11 562 1745  
M +27 (0)82 404 5546  
E eben.smit@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

### Roxanna Valayathum

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

### 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

### Nuhaa Amardien

Counsel:  
Corporate & Commercial  
T +27 (0)21 405 6019  
M +27 (0)60 962 9975  
E nuhaa.amardien@cdhlegal.com

### Alecia Pienaar

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

### Christelle Wood

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

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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](mailto: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](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> 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](mailto:cdhkenya@cdhlegal.com)

**ONGWEDIVA**

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.  
T +264 (0) 81 287 8330 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

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

**WINDHOEK**

1<sup>st</sup> 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](mailto:cdhnamibia@cdhlegal.com)  
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