GUIDELINE:
The Draft Code of Good Practice on Dismissal

Scan the QR code to view our team
OR

Click here to view

On 22 January 2025, Minister of Employment and Labour published the Draft Code of Good Practice on Dismissal (the Draft Code). The Draft Code aims to refine and clarify standards for dismissals in the workplace. In addition, the Draft Code introduces several modifications in structure and content, addressing issues ranging from probation to operational requirements.

What is the Code of Good Practice: Dismissal and what is its purpose?

The Code of Good Practice: Dismissal deals with key aspects of dismissals for reasons related to conduct and capacity and provides guidance to employers, employees, trade unions and persons applying the Code on how the legal obligations under the Labour Relations Act regarding dismissals for misconduct, incapacity and operational requirements apply to employers and employees.

Most notably, the draft code also recognises the limitations of small businesses and makes specific provision for a less rigid approach to small businesses which ensures that it can still be complied with while allowing small businesses to operate viably.

PART A & B – DISMISSAL

How does the draft code balance the interests of employers and employees?

The draft code seeks to balance competing interests by ensuring the protection of employees from unfair conduct while also recognising that employers are entitled to satisfactory conduct and work performance from employees. The Draft Code provides that to the extent that the circumstances conform with fair reasons for dismissal, then an employer will be entitled to dismiss.

What is the status of collective agreements in relation to the draft code?

The rights and obligations created under a collective agreement remain unaltered by the Draft Code and take precedence.

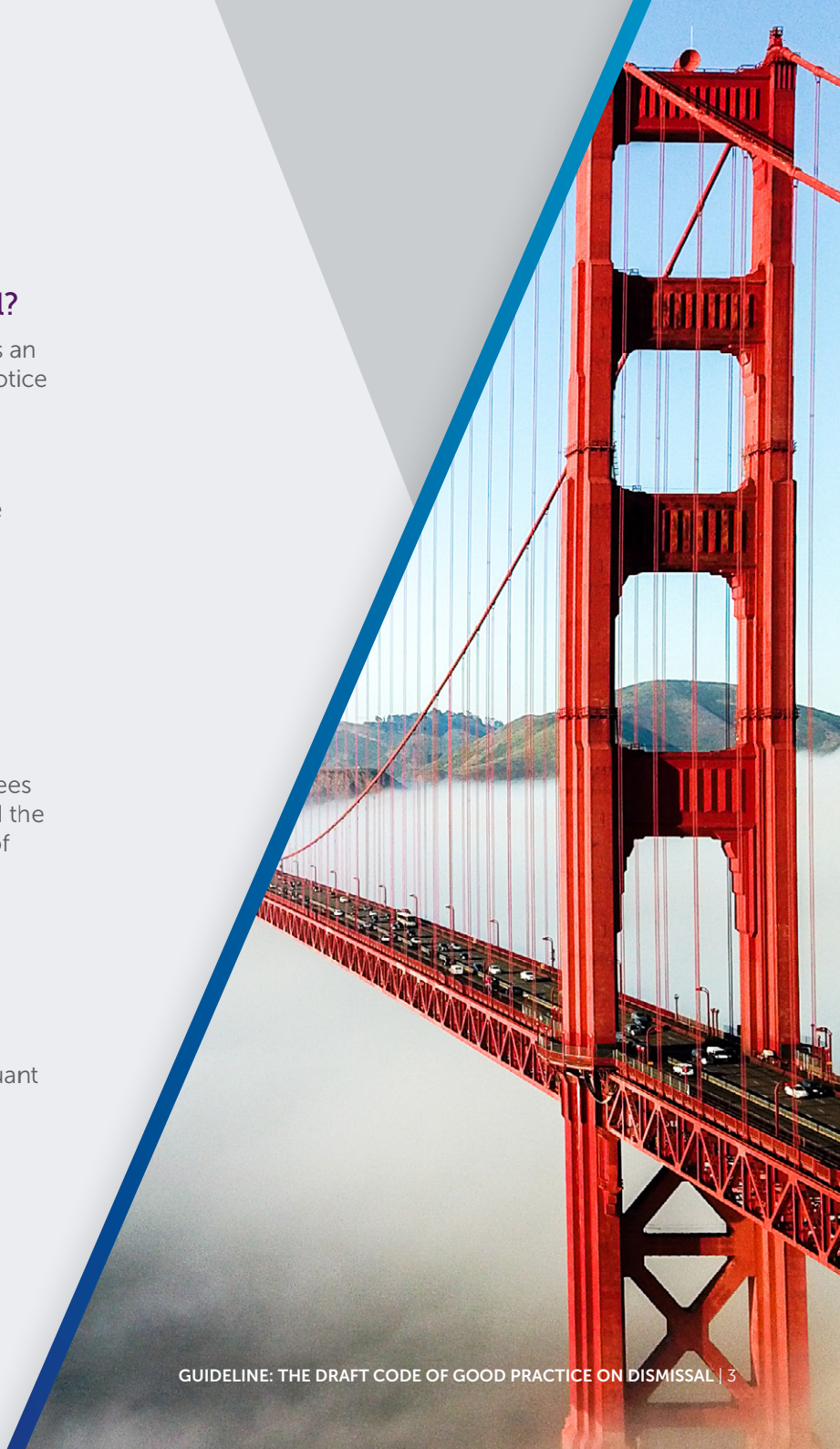
How does the draft code assist small businesses?

The Draft Code recognises that there are instances where it may be impracticable for small businesses to comply with formal procedures, including those set out in the Draft Code, and introduces flexibility for small businesses stating that disciplinary rules and procedures may differ based on the employer's size and nature and emphasising that written rules and procedures may be appropriate for medium and large employers but not for smaller businesses. However, the Draft Code does not include a definition of a small business.

What is the meaning of dismissal?

A dismissal is when an employer terminates an employee's employment with or without notice and can include the following:

- the non-renewal of an employee's fixed-term contract where the employee reasonably expected the contract to be renewed;
- the non-retention of an employee where the employee reasonably expected to be retained;
- refusing to allow an employee to resume employment after taking maternity leave;
- the dismissal of numerous employees for the same or similar reasons and the re-employment of only a portion of those dismissed employees;
- the employer making continuous employment intolerable for the employee and the employee terminating employment for that reason; and
- the dismissal of an employee pursuant to the transfer of a business as a going concern, provided that the employee was then employed on terms that were substantially less favourable with the new employer than with the old employer.



PART C – UNFAIR DISMISSAL

When is a dismissal considered "*fair*"?

A dismissal is fair if it is for a fair reason and in accordance with a fair procedure. The Labour Relations Act (LRA) lists three grounds on which a dismissal may be considered fair:

- **Conduct of the employee:** For example, misconduct or a breach of workplace rules.
- **Capacity of the employee:** Including poor work performance or ill health.
- **Operational requirements of the employer:** For example, retrenchments due to restructuring or downsizing.

When is a dismissal automatically unfair?

A dismissal is automatically unfair if it infringes on the rights of employees and trade unions, or if the reason for the dismissal is one of those listed in section 187 of the LRA. These reasons include: participation in a protected strike; pregnancy or any reason related to pregnancy; and acts of discrimination on prohibited grounds such as race, gender, or religion.

What must an employer prove if a dismissal is not automatically unfair?

In cases where a dismissal is not automatically unfair, the Draft Code provides that the employer must show that the dismissal was for a fair reason and that it was carried out in accordance with a fair procedure.

Why is fairness critical in dismissal cases?

Fairness is essential to uphold the constitutional right to fair labour practices. This principle was emphasised in the case of *County Fair v CCMA* [1998] 6 BLLR 577 (LC), in which it was stated that the Code of Good Practice should guide any determination of whether the reason for a dismissal is fair under section 188(2) of the LRA.

PART D – MISCONDUCT

Are employers required to always follow a formal disciplinary procedure?

The Draft Code emphasises that the purpose of a fair procedure is to foster dialogue and reflection, affording employees an opportunity to respond to allegations of misconduct. It further stipulates that misconduct investigations or enquiries may be informal, with their nature tailored to the specific context and size of the employer, and the frequency and severity of the misconduct in question. Employers must ensure that the disciplinary allegations are prepared with sufficient detail to allow an employee to read and understand the allegations of misconduct and thereafter adequately respond to them, albeit, via an informal process. This approach is consistent with the decriminalisation of disciplinary processes.

May employers deviate from disciplinary procedures?

The Draft Code allows for justified departures from the norms it establishes, acknowledging varied operational realities and permits flexibility if justified by the context.

What factors determine a fair sanction?

Employers should assess whether a workplace rule or standard was contravened and evaluate the reasonableness and validity of the rule. They should determine if the employee was aware or should have known about the rule and consider the rule's importance in maintaining workplace operations. Additionally, employers need to assess the harm caused by the breach, ensure the rule has been consistently applied to all employees, and evaluate whether dismissal is an appropriate sanction for the specific contravention.

When is dismissal an appropriate sanction?

Dismissal is typically reserved for situations where the continuation of the employment relationship has become intolerable. When determining the appropriateness of dismissal as a sanction, it is essential to consider the nature and requirements of the job, the severity of the misconduct and its impact on the business, and the potential effectiveness of progressive discipline in preventing future misconduct. Additionally, it is important to evaluate any acknowledgment of wrongdoing by the employee and their willingness to adhere to the employer's rules and standards. Finally, the employee's personal circumstances, including their length of service, disciplinary record, and the potential consequences of dismissal, should be taken into account.

How does consistency impact the fairness of dismissal?

Consistency ensures fairness in disciplinary action. Employees involved in similar misconduct under similar circumstances should receive comparable sanctions. However, if the misconduct irreparably damages the employment relationship, dismissal maybe fair, even if prior cases were treated differently.

Procedural steps that ensure fairness

A fair procedure ensures employees can respond to allegations before decisions are made. This typically involves notification of the alleged misconduct (preferably in writing); adequate time for the employee to prepare and present their case; the opportunity to be assisted by a fellow employee or union representative; and communicating in a language the employee understands and is comfortable with, where reasonably possible.

The process should be proportional to the nature of the allegation and the employer's size. Informal investigations may suffice for minor issues, but serious cases may require more structured procedures.

Can employees be dismissed for participating in unprotected strikes?

Yes, but dismissal must be substantively and procedurally fair. Employers should consider factors such as the seriousness of the strike's illegality; attempts by employees to comply with the law; and whether the strike was provoked by the employer's unlawful or unreasonable conduct.

What steps should an employer take before dismissal for participating in unprotected strikes?

The employer should notify the trade union or employee representatives of the strike, engage in discussions to address the dispute, issue a clear and unambiguous ultimatum outlining the required actions and potential consequences of non-compliance, and allow employees reasonable time to comply with the ultimatum.

What is the importance of disciplinary records?

Employers should maintain records of employee misconduct, disciplinary actions taken, and the reasons for those actions. This ensures accountability and provides evidence in the event of disputes.

PART E – PROBATION

What is probation and what is its purpose?

Probation is a period during which a newly hired employee's performance and suitability for employment are evaluated. An employer may require an employee to serve a probationary period before confirming their appointment.

The purpose of this is to give the employer an opportunity to assess the employee's performance and determine whether the employee is suitable for continued employment.

Probation must not be used to deprive employees of the status of permanent employment. For example, dismissing employees at the end of probation for reasons unrelated to their performance or suitability and replacing them with new hires is inconsistent with the purpose of probation and may be considered an unfair dismissal.

How long should the probation period be?

The probation period should be determined in advance and be of a reasonable duration, taking into account the nature of the job and the time required to evaluate the employee's suitability for continued employment.

What are the responsibilities of the employer during probation?

During probation, employers must provide employees with reasonable guidance to help them render satisfactory service. This may include instruction, training or counselling.

The nature and extent of this guidance should be appropriate to the job and the size of the employer's operations.

Can an employer decide not to confirm an employee's appointment after probation?

Yes, but only after following a fair process. The employer must provide the employee with an opportunity to make representations and consider these representations before making a decision to either to dismiss the employee or extend the probationary period.

What standard applies to dismissals during probation?

If a dismissal is related to the employee's conduct or capacity, including poor work performance, decision-makers should accept reasons for dismissal that are less compelling than those required for dismissals after probation. This aligns with the purpose of probation as a period of evaluation.

This marks a slight shift from the current Code. Courts have consistently held that arbitrators should be cautious about interfering with an employer's decision on whether a probationary employee has met the required performance standards.

Is there a change from the current Code?

The Draft Code emphasises the need for reasonable guidance to be provided to employees during the probation period. However, unlike the previous Code, which was more specific about the requirements for guidance and evaluation, the draft Code adopts a more flexible approach.

This flexibility allows the nature and extent of reasonable guidance to be adapted based on the size and resources of the employer and the nature of the employee's role.

Furthermore, the Draft Code states that probation should not be used as a mechanism to deprive employees of permanent employment status. Misusing probation in this manner may constitute an unfair dismissal, whereas in the current Code it is deemed an unfair labour practice.

PART F – INCAPACITY

Is it fair to dismiss an employee for poor work performance without first issuing the employee with a warning?

Yes. Employers might not need to warn employees about potential dismissal due to poor work performance, especially in the case of managers, senior employees, and highly skilled professionals. These individuals are expected to have the knowledge and experience to assess whether their performance meets the required standards.

How should incapacity be dealt with in the workplace?

If an employee is unable to work due to physical or mental health issues or injury, whether temporarily or permanently, employers should assess the severity and cause of the incapacity and explore all alternatives before considering dismissal. Factors to consider include the nature of the job, the length of the absence, the seriousness of the condition, and the feasibility of finding a temporary replacement. Employees should be given the chance to present their case and be supported by a trade union representative or fellow employee. For permanent incapacity, employers should look into the possibility of alternative employment or modifying the employee's duties or work environment to accommodate their disability.

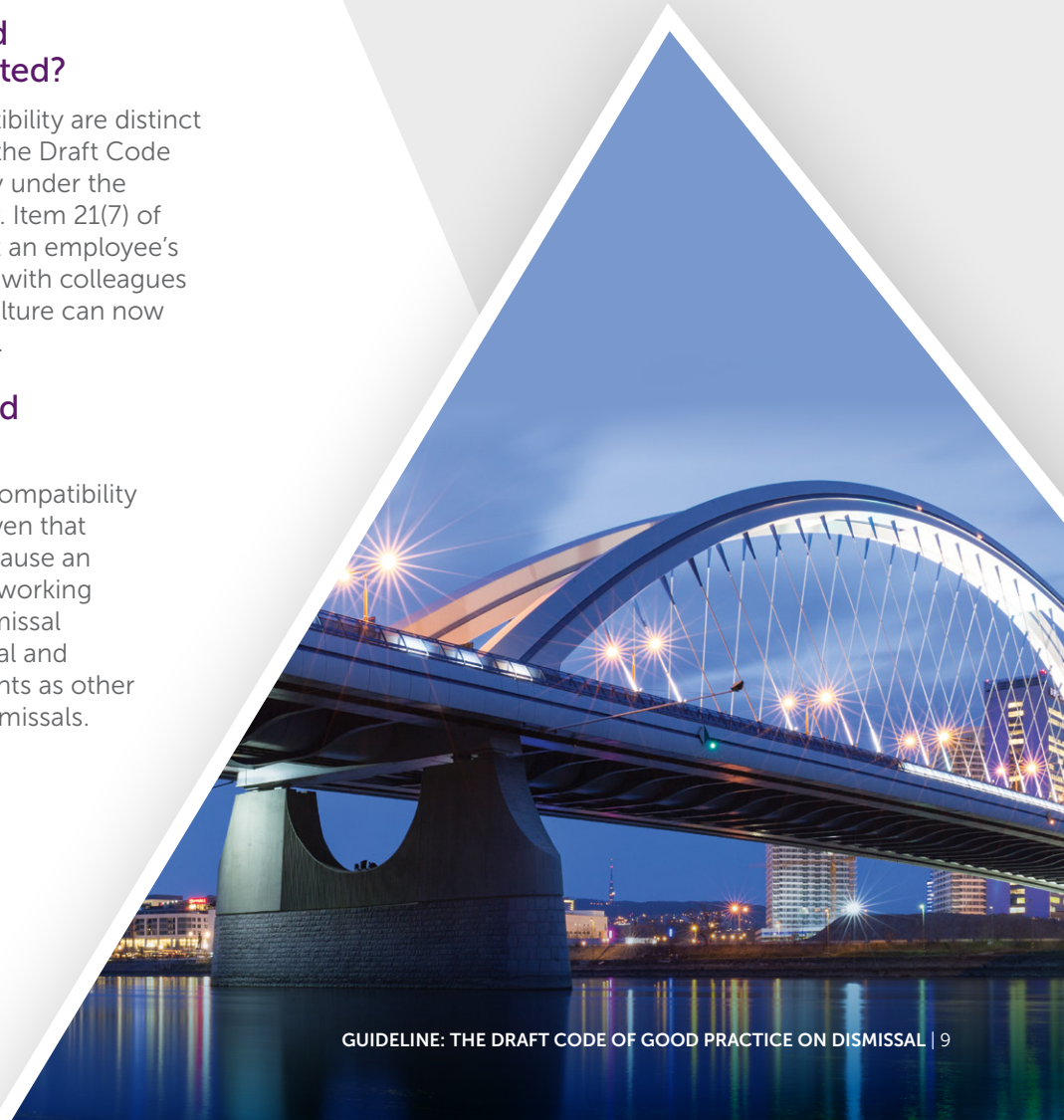
In situations where the incapacity of the employee is due to a work-related illness, the duty on the employer to accommodate the employee is more onerous.

How are incapacity and incompatibility connected?

While incapacity and incompatibility are distinct concepts in employment law, the Draft Code explicitly places incompatibility under the broader umbrella of incapacity. Item 21(7) of the Draft Code recognises that an employee's inability to work harmoniously with colleagues or align with the employer's culture can now constitute a form of incapacity.

Can incompatibility lead to dismissal?

In terms of the Draft Code, incompatibility may justify dismissal if it is proven that the issue is severe enough to cause an irretrievable breakdown in the working relationship. However, this dismissal must meet the same procedural and substantive fairness requirements as other forms of incapacity-related dismissals.



PART G – OPERATIONAL REQUIREMENTS

What constitutes a dismissal for operational requirements?

Dismissal for operational requirements are based on the economic, technological, structural, or similar needs of the employer. This is commonly referred to as retrenchment.

Economic reasons: These relate to the financial state of the employer and the need to reduce costs or improve profitability.

Technological reasons: Refer to new technologies that either make existing jobs redundant or require significant workplace restructuring.

Structural reasons: Arise from reorganisations or changes to the employer's business structure, leading to job redundancies.

What are the key changes in the Draft Code regarding operational requirements?

The Draft Code incorporates dismissals relating to operational requirements, which were previously addressed separately. It reflects and consolidates existing principles and emphasises the importance of procedural clarity and fairness.

The Draft Code introduces an annexure detailing the format for a Section 189(3) notice, providing a standardised approach for the notice in retrenchments as set out below.

Number and job categories of employees	How many employees are likely to be affected and in what job categories?
Reasons	What are the operational reasons for the proposed retrenchments?
Alternatives	What alternatives were considered? • If those alternatives have not been pursued, why not? • If any alternatives are offered, what are they?
Selection criteria	What criteria are proposed for selecting the employees for retrenchment?
When the proposed retrenchments will take place	At what time or during which period will the proposed retrenchments take place?
Severance pay	What is the proposed severance pay to be paid?
Assistance	What assistance does the employer propose to offer to the retrenched employee?
Re-employment	• Is there any possibility of re-employment? • If so, who will be offered employment first, and what are the arrangements for keeping in contact?
Employers with more than 50 employees	Employers which employ more than 50 employees must disclose the number of employees employed by the employer and the number of employees that the employer has retrenched in the preceding 12 months.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2025 ranked our Employment Law practice in Band 1 for employment and from *2014–2024* in Band 2. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024–2025* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2025 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

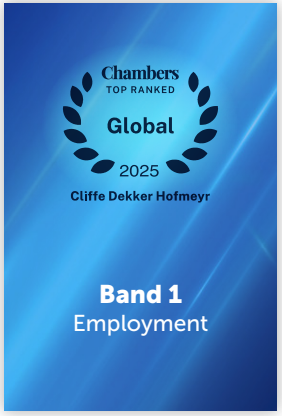
Chambers Global 2021–2025 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

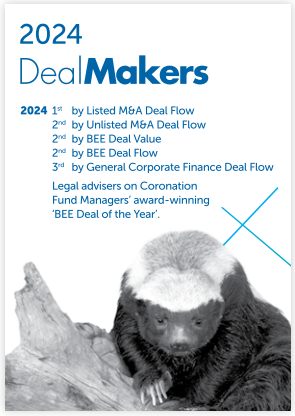
The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

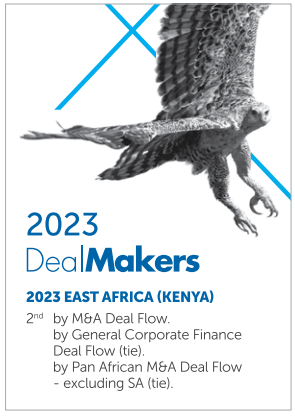
The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2025 ranked Ngeri Wagacha in Band 2 for Fintech, and in Band 3 in *2024*. *Chambers 2025* ranked her in Band 4 for corporate/M&A. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A. *IFLR1000 2024* ranked Njeri as a highly regarded lawyer in Private equity, and M&A.







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