

Dispute Resolution

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An emerging sector in South Africa
and new offering at CDH



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**DISPUTE RESOLUTION
ALERT**

Business and human rights: An emerging sector in South Africa and new offering at CDH

"Under the constitutional dispensation it is no longer legally viable for a company to claim that its adherence to human rights norms is strictly voluntary." – D Bilchitz

Human rights encompass a range of civil, political, social, cultural, and environmental rights. Business and human rights (BHR) has gained significant traction and concern globally due to the corporate responsibility it places on businesses to comply with human rights obligations and standards during their business operations and engagements.

BHR enables and requires a business to avoid, mitigate, respect and remedy its involvement in human rights abuses that may occur as a direct or indirect result of a business or a third party's business operations or involvement.

Businesses have human rights responsibilities towards the people and environments that are affected by its business operations and, where these responsibilities are not explicitly set out by domestic law, businesses are encouraged to take guidance from international human rights norms, best practices, treaties and standards which contain BHR commitments. The impact of businesses on human rights should be evaluated prior to the commencement of operations or activities and be consistently monitored. Potential violations ought to be prevented or detected and responded to from the outset.

A specific focus of BHR is on the rights of indigenous people; women; national, ethnic, religious and linguistic minorities; children; persons with disabilities; migrant workers; and any other vulnerable groups of society who are at a high risk of having their human rights violated by the activities of a business. An action plan should be developed with management strategies to address specific risks which may arise in respect of categories such as cultural heritage; environmental management and conservation; health and safety; governance and ethics; security and human rights; transformation; human rights at the workplace; child labour and modern slavery; and land use and resettlements.

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Global standards

The United Nations Guiding Principles on BHR (UNGPs) are the global standard on BHR and govern BHR obligations. Although the UNGPs are not binding, they are the most authoritative international principles to date in respect of BHR. They are based on three pillars: protect, respect and remedy. Each of these pillars defines concrete measures for governments and companies to meet their respective duties and responsibilities in order to prevent human rights abuses in company operations and provide remedies if such abuses take place. The UNGPs affirm that business enterprises must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to.

In order to meet the corporate responsibility to respect and protect human rights, the UNGPs identify three components of corporate responsibility: corporations must institute a policy commitment to meet the responsibility to respect human rights; corporations must undertake ongoing human rights due diligences to identify, prevent, mitigate and account for their human rights impacts; and corporations must have processes in place to enable remediation for any adverse human rights impacts they cause or contribute to. This is equally important when a merger or a corporate acquisition is contemplated – does any corporate want to take on the legal risks that a target has which arise from BHR violations?

The most recent development underway in international law, the draft treaty titled: *“Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”* (Draft Treaty) proposes introducing liability for juristic entities for human rights abuses that may arise from their business activities. It further proposes that states must ensure that their domestic laws provide for the liability of corporations for their failure to prevent an entity or natural person that they control, manage or supervise from causing or contributing to human rights abuses. Liability also extends to circumstances where the controlling legal entity should have foreseen risks of human rights abuses in the conduct of the business activities of other entities that they control, including those of a transnational character, but failed to take adequate measures to prevent the human rights abuse.

Cliffe Dekker Hofmeyr is proud to announce its offering of advice on BHR and would like to encourage clients and businesses alike to adhere to BHR principles and incorporate them into plans and policies. Failure to introduce and implement BHR principles would lead to reputational, financial and legal risks.

Tanya Calitz and Marelise van der Westhuizen

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Imraan Abdullah

Director:
Dispute Resolution
T +27 (0)11 562 1177
E imraan.abdullah@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Denise Durand

Director:
Dispute Resolution
T +27 (0)11 562 1835
E denise.durand@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Nastascha Harduth

Sector Head: Corporate Debt,
Turnaround & Restructuring
Director: Dispute Resolution
T +27 (0)11 562 1453
E n.harduth@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Nomlayo Mabhena-Mlilo

Director:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Sentebale Makara

Director:
Dispute Resolution
T +27 (0)11 562 1181
E sentebale.makara@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Khaya Mantengu

Director:
Dispute Resolution
T +27 (0)11 562 1312
E khaya.mantengu@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Desmond Odhiambo

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

Lucinde Rhodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Marelise van der Westhuizen

Director:
Dispute Resolution
T +27 (0)11 562 1208
E marelise.vanderwesthuizen@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@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

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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