



LISTED COMPANIES

CDH – YOUR LEGAL PARTNER IN NAVIGATING VOLATILE MARKETS

Recent market reaction to various allegations of regulatory non-compliance or formal investigations has reduced some listed companies' market capitalisation by more than 50%.

The environment is ever more challenging and volatile. Traditional risk areas are becoming more prominent and there is increased scrutiny by regulators like the Johannesburg Stock Exchange (JSE), new Financial Sector Conduct Authority (FSCA) and even the Companies and Intellectual Property Commission (CIPC). New risk areas are emerging with activist institutional investors voting against remuneration policies and attempting to reconstitute boards, individual shareholders regularly exercising appraisal rights and perceived US-style "*short and distort*" campaigns.

Compliance and good governance are high on the boardroom agenda with asset managers and commentators becoming more vocal. This is a major challenge in a constantly evolving regulatory environment, often with a disconnect between the black-letter law of the regulations and the practices adopted in the market.

To navigate this, your board, management and in-house legal counsel need advisors with deep experience and a tailored, solutions-based approach.

CDH regularly works with many of the players in the South African corporate services space. We are able to recommend or work with your chosen expert service providers (such as corporate advisor, sponsor, investor relations professional, fairness opinion provider) and deliver advice tailored to your particular situation.

CDH enjoys cordial relationships with key regulators, including the JSE, the Takeover Regulation Panel (TRP), the FSCA and the newly licensed exchanges. We are able to approach these regulators on behalf of clients in order to establish policy positions, clarify complex issues, or sometimes to obtain a non-binding view on a no-names basis.

CDH – MARKET LEADER IN SERVICING JSE-LISTED CORPORATIONS

CDH are exceptionally strong in the JSE listed M&A and Corporate Finance markets, servicing clients from both our Johannesburg and Cape Town offices. For the last 10 years, we have ranked first for advising on more M&A deals involving JSE listed entities than any other law firm.

We advise South African and foreign JSE-listed clients across all sectors, including financial services, information and communication technology, mining, commodities and fast-moving consumer goods and have a particularly strong involvement in the listed-property and real estate investment trust sector (REIT). Our recent experience includes:

- Advising on and providing project management services on various corporate actions, including initial and secondary offerings, restructures, buy backs, capitalisation issues, consolidations and sub-divisions of share capital, odd-lot offers, rights offers, unbundling transactions and schemes of arrangement
- Drafting and advising on offering documents, including prospectuses, pre-listing statements, documentation related to book-builds and accelerated book-builds (placement agreements, etc)
- Drafting and advising on announcements, circulars, reviewing annual general meeting (AGM) and special general meeting notices from a Companies Act, JSE Listings Requirements and Financial Markets Act compliance perspective
- Review of memoranda of incorporation (MOIs) to ensure compliance with JSE Listings Requirements, maximum flexibility for the company and inclusion of cutting-edge enabling provisions

- In-house workshops and training sessions on selected aspects of the JSE Listings Requirements
- Assisting companies and their JSE sponsors in dealing with questions and challenges from the JSE in relation to compliance with JSE Listings Requirements

An aspect of listed action which by its nature receives fewer accolades, is legal services to listed companies facing hostile action. Recent experience includes:

- A long running attempt to acquire a controlling interest in our client which we successfully defended
- A board takeover by a consortium of asset managers (that is, an attempt to reconstitute the listed company's board)
- An attempt by a dissenting shareholder to derail a major group restructure aimed at collapsing a pyramid structure in the group (that is, an attempt by a minority shareholder to prevent a corporate restructure from being implemented and trigger obligation to make a mandatory offer) which we successfully defended
- Allegations made by short-sellers as part of "short and distort" campaigns

CDH – fireproofing
and firefighting in
the listed space

We divide our service offerings into the following:



FIREPROOFING

Identifying the key risk areas and ensuring that practices are compliant with the legal and regulatory framework



FIREFIGHTING

Ensuring that the appropriate support structures are in place to “fight the fire”, should a fire break out



CDH FIREPROOFING SERVICES

CORPORATE GOVERNANCE

- General advice on corporate governance and directors’ obligations
- Advice on legal and governance requirements in respect of board and committee meetings
- Reviewing and developing board charters and sub-committees’ terms of reference to align with King IV
- Advice in relation to the identification of “prescribed officers”
- Drafting agenda, notices and proposed resolutions
- Reviewing sections of integrated annual reports (such as directors’ information, corporate governance statements, committee reports, AGM notices etc) to align with best practice
- In-house workshops, training sessions and board presentations on corporate governance and directors’ obligations



AGMS



RISKS INCLUDE

AGMs being derailed:

Traditionally AGMs were meetings that were not well attended in person, as most of the voting is done by proxy and is essentially settled prior to the AGM.

This has changed in that shareholder activists are attending AGMs and challenging the chairman and the board on a number of issues (often related to company strategy and remuneration).

Resolutions being rejected by shareholders:

Companies have traditionally managed their risk by discussing key matters to be dealt with at the AGM with institutional investors prior to the meeting.

Institutional investors that now disclose how they voted on matters and are thus accountable to their investors, have recently frequently voted against resolutions at AGMs, particularly the non-binding vote on remuneration policy¹.

Resolutions not being compliant:

In our experience a template approach is often applied by companies when drafting the notice of the AGM and the resolutions to be included therein, and not enough thought and attention is given to this important aspect.

¹ A PwC report on executive director remuneration shows that the Public Investment Corporation, Old Mutual, Allan Gray and Coronation voted against a significant number of remuneration policies at JSE-listed companies between September 2017 and May 2018 (44,9%, 37%, 28,6% and 20,9% respectively).



FIREPROOFING SERVICES

- Review of AGM or meeting notices and resolutions to ensure compliance with the applicable laws and regulations (this is especially important with regard to those resolutions required in terms of the JSE Listings Requirements given that the details of those resolutions are updated in the JSE Listings Requirements on a frequent basis)
- Attendance at client AGM and analyst presentations to provide support to the chairman of the meeting should any additional resolutions be proposed, a shareholder attempt to derail the meeting or have some other business heard
- Assist in preparation of AGM chairman script and Q&A documents
- Legal advice in relation to conduct of meetings, postponements and adjournments, and amendments of resolutions
- Advising and overseeing implementation of resolutions adopted at the meeting
- In-house workshops with listed companies to:
 - Sensitise them regarding those areas which are often targeted by activist shareholders
 - Identify areas of weakness
 - Develop measures to ensure the company is well-positioned to deal with any issues raised by activist shareholders
- Assist and advise listed companies in dealing with activist shareholders
- Advice in relation to access to company information.
- Advice in relation to requests for access to share registers



DEALINGS IN THE COMPANY'S SECURITIES AND USE AND DISCLOSURE OF PRICE SENSITIVE INFORMATION



RISKS INCLUDE

- Dual applicability of the Financial Markets Act (FMA) and JSE Listings Requirements, meaning that it is necessary to comply from a directors' dealings perspective under the JSE Listings Requirements and to guard against insider trading from the FMA perspective
- Allegations that share price is being inflated and liquidity levels being synthetically increased by directors or associates trading in the securities of the company among themselves
- Unlawful use or disclosure of price sensitive information



FIREPROOFING SERVICES

- In-house workshops and training sessions on compliance with the JSE Listings Requirements and FMA
- Advice on when cautionaries and announcements are required
- Advice on directors' dealings and related disclosures
- Advice on insider trading and market abuse.
- Drafting of company policies on share dealings
- Drafting of company policies on price sensitive information and announcements
- Advice on legal implications of being in possession of price sensitive information in the context of corporate actions



SHARE INCENTIVE SCHEMES



RISKS INCLUDE

- Share incentive schemes provide an avenue for the board to issue or otherwise transfer shares to executives or other participants without recourse to the shareholders, meaning these schemes are often focused on by activist shareholders
- It is common for the company to fund the acquisition of those securities by advancing credit to participants, and this brings about risk in that (i) it may have National Credit Act implications and require the lender to be a registered credit provider, (ii) advancing credit to executives to participate in share schemes has also been highlighted in various disparaging analyst and short-seller reports and (iii) to the extent that the share debt becomes repayable at a time where the market is at a low and the shares are under water, this can create difficulty for the company and the participant borrower
- In terms of Schedule 14 of the JSE Listings Requirements, if shares are issued under the share incentive scheme in a manner that does not comply with Schedule 14, this is deemed to be an issue of shares for cash



FIREPROOFING SERVICES

- Structuring and drafting of various types of share-based incentive structures, including a full suite of implementation documents
- Structuring debt-funded share incentive schemes that are compliant from a National Credit Act perspective and are consistent with best practice, including maximum share debt thresholds and providing appropriate mechanisms for situations where the underlying assets are insufficient to settle the share debt when it becomes due
- Advice on compliance with the JSE Listings Requirements, National Credit Act and Companies Act
- Statutory and legal compliance audit and implementation manuals
- Practical guidance during each round of allocations under the share incentive scheme to ensure compliance with the terms of the scheme and Schedule 14 of the JSE Listings Requirements to guard against the issue being deemed an issue of shares for cash
- Advice on disclosure obligations, including directors' dealings implications
- Advice on the impact of share-based incentive structures on remuneration policies and implementation policies



Legal assistance in navigating the shareholder appraisal rights procedure should the company receive a notice from a dissenting shareholder under s164 of the Companies Act.

Given our wealth of experience, we are uniquely placed to offer firefighting services should the need arise.



- Advising and representing listed companies, directors and other market participants in insider trading and market abuse investigations. For example, advising clients on what constitutes inside information, whether parties may deal in securities when in possession of information not in the public domain, when announcements are required by a company in relation to price sensitive information, and when embargos should be placed or lifted on the dealing in securities
- Advice regarding allegations on matters such as:
 - Non-compliant directors' dealings
 - Related party transactions and concert party actions
 - The obligation to make a mandatory offer
- Advice in relation to the removal of existing board members and potential reconstitution of the board
- Advice on defending hostile attempts to acquire control of the company
- Advice on disputes before the Takeover Special Committee
- Legal assistance in navigating the shareholder appraisal rights procedure should the company receive a notice from a dissenting shareholder under s164 of the Companies Act

MARKET RECOGNITION

The way we support and interact with our clients attracts significant external recognition.

Ian Hayes is the Practice Head of the Corporate & Commercial team. *Chambers Global 2021–2023* ranked him in Band 1 for corporate/M&A. *The Legal 500 EMEA 2022* recommended Ian for banking & finance. *The Legal 500 EMEA 2015–2023* included him in the 'Hall of Fame' for commercial, corporate/M&A. *The Legal 500 EMEA 2022–2023* also recommended Ian in the 'Hall of Fame' for mining. *IFLR1000 2021–2022* ranked Ian as highly regarded in capital markets: debt, capital markets: equity, energy and infrastructure, M&A, and private equity.

André de Lange is the Head of the Agriculture, Aquaculture & Fishing sector. *The Legal 500 EMEA 2022* recommended him for banking & finance.

Chambers Global 2019–2023 ranked **Peter Hesseling** in Band 2 for corporate/M&A. *Chambers Global 2023* ranked him in Band 3 for Capital Markets: Equity. *Chambers Global 2017–2018* ranked him in Band 3 for corporate/M&A. *The Legal 500 EMEA 2022* recommended Peter for banking & finance. *The Legal 500 EMEA 2012–2023* recommended Peter for commercial, corporate/M&A. *IFLR1000 2021–2022* recommended Peter as a market leader for restructuring & insolvency, and M&A. *IFLR1000 2018–2020* recommended Peter as a highly regarded lawyer for restructuring & insolvency, and M&A.

Chambers Global 2014–2023 ranked **Willem Jacobs** in Band 2 for corporate/M&A and in 2022–2023 ranked him in Band 3 for corporate/M&A: Private Equity. *The Legal 500 EMEA 2016–2023* recommended him as a leading individual for commercial, corporate/M&A. Willem was also recommended in 2012–2016 for mining. *IFLR1000 2018–2022* recommended Willem as a highly regarded lawyer for M&A, and private equity.

IFLR1000 2018–2022 recommended **Yaniv Kleitman** as a notable practitioner in M&A.

IFLR1000 2021–2022 ranked **Anita Moolman** as highly regarded in M&A.

David Pinnock is the Joint Head of the Private Equity sector, and a director in our Corporate & Commercial practice. *Chambers Global 2017–2023* ranked David in Band 1 for corporate/M&A: Private Equity. *The Legal 500 EMEA 2020–2023* recommended him as a leading individual for commercial, corporate/M&A. *The Legal 500 EMEA 2016–2019* recommended him for commercial, corporate/M&A. *IFLR1000 2018–2022* recommended David as a notable practitioner in private equity, and M&A.

David Thompson is a director and the Deputy Practice Head in our Corporate & Commercial practice. *Chambers Global 2015–2023* ranked him in Band 4 for corporate/M&A. *The Legal 500 EMEA 2020* and 2022–2023 recommended him for corporate, commercial/M&A. *IFLR1000 2021–2022* ranked David as highly regarded in M&A.

The Legal 500 EMEA 2021–2022 recommended **Roux van der Merwe** for commercial, corporate/M&A. *IFLR1000 2021–2022* ranked Roux as highly regarded in M&A.



OUR TEAM

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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.

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.

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