CORPORATE & COMMERCIAL
ALERT

27 JULY 2022

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

The story of the Vrrr Pha (Volkswagen Golf) gone wrong

It is trite in law that a company is a separate juristic entity. This means, among other things, that the debts of the company cannot be regarded as the debts of its shareholders or directors.

This is, however, not cast in stone as seen in the recent High Court judgment regarding *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431 (*Kolisang case*).

BACKGROUND

The salient facts of the *Kolisang case* are as follows:

- The second respondent, a director (Director) of the first respondent, Alegrand General Dealers and Auctioneers (Company), sold to the applicant a motor vehicle described as a 2012 Golf GTI. It later transpired that the Director misrepresented the model of motor vehicle which was in fact a 2010 Golf GTI.
- The applicant cancelled the agreement and returned the motor vehicle. However, the Company refused to refund the purchase price to the applicant.
- The applicant instituted proceedings in the Magistrate Court to recover the purchase price. Judgment was granted in favour of the applicant as the Company did not defend the legal proceedings.
- Despite the court order, the Company did not refund the purchase price.
- The Director resigned from the Company and sold the business. He then contended, among other things, that (i) the sale of business agreement contained an indemnity for any claims and; (ii) the Company (and not him personally) remained liable to refund the purchase price.

The key issue before the court was whether the Director's misrepresentation amounted to unconscionable conduct entitling the court to pierce the corporate veil.

The pertinent provision in the *Kolisang case* was section 20(9) of the Companies Act 71 of 2008. This section provides a court with the discretion to ignore the limited liability of a company when there is *"unconscionable abuse"* of the company's separate juristic personality.

The court relied on earlier cases in interpreting "unconscionable abuse". It is wide enough to cover terms such as *"sham"*, *"device"*, *"stratagem"* and the like used in earlier cases. The court in particular cited *Ex parte Gore NO and Others NNO* (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries). In addition, the remedy may be used *"whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced"*.

The story of the Vrrr Pha (Volkswagen Golf) gone wrong

CONTINUED

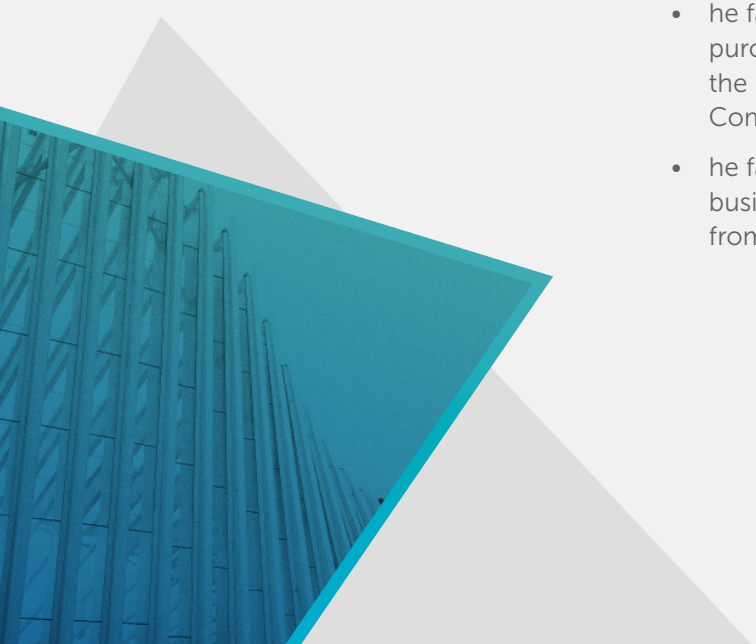
UNCONSCIONABLE ABUSE

In the *Kolisang case*, the court found that the Director's conduct set out below, among other things, constituted unconscionable abuse of the Company's juristic personality:

- he considered himself the owner of the company;
- he was reckless, dishonest and did not act in the best interest of the company;
- he had a careless disregard for the interest of the company as he failed to defend the proceedings in the magistrate court;
- he failed to notify the purchaser of the business of the legal action against the Company; and
- he fabricated the sale of business to distance himself from any personal liability.

The court was satisfied that the Director's conduct (the misrepresentation) was intended and did in fact induce the applicant to purchase the motor vehicle and granted an order in favour of the applicant. While the misrepresentation was reprehensible, it does not appear that the Director conflated himself and the Company to be one and the same. In our view, by selling the business, he actually appreciated the divide between the Company's legal personality and that of his own because he tried to evade ultimate liability. Failing to ensure that the Company was defended in the proceedings was, in our view, irrelevant as there is no obligation to defend. By not notifying the purchaser of the business of the legal action, he clearly intended to defraud or misrepresent the new acquirer by having the new acquirer assume liability under the claim. But even so, the new acquirer would have their own legal remedies for this conduct (including any breach of the Director's fiduciary duties).

It would seem that the court in the *Kolisang case* was lenient in determining whether the misrepresentation by the Director constituted "*unconscionable abuse of the juristic personality*" and other appropriate legal remedies could have been sought to compensate the applicant. For instance, in the recent Western Cape High Court decision in *Department of Agriculture, Forestry and Fisheries and another v B Xulu and Partners Incorporated and Others* [2022] 1 All SA 434 (WCC), the court found that using a company dishonestly and improperly such as appropriating funds of a company for personal affairs constituted unconscionable abuse by its controllers. In this regard the entity is treated in a way that draws no distinction between the separate juristic personality of the entity and those in control of it.



The story of the Vrrr Pha (Volkswagen Golf) gone wrong

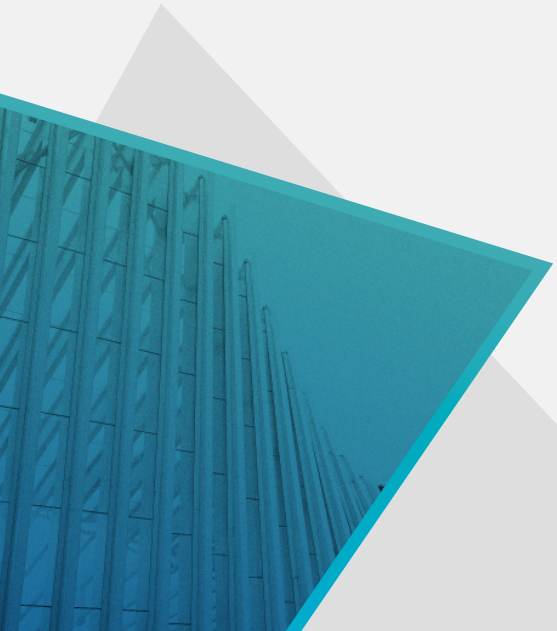
CONTINUED

PIERCING THE CORPORATE VEIL

The *Kolisang case* reminds directors serving on boards of companies that the standard to be held liable for the obligations of a company may, in certain facts, be quite low. Furthermore, companies have legal personality and cannot be utilised as alter egos. Failure thereof may result in a court piercing the corporate veil and consequently finding directors personally liable, as if the company did not exist. Further, a resignation by a director cannot be used as a means of evading liability and fiduciary duties must always be observed when acting on behalf of companies.

It will be interesting to see how the *Kolisang case* will be applied by other courts, if at all, in comparison to earlier judgments. In light of the *Kolisang case*, extreme caution may need to be followed going forward.

BRIAN JENNINGS,
THANDIWE NHLAPHO AND
STORM ARENDS



High Court sets aside B-BEE Commission's findings

In *Sasol Oil Limited v The B-BBEE Commission and Others* (21415/2020) [2022] ZAGPPHC 431 (14 June 2022) the High Court of South Africa (Gauteng Division, Pretoria) was called upon to determine whether certain adverse findings of fronting made by the B-BEE Commission (Commission) against Sasol Oil Limited (Sasol Oil) should be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000.

The Commission, acting on a complaint received against Sasol Oil in 2017, made certain "*final findings*" in 2019 that were adverse to Sasol Oil. One of these findings was that Sasol Oil was somehow responsible for the terms of a shareholder funding agreement entered into by one of its shareholders (Golden Falls) to facilitate its acquisition of shares in Sasol Oil. However, Sasol Oil was not aware of the existence of this agreement until Golden Falls had asked Sasol Oil to facilitate a negotiation in respect of disputes arising from this agreement, which Sasol Oil had then done and was of the view that matters had been satisfactorily resolved. The Commission, ignoring the evidence in front of it while acting on irrational assumptions which were erroneous, found that Sasol Oil had engaged in fronting.

The High Court, having examined all evidence before it, set aside all of the Commission's findings against Sasol Oil, calling these findings "*irrelevant*", "*irrational*" and "*unreasonable*" and concluding that the findings were made arbitrarily or capriciously. However, there are two particular findings of the court in this judgment that merit attention and may be relevant to anyone having had dealings with the Commission in the past or needing to have dealings with the Commission in the future.

THE COMMISSION'S "*RECOMMENDATIONS*" FOLLOWING ITS FINAL FINDINGS

The Commission made certain recommendations against Sasol Oil. These included a recommendation that Sasol Oil contribute a whopping 10% of its annual turnover to a bursary fund. Those who have had engagements with the Commission during the course of the Commission's investigations may be familiar with this recommendation, which is sometimes raised as a proposed settlement mechanism by the Commission.

The Commission, when pressed by the court as to the source of its powers to be able to make such recommendations, was not able to answer. The court found that the Commission was not authorised to make these recommendations and, damningly, that the Commission had threatened to exercise its statutory powers for an ulterior purpose of compelling Sasol Oil to adopt and implement its unlawful recommendations.

TIME BARRED FINDINGS

In terms of the Broad-Based Black Economic Empowerment Regulations (2016) (Regulations), the Commission must, within one year of receiving a complaint, make a finding, with or without recommendations. In this case, a complaint against Sasol Oil was lodged with the Commission in December 2016, with final findings being issued on 7 October 2019. Sasol Oil contended that the Commission's findings were time barred as the report was rendered outside of the time limit prescribed by the Regulations.

High Court sets aside B-BEE Commission's findings

CONTINUED

In response, the Commission sought to rely on another of the Regulations, which permits the Commission to extend the time warranted to conclude an investigation. However, in such cases, the Commission must inform the complainant of the need to extend the time, the circumstances warranting a longer period of time, and the exact time period required as an extension.

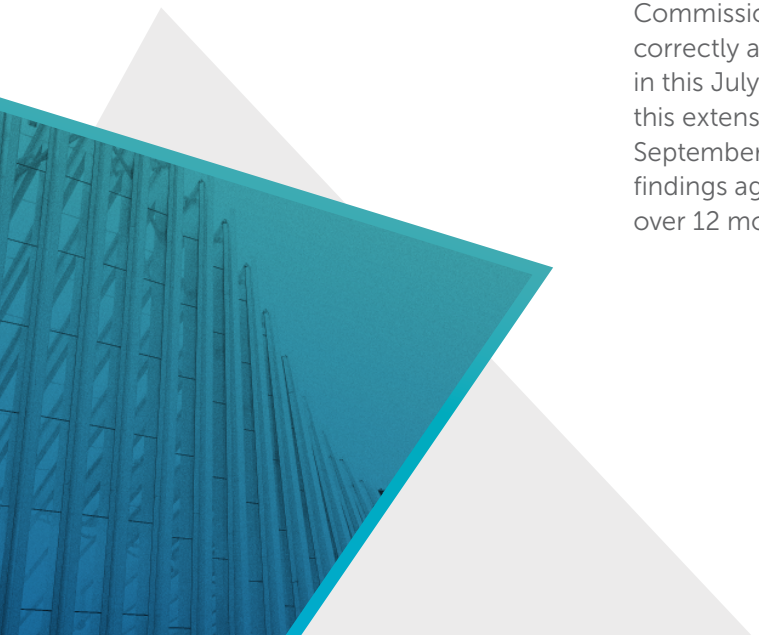
However, the Commission itself had not complied with the provisions of this Regulation. On 12 July 2018, the Commission had sought a two-month extension to September 2018 but had not explained what circumstances warranted the extension. Even if the Commission had followed procedure correctly and sought an extension in this July 2018 correspondence, this extension was only until September 2018, whereas the final findings against Sasol Oil were made over 12 months later.

The court found that, on this basis alone (leaving aside all the other grounds upon which the Commission's findings against Sasol Oil were set aside), the Commission's findings were reviewable in that a mandatory and material condition prescribed by the empowering provision (the Regulations) was not complied with.

Accordingly, all of the Commission's findings against Sasol Oil were declared invalid and set aside. As part of its order, the court interdicted the Commission from making unlawful demands of Sasol Oil and threatening to invoke its powers against Sasol Oil if Sasol Oil did not comply with the Commission's unlawful demands.

This case, a far reaching and long overdue judgment, is the second time this year where the Court reviewed and set aside "*final findings*" made by the Commission (as detailed in our previous article B-BBEE Commission found to lack evidence in finding of fronting). Importantly, this case confirms that the Commission can only act in accordance with the powers conferred upon it and it should not use these powers for ulterior purposes. In addition, investigations must be conducted within the time frames prescribed by the Regulations, or an extension properly sought under the Regulations, failing which findings may be set aside. A tough judgment against the Commission, but hopefully these findings will bring about changes in terms of how these investigations are undertaken going forward.

RACHEL KELLY AND
MENACHEM GUDELSKY



KENYA

Reprieve for non-deposit-taking microfinance businesses as the high court temporarily exempts them from the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022

On 7 December 2021, the President signed into law the Central Bank of Kenya (Amendment) Act of 2021 (Act) that grants the Central Bank of Kenya (CBK) powers to regulate digital credit providers.

Section 57 and section 59 of the Act empower the CBK to enact regulations under the Act within three months of it coming into force. To meet the statutory timeline, the CBK gazetted the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022 (Regulations) on 18 March 2022.

Section 59 (2) of the Act requires all existing digital credit providers not regulated under any law to apply for a licence within six months of the publication of the Regulations. In this respect, the CBK required all digital credit providers and non-deposit-taking microfinance institutions to apply for a licence no later than 17 September 2022.

However, on 7 July 2022, the Association of Microfinance Institutions – Kenya (Association) filed a Petition in the High Court at Machakos, seeking a declaration that the Regulations are:

- unconstitutional for lack of public participation;
- discriminatory; and
- violate the right to fair administrative action.

With respect to public participation, the Association argued that the CBK had failed to ensure that the process of enacting the Regulations was transparent, inclusive and accountable.

With respect to the allegation of discrimination, the Association argued that while institutions already licensed under the Banking Act, the Microfinance Act, and the Sacco Societies Act are exempted from the application of the Act and the Regulations, non-deposit taking microfinance businesses are not, meaning that they are regulated both under the Act and the Regulations, as well as under the Microfinance Act.

With respect to fair administrative action, the Association claimed that, although the Cabinet Secretary in the Ministry of National Treasury and Planning is mandated to enact regulations to regulate non–deposit taking businesses by section 3 of the Microfinance Act, this is yet to be done. Resultantly, these businesses are being compelled to comply with the Regulations, but they are not appropriate for their businesses. During the hearing of the petition, CBK will have an opportunity to respond to these claims before the High Court makes a final determination on each allegation and the entire petition.

KENYA

Reprieve for non-deposit-taking microfinance businesses as the high court temporarily exempts them from the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022

CONTINUED

Accompanying the petition was an application seeking conservatory orders to stay the implementation of the Regulations in so far as they are meant to apply to non-deposit-taking microfinance institutions.

On 13 July 2022, the court allowed the application, granting interim relief to these institutions pending the hearing and determination of the petition. This means that while digital credit providers must comply with the 17 September 2022 deadline, this requirement does not apply to non-deposit-taking microfinance institutions until the court determines the petition.

If, during the hearing of the petition, the petitioners satisfy the court that the Regulations are unconstitutional for lack of public publication or discrimination, the Regulations will be null and void at that point and will not apply to anyone going forward, including the digital credit providers. Equally, any licences issued under these Regulations will also be null and void, and the CBK will have to comply with the Constitution in enacting fresh regulations, in accordance with the requirements for public participation.

NJERI WAGACHA AND JOHNSTONE ODEYA

OUR TEAM

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

Willem Jacobs
Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@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

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

Roelof Bonnet
Director:
Corporate & Commercial
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

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

Etta Chang
Director:
Corporate & Commercial
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin
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

Jenni Darling
Director:
Corporate & Commercial
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@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

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

Ian Hayes
Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@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

Brian Jennings
Director:
Corporate & Commercial
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@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

Justine Krige
Director:
Corporate & Commercial
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant:
Corporate & Commercial
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa
Director:
Corporate & Commercial
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

OUR TEAM

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

William Midgley
Sector Head: Commercial Real Estate
Director: Corporate & Commercial
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director:
Corporate & Commercial
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@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

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

Verushca Pillay
Director:
Corporate & Commercial
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@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
Joint Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Jess Reid
Director:
Corporate & Commercial
T +27 (0)11 562 1128
M +27 (0)83 571 6987
E jess.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
Director:
Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@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
Director:
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director:
Corporate & Commercial
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@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

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

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

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

Emma Hewitt
Practice Development Director:
Corporate & Commercial
T +27 (0)11 562 1635
E emma.hewitt@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

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

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA