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EMPLOYMENT LAW ALERT

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CLIFFE DEKKER HOFMEYR

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Introducing mandatory vaccinations for staff and students at South African universities

In both South Africa and the US, business and educational establishments are left to develop their own policy views on COVID-19 vaccinations to address lagging vaccination statistics and the threat of another wave of COVID-19 infections.

The global vaccine mandate scene has been set by a recent decision in *Smith v Biden* [2021] U.S. Dist. LEXIS 215437 that gave the green light to *"vaccine or test"* orders imposed on federal employees and contractors in the US. However, the US Appeal Court has kept the brakes on for the time being in respect of orders intended to impose similar mandates on private sector businesses with 100 employees or more.

In both South Africa and the US, business and educational establishments are left to develop their own policy views on COVID-19 vaccinations to address lagging vaccination statistics and the threat of another wave of COVID-19 infections.

Universities taking the lead

In South Africa, we are seeing universities take the lead by putting mandatory vaccination policies in place while awaiting legislative clarity on the state's role in COVID-19 vaccination mandates.

Universities in South Africa and across the globe are grappling with the challenges that have arisen with the COVID-19 pandemic. To ensure that teaching and learning continue without hindrance, some universities are planning to go back to contact learning while others opt for a hybrid system.

The University of Cape Town's (UCT) Council intends to approve a proposal to make COVID-19 vaccinations mandatory for campus access. The proposal requires that all staff, as a condition of being able to perform their duties, and students, as a condition of registration, provide proof of vaccination against COVID-19.

Shortly after UCT tabled its policy, Rhodes University announced a move to make COVID-19 vaccinations mandatory for campus access in 2022. According to Rhodes University, individuals may be required to be vaccinated against COVID-19 following approval of a senate recommendation to that effect. These measures have been introduced in line with the university's obligation to ensure that its community is protected in terms of the Occupational Health and Safety Act 85 of 1993.

Challenges may arise in the implementation of mandatory vaccination policies in South Africa as legal considerations do not permit their blanket enforcement.

Universities must allow for objections based on religious, medical or other constitutional grounds.

To that end, Rhodes University has included a recommendation for exemption for those who cannot be vaccinated on justifiable grounds such as health and religion. However, any such exemption would not be condition free as those students and staff members need to produce regular negative COVID-19 test results in order to mitigate against the rise and spread of infections.

This debate is informed by the considerations in section 36 of the Constitution, which require a balance between the rights of individuals who choose not to be vaccinated or disclose their vaccination status, and the universities' obligation to ensure a safe working and learning environment.

There is no case law in South Africa on the issue at present and it remains to be seen how courts will view these competing rights.

Introducing mandatory vaccinations for staff and students at South African universities...*continued*

The court held that the enforcement of the vaccination policy was based on the legitimate interest of promoting the health and safety of those under the care of the university.

Global approach

In an attempt to deal with these challenges, we look to how other jurisdictions have dealt with the matter, with a particular focus on the US.

The decisions in *Smith v Biden* [2021] U.S. Dist. LEXIS 215437 highlight that legislative imposition of COVID-19 vaccinations remains tricky territory, with the Appeal Court narrowing the enquiry into the state's mandatory COVID-19 vaccination orders as policy made in its capacity as an employer and not as a sovereign lawmaker.

This case addresses two executive orders issued by the presidency requiring COVID-19 vaccinations for the federal workforce and federal contractors, subject to exceptions required by law.

The executive orders were hotly opposed by a coalition of federal contractors, businesses, religious groups, and a handful of Republican states on the basis that the laws are unconstitutional and violate rights to privacy and liberty. After the court granted temporary injunctive relief in favour of the coalition, its final order vindicated the state's actions, ruling that the balance of equities and public interest in stemming the spread of the rapidly mutating COVID-19 far outweigh the interests of individual federal employees and contractors.

International tertiary mandates

Turning to case law emanating from the tertiary education sector in the US, we look at *Children's Health Def., Inc. v Rutgers Civil Action* No. 21-15333 (ZNQ) (TJB) where the plaintiff sought to prevent the university from implementing a mandatory vaccination policy. The court had to determine whether the university's mandatory vaccination policy was unlawful and unconstitutional in that the policy required students to be vaccinated prior to returning to campus.

The court dismissed the application, noting that many students would be returning to campus and attending in-person classes and taking into account the considerable size of the student population. If the court were to grant the relief sought, thousands of students would be at risk of possible infection. The court further considered public interest which weighed in favour of mandatory vaccinations.

The mandatory vaccination policy for an Indiana university was challenged on the basis that it infringed upon the right to liberty, bodily autonomy, medical privacy, and religion, amongst other things, in the case of *Klaasen et al v The Trustees of Indiana University* Cause No. 1:21-CV-238 DRL. The policy required all students and staff to be fully vaccinated

Introducing mandatory vaccinations for staff and students at South African universities...*continued*

UCT and Rhodes University's decisions to implement their mandatory vaccination policies is consistent with trends seen in the US, provided that they do not unreasonably infringe on the constitutional rights of those involved.

before returning to university. The court held that the enforcement of the vaccination policy was based on the legitimate interest of promoting the health and safety of those under the care of the university. The court held that there is a reasonable accommodation which caters for religious rights of individuals and therefore the policy was found to be both lawful and constitutional.

Drawing from the principles of the decisions discussed above, UCT and Rhodes University's decisions to implement their mandatory vaccination policies is consistent with trends seen in the US, provided that they do not unreasonably infringe on the constitutional rights of those involved.

These policies should resemble those implemented by employers in line with the Directive of the Department of Employment and Labour on 11 June 2021, which requires an establishment to conduct a risk assessment and ensure that there is reasonable accommodation for those categories of students and staff who elect not to be vaccinated or to disclose their vaccination status on grounds of health or religion.

Importantly, the provisions of the Protection of Personal Information Act 4 of 2013 must always be adhered to by any institution, as they will be required to process vaccine-related medical information, which constitutes special personal information, of students and staff.

Imraan Mahomed, Amy King and Syllabus Mogashoa

Let the author speak: A reminder on admission of documentary evidence

Admitting documentary evidence requires originality and authenticity to be proven. Often, the author of the book or document will be called to testify to confirm its originality and authenticity.

Being human, we tend to take the easier route. We take shortcuts; we grow comfortable. Entrenched law and trite principles become common, and we adopt routine ways of doing things. Many times, these routine ways are widely followed by legal practitioners.

In this vein, a trend which has surfaced in employment and labour law practice (as well as other litigious matters) is the inclusion of a statement along the lines of "*all discovered documents are what they purport to be*" in pre-trial minutes.

A recent Supreme Court of Appeal (SCA) judgment considered this very statement in the context of documentary evidence.

For the sake of context, in South African law of evidence there are various categories of evidence. For the purposes of this alert we must distinguish between real evidence and documentary evidence. Essentially, the purpose for which the evidence is being used determines whether it is documentary or real evidence. If the contents are being relied upon, the evidence is documentary; if the item itself (i.e. as an object) is to be considered, then it is real evidence.

For example, a labour law textbook can be both documentary and real evidence. If the existence of the textbook itself is in question, the book can be admitted as real evidence. However, if the contents of the textbook form part of the evidence, then it is documentary in nature.

Admitting documentary evidence requires originality and authenticity to be proven. Often, the author of the book or document will be called to testify to confirm its originality and authenticity.

Relying on document contents

In the unanimous judgment of *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021), the SCA addressed the issue of reliance on the contents of discovered documents.

The appellant, Mr Rautini, claimed damages from the respondent, the Passenger Rail Agency of South Africa (PRASA), for injuries sustained during an incident on 19 November 2011.

While the trial court found in favour of Rautini, an appeal to the full bench of the High Court succeeded and the High Court dismissed Rautini's claim – hence his appeal to the SCA.

In his appeal, the court noted that Rautini was the only witness to give evidence on how the incident happened.

The facts are as follows: Rautini boarded a train at Du Toit station on his way to work. The train doors were open during the entire journey. Just before reaching the Lynedoch station, where Rautini usually disembarked, three men appeared. Using a knife and gun they threatened the passengers and demanded their cell phones.

In a scuffle with one of the men, Rautini was thrown from the moving train.

Rautini later regained consciousness at the Paarl General Hospital, but could not remember where exactly he fell from the train. Despite witnesses being called, they could not shed any light on how the incident occurred.

Notably, in terms of the evidence, Rautini discovered medical and ambulance reports. However, neither party led the evidence of the authors of those reports.

Let the author speak: A reminder on admission of documentary evidence

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Parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents.

Documentary or hearsay evidence

The full bench of the High Court rejected Rautini's version since it was inconsistent with the version contained in the medical and ambulance reports. The High Court relied on the notes contained in the medical records as credible and acceptable. Essentially, the High Court admitted the medical and ambulance reports as documentary evidence.

However, it is trite law that if evidence is not led to prove the authenticity and originality of documentary evidence, such evidence will only qualify as hearsay evidence.

Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines evidence as "*evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*".

Hearsay evidence is only admissible in very limited circumstances and is presumed to be inadmissible unless proven otherwise.

In the appeal to the SCA, counsel for Rautini argued that the medical records which the High Court relied upon constituted hearsay evidence and accordingly the High Court was not justified in doing so.

Notably, counsel for PRASA confirmed that the contents of the documents amounted to hearsay evidence, but that it was unnecessary to call the authors as witnesses considering the agreement between the parties that the discovered documents were what they purported to be. This is the same inclusion often encountered in pre-trial minutes.

The SCA held that discovering the documents in terms of the rules of court does not make their contents admissible as evidence (unless the documents can be admitted under a common law exception to the hearsay rule).

Furthermore, the SCA showed that the High Court therefore erroneously relied on the medical records to show that there were material differences between Rautini's version and the contents of the discovered documents. The SCA labelled this a "*material misdirection that vitiates its ultimate finding*".

The inclusion of "*all discovered documents are what they purport to be*" is not unlawful. In fact, it serves a legitimate purpose: it allows the documents to be discovered as real evidence. However, parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents.

The importance of this case lies in its timely reminder that litigants should be vigilant when admitting evidence and avoid falling into the trap of believing real evidence can be documentary evidence by virtue of a pre-trial minute agreement to this effect – whether in the Labour Court, High Court, or other judicial forum.

Hedda Schensema and Taigrine Jones

Mind the [wage] gap: The implications of the proposed Wage Ratio Report in the Companies Act Amendment Bill

This is by no means a new phenomenon as similar requirements already exist in the US, Australia and the UK.

On 1 October 2021, the draft Companies Act Amendment Bill was published for public comment (Bill).

The Bill proposed wide-ranging amendments to the Companies Act 71 of 2008 (Companies Act), including the introduction of a wage ratio report which will require public companies and state-owned entities to produce a report that outlines the difference between the company's highest paid and lowest paid employees. The proposed amendment will be inserted as section 30A to the Companies Act.

On 6 October 2021, our Corporate & Commercial team published an alert which analysed the implications of the proposed amendments in the Bill in substantial detail. We focus in this alert on an analysis from an employment law perspective.

International best practice?

The proposed wage ratio report will require companies to disclose the remuneration of certain key individuals. This is by no means a new phenomenon as similar requirements already exist in the US, Australia and the UK, albeit under a different guise.

In the UK companies are required to provide reasons for changes to their pay ratios and must also include data addressing gender pay gaps.

In Australia, shareholders can compel directors to cease operating immediately if a company's remuneration plan is voted against at two consecutive annual general meetings (AGMs).

Mind the [wage] gap: The implications of the proposed Wage Ratio Report in the Companies Act Amendment Bill

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The wage ratio report will require the approval of shareholders at the AGM and once published, it will be a public document, whereas a company submits its EE Report to only the Director-General of the DEL.

What will the wage ratio report look like in South Africa?

In terms of the proposals, the wage ratio report will have to disclose, amongst other things:

- total remuneration of the highest paid employee;
- total remuneration of the lowest paid employee;
- average and median remuneration of all employees; and
- the remuneration gap reflecting the ratio between the lowest and highest paid employees.

The wage ratio report will be published on an annual basis and will have to be approved by shareholders at the company's AGM.

Is there a difference between the wage ratio report and the section 27 EEA report?

The Employment Equity Act 55 of 1998 (EEA) requires an employer to submit a report to the Department of Employment and Labour (DEL), which discloses the remuneration and benefits received at each occupational level. The Employment Equity (EE) Report requires an employer to take proactive steps to address unfair discrimination in matters relating to the remuneration of employees.

The spirit of the EEA encourages companies to reduce remuneration gaps between executives and other employees through monitoring to establish benchmarks and norms. However, the EEA only requires monitoring of the gap and does not impose an obligation to close the gap. At a narrow level the objectives of the proposed wage ratio report are aligned to those set out in section 27 of the EEA.

The wage ratio report will require the approval of shareholders at the AGM and once published, it will be a public document, whereas a company submits its EE Report to only the Director-General of the DEL.

The draft Employment Equity Amendment Bill is awaiting National Assembly consideration. There are proposed changes which require employers to take into account the National Minimum Wage Act 9 of 2018 when publishing their EE Report. This reinforces the legislature's desire for employers to address wage discrepancies.

What does organised labour have to say about the wage ratio report?

Both organised labour and Business Unity South Africa (BUSA) at the National Economic Development and Labour Council (NEDLAC) support the notion of the wage ratio report in principle. However, it is worth noting that BUSA and organised labour have raised two concerns.

Mind the [wage] gap: The implications of the proposed Wage Ratio Report in the Companies Act Amendment Bill

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The publication of the wage ratio report will increase transparency on remuneration. While new to South Africa, the concept of wage ratio reports is not a novel phenomenon abroad.

The first concern relates to the voting and implementation of the wage ratio report at the AGM. Business favours the option that this should be an advisory vote and therefore not binding. However, labour favours the option that the vote should be binding and have the status of a special resolution (with 75% of the shareholders having to approve the wage ratio report).

The second concern relates to the amounts that will form the basis of the calculation of the ratio between the lowest paid and highest paid employee. Both business and labour favour the disclosure of the ratio between the top 5% highest paid and top 5% lowest paid employees. However, business has suggested an *"on-target remuneration"* of executives to be used to allow for a better yearly comparison. On the other hand, labour has suggested that the executives' actual annual remuneration should be used as the yardstick.

Neither the current Companies Act nor the Bill defines the term *"remuneration"*. This will be an area of debate as it is in the arena of employment law. In the workplace what and what does not constitute remuneration is not always clear.

The Bill is also silent on whether the ratio between the highest and lowest paid employees should be the gross or net salary of the individuals concerned and if sub-contracted employees need to be considered as part of the report.

The term *"employee"* is also not defined in the Bill and this will inevitably give rise to uncertainty when taking into account sub-contractors and temporary service employees, to name a few categories of persons who do not neatly fall into the traditional category of an *"employee"*. It is worth noting that a definition of an *"employee"* exists in terms of prevailing employment and tax law, but there is no definition of *"employee"* in the Companies Act, as mentioned earlier. Who constitutes an employee in the *"new world of work"* is something which will also need to be properly considered as the concept of an employee in the hybrid/platform world of work begins to take shape.

Conclusion

The publication of the wage ratio report will increase transparency on remuneration. While new to South Africa, the concept of wage ratio reports is not a novel phenomenon abroad.

Whilst in some parts of the world gender pay statistics are also to be published, this is not as yet the proposed requirement in South Africa. This is likely to become part of the wage ratio report in time to come.

Imraan Mahomed, Amy King, Syllabus Magashoa and Thato Maruapula

A strike again gone violent – where is an employer to turn?

The employer contended that the damage constituted *"riot damage"* under section 11(3) of the Regulations of Gatherings Act 205 of 1993 (RGA), whereas NUMSA argued that it was a picket in terms of section 69 of the Labour Relations Act 66 of 1995 (LRA).

It has sadly become commonplace in the South African world of work for a strike to be accompanied by violence. In late December 2018 this gave rise to the promulgation of the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (Code). Code recognises that violence during strikes requires serious measures to prevent illegality and to induce a behavioral change in the way employees, employers, the police and private security engage with each other during collective bargaining.

We know that prolonged and violent strikes have a serious detrimental effect on strikers, the families of strikers, the small businesses that provide services in the community to those strikers, the employer, the economy, and the community in which the employer is located.

In the context of a strike, the employer would need to consider (i) whether the strike is protected and, if not, to seek an interdict in the Labour Court; and (ii) if the strike is protected, at what time to interdict unlawful conduct or violence and whether a "*perimeter order*" should be sought from the Labour Court or a declaration that the strike has lost its protected status.

Claiming for damages

Once the dust settles, however, and the strike damages are ascertained, is an employer obliged to seek damages in the Labour Court or can it approach the High Court? This was the question the Supreme Court of Appeal (SCA) had to answer in *NUMSA and Others v Dunlop Mixing and Technical Services (Pty) Ltd* [2021] (4) SA 144 (SCA). The background to the dispute was nothing out the ordinary. Is as follows; the National Union of Metalworkers of South Africa (NUMSA) notified the employer that its members intended to embark upon strike action after a dispute at the Commission for Conciliation, Mediation and Arbitration remained unresolved. In furtherance of the strike, NUMSA authorised a picket to take place outside the workplace. The picket turned violent and resulted in damage to the employer's property and to the property of non-striking employees.

Consequently, the employer issued summons against NUMSA and its members for the damages to its property and for the costs of the security services it was forced to incur. The employer contended that the damage constituted *"riot damage"* under section 11(3) of the Regulations of Gatherings Act 205 of 1993 (RGA), whereas NUMSA argued that it was a picket in terms of section 69 of the Labour Relations Act 66 of 1995 (LRA). The essence of the legal debate was whether the employees' assembly was a gathering under the RGA or a picket under the LRA. If regulated under the RGA, NUMSA could be sued in the High Court under the RGA for civil damages. Where *"riot damages"* are claimed from a picket that has turned violent, NUMSA could be sued in the Labour Court under the LRA.

After a lengthy legal analysis, the SCA concluded that where a picket is authorised under the LRA and damages are suffered as a result of the picket, the LRA takes preference over the RGA and the aggrieved employer may only seek relief from the Labour Court. The claim would be for "*just and equitable compensation*".

The judgment of the SCA is consistent with an earlier 2012 judgment of the Labour Appeal Court (LAC) in *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union and Others* (CA18/11) [2012] ZALCCT 57 where the LAC was called upon

A strike again gone violent – where is an employer to turn?*...continued*

Employees are entitled to participate in a picket authorised by a union in furtherance of a strike. In exercising this right, unions should, however, be wary that violence, including damage to property, may attract damages claims under the LRA.

to determine the interplay between protest action in terms of the LRA and picketing in terms of the RGA. In the ADT Security matter, off-duty employees wished to march, gather and picket for purposes of handing over a petition to senior management concerning employment related claims and sought to authorise their protest gathering and assembly under the RGA. ADT Security approached the Labour Court to interdict the assembly, arguing that the gatherings could not be authorised under the RGA. The LAC, like the SCA, found that the LRA took precedence over the RGA and interdicted the union from organising the "*protest action*".

The writer was the lead attorney for ADT Security, which followed an earlier judgment on similar issues involving ADT Security and the South African Transport and Allied Workers Union (SATAWU) in the LAC, where the writer also represented ADT Security, but the LAC declined to consider the appeal lodged by SATAWU (interdicting a SATAWU protest under the RGA) on the basis that the appeal had become academic by the time SATAWU approached the appeal court.

Caution for strikers

Whilst the SCA in *NUMSA* does not make reference to the *ADT Security* judgment, it is not surprising in our view that the two appeal courts came to the same conclusion on different legal issues relating to different aspects of the same pieces of legislation as the underlying legal debate in both cases was closely mirrored.

In conclusion, employees are entitled to participate in a picket authorised by a union in furtherance of a strike. In exercising this right, unions should, however, be wary that violence, including damage to property, may attract damages claims under the LRA.

Employers now know that they can turn to the Labour Court to hold violent strikers accountable for violently disruptive picket line conduct together with their union, along with the other remedies available to employers.

Imraan Mahomed

OUR TEAM

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

Aadil Patel
Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

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

Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com

Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

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

Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

OUR TEAM

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

Amy King
Professional Support Lawyer
T +27 (0)11 562 1744
E amy.king@cdhlegal.com

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com

Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com

Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com

Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com

Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com

Kgodisho Phashe
Associate
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Dylan Bouchier
Associate
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com

Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Taryn York
Associate
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

Abigail Butcher
Associate
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@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.

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

INCORPORATING
KIETI LAW LLP, KENYA