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Corporate & Commercial ALERT

IN THIS ISSUE

Who's really in charge? – The new beneficial ownership regime

In this alert, we touch on the amendments to the Companies Act 71 of 2008 (Companies Act) that are coming into effect from 1 April 2023 and which will regulate the disclosure by companies of their beneficial ownership – in other words, disclosure of the person or persons who ultimately (directly or indirectly) own or control the company.



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CLIFFE DEKKER HOFMEYR

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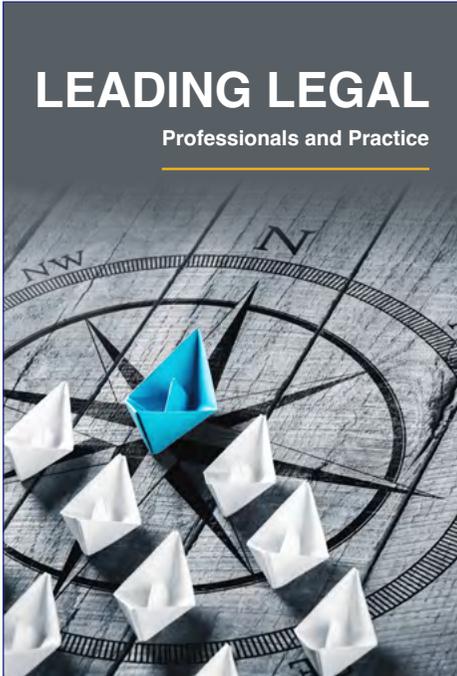
Who's really in charge? – The new beneficial ownership regime

In this alert, we touch on the amendments to the Companies Act 71 of 2008 (Companies Act) that are coming into effect from 1 April 2023 and which will regulate the disclosure by companies of their beneficial ownership – in other words, disclosure of the person or persons who ultimately (directly or indirectly) own or control the company.

Opaque corporate structures that hide the ultimate beneficial owner have traditionally been used for many legitimate reasons, including the protection of privacy of high-net-worth individuals and their families. For example, an opaque corporate structure can be used to mitigate the risks that large family-owned businesses are typically exposed to, including fraud (think phishing attacks and identity theft), kidnapping, blackmail, violence and intimidation. There are also commercial reasons for anonymity and discretion, which include the protection of organisational autonomy.

The abuse of opaque corporate structures has, however, become prevalent in a global community where they are used to facilitate money laundering, terrorist financing, tax evasion and corruption. In South Africa, the use of “no-name brand” companies has become endemic in facilitating government tender fraud and corruption.

In 2021, the Financial Action Task Force (FATF) released its Mutual Evaluation Report of South Africa (report). The report summarised the effectiveness of South Africa's anti-money laundering and counter-terrorism financing measures. The findings showed that law enforcement in South Africa faces challenges in readily obtaining accurate, updated and adequate beneficial ownership information about companies and trusts for effective investigation of money laundering and terrorism financing. The FATF recommended that South Africa should, amongst other things, revise and substantially improve its mechanisms for ensuring that accurate, up-to-date and verified beneficial information is available timeously to competent authorities, and it should also consider having a competent authority responsible for obtaining and maintaining beneficial ownership information.



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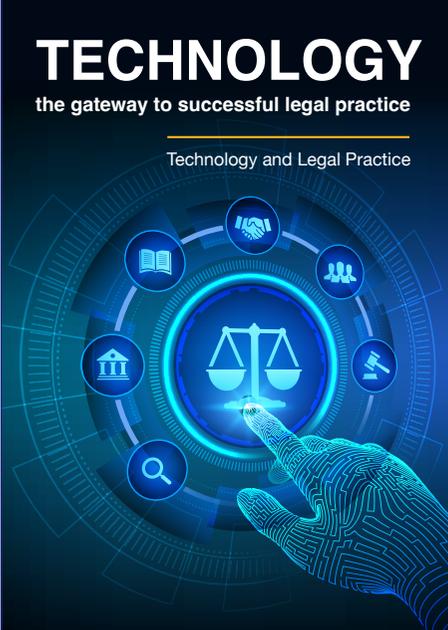
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In response to the findings contained in the report, the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 (GLAA) was signed into law in December 2022. The GLAA amended the Companies Act to require companies to keep a record of natural persons who own or control the company and to provide for a comprehensive mechanism through which the Companies and Intellectual Property Commission (CIPC) can keep accurate and updated beneficial ownership information.

A beneficial owner in respect of a company is defined in the Companies Act as an individual who, directly or indirectly, ultimately "owns" or exercises "effective control" (both undefined terms) of that company. In terms of the amendments to the Companies Act, companies, other than

"regulated" companies or companies controlled by a "regulated" company (a "regulated" company would include a company whose shares are listed on a securities exchange), will have to record in their securities registers information regarding the natural persons who are the beneficial owners of the company. As part of the process of filing their annual returns with the CIPC, companies will now also have to file a copy of their securities register reflecting this beneficial ownership information.

Of significance is the definition of beneficial ownership, which contemplates a person's ability to exercise control, including a chain of ownership or control of a juristic person other than the holding company of that company. The beneficial owner of a company is therefore the natural person who ultimately owns or who can ultimately exercise effective control



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over a company. For example, in a company structure where Company A is a wholly owned subsidiary of Company B, which is in turn wholly owned by Mr T Ender Preneur, being a natural person, Mr T Ender Preneur would, for purposes of the Companies Act, be the beneficial owner of Company A. The facts will, however, not always be so simple and ascertaining the beneficial owner (if any) will be more nuanced in the context of, for instance, family or business trust structures (where the provisions of the trust deed would need to be considered), and scenarios of *de facto* control in less-than-majoritarian shareholding structures.

It remains to be determined, by regulations to be promulgated, which information regarding a beneficial owner will have to be disclosed and which persons will have access to the securities registers of companies. It is noteworthy that the FATF's report recommends that legislation in South Africa should empower the CIPC to impose administrative penalties directly on companies for failure to comply with information requirements. Once the regulations to give effect to the provisions of the GLAA are promulgated, it will be important to note the nature of the administrative penalties that the CIPC will be able to impose. Nonetheless, companies should begin to prepare for the heightened disclosure requirements that will be implemented to give effect to the provisions of the GLAA.

Akhona Mdunge and Quintin Honey



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2021 - 2023 ranked our Corporate & Commercial practice in **Band 1: Corporate/M&A** and in **Band 2 Capital Markets: Debt and Capital Markets: Equity**.

Ian Hayes ranked by **Chambers Global 2022 - 2023** in **Band 1: Corporate/M&A**.

David Pinnock ranked by **Chambers Global 2022 - 2023** in **Band 1: Corporate/M&A: Private Equity**.

Peter Hesseling ranked by **Chambers Global 2022 - 2023** in **Band 2: Corporate/M&A** and in **Band 3 Capital Markets: Equity for 2023**.

Willem Jacobs ranked by **Chambers Global 2022 - 2023** in **Band 2: Corporate/M&A** and in **Band 3: Corporate/M&A: Private Equity**.

Sammy Ndolo ranked by **Chambers Global 2021 - 2023** in **Band 4: Corporate/M&A**.

David Thompson ranked by **Chambers Global 2022 - 2023** in **Band 4: Corporate/M&A**.

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

Tessa Brewis

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

Dane Kruger

Director:
Corporate & Commercial
T +27 (0)21 481 6362
M +27 (0)74 914 1402
E dane.kruger@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

Allan Hannie

Director:
Corporate & Commercial
T +27 (0)21 405 6010
E allan.hannie@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 Hesselning

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselning@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

Jaco Meyer

Director:
Corporate & Commercial
T +27 (0)11 562 1749
M +27 (0)83 477 8352
E jaco.meyer@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

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



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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.

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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 cdhstellenbosch@cdhlegal.com

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