

# Corporate & Commercial ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

## IN THIS ISSUE

### Board committees 101

Section 72 of the Companies Act 71 of 2008 (Companies Act) empowers the appointment and operation of board committees (committees), which can play a key role in the operations of the board of directors. For example, specialist knowledge or extended time is required to deal with an important issue such as refinancing, building a new plant, or an office move.



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## Board committees 101

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In this alert, we explore the concept of committees, discuss their advantages and disadvantages, and examine how they affect director liability. We don't deal with specific rules applicable to certain committees that are required and dealt with in other sections of the Companies Act, such as audit and social and ethics committees.

Section 66 requires that the business and affairs of a company must be managed by or under the direction of the board of directors (board), which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Companies Act or the memorandum of incorporation (MOI) provides otherwise. Section 72(1) provides that, unless specified otherwise in a company's MOI, the board has the authority to establish multiple committees and may delegate some of its powers, authority and functions to these committees.

In terms of section 72(2)(b) and (c), unless the MOI or a committee-establishing resolution states otherwise, a committee has the authority to seek advice from external sources and is granted full authority by the board about matters referred to it.

### Advantages of having board committees

#### *Expertise and specialisation*

One of the primary advantages of committees is their ability to bring expertise and specialist knowledge to the decision-making process, especially by involving non-director members – although such members may not vote and must not be ineligible or disqualified from being a director. By forming committees such as compensation, risk and nomination committees, boards can tap into the specialised knowledge and experience of their members. This can lead to more informed and effective decision-making in complex areas.



The graphic features a gold diagonal stripe across a light blue background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Corporate, Commercial/M&A 2023 Rankings'. Further down, it states: 'Corporate & Commercial practice is ranked in Tier 1.' and 'CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.' Underneath, it lists 'Leading Individuals: Willem Jacobs | David Pinnock', 'Recommended Lawyers: Vivien Chaplin | Peter Hesselting, Justine Krige | Sammy Ndolo, David Thompson | Roxanna Valayathum, Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

## Board committees 101

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### *Enhanced accountability*

Committees can help to improve communication and transparency within the company, as they may be required to report regularly to the board on their activities. This reporting process can help to ensure that the board is kept informed of important developments while committee members are accountable for more in-depth attention to committee issues.

### *Efficient decision-making*

Committees streamline the decision-making process. Either by delegating decision-making power to the committee or by empowering the committee to investigate and then bring an informed recommendation or alternatives to the board for decision. For example, the compensation committee may be authorised to determine certain matters, such as starting salaries within a category band, but required to bring annual salary increase percentages to the board for approval. Boards can allocate full board time

and resources more efficiently, which is especially important in larger organisations with complex operations and/or specific matters which require substantial attention.

### **Disadvantages of having board committees**

#### *Silo effect*

One of the main disadvantages of having committees is that they can create a silo effect. Committee members may become more focused on their own committee's work and less aware of the overall needs of the company and how parts of the company's business or affairs inter-relate. This can lead to a lack of co-ordination and an overlap between different committees.

#### *Overreliance*

Boards may become overly reliant on committees, leading to detachment from key decisions and a lack of comprehensive oversight. This overreliance can create blind spots and hinder effective governance.

### *Using board committees as scapegoats*

Finally, can the board blame and hide behind a committee? Generally, the answer is no: directors are ultimately responsible for the actions of the committees. The board cannot simply delegate a decision to a committee and then wash their hands of it.

Section 72(3) of the Companies Act provides that the creation of a committee, delegation of any power to, or action taken by, a committee does not alone satisfy or constitute compliance by a director with their required duty to the company, as set out in section 76.

This means that the board remains liable for the proper performance of the delegated duty. Thus, while the board may delegate its powers to a committee, it cannot abdicate its legal responsibility for the conduct of the committee. If the board is reasonably diligent in selecting expert committee members who merit confidence and exercise reasonable oversight, then board members may limit their liability under section 76(4) and (5).

## Board committees 101

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### Tips for effective committee management

We suggest a few tips for boards to ensure the effective management of any committee:

1. Clear terms of reference for each committee. This should ensure that the committee stays focused on its assigned tasks and does not overlap with other committees. These may also include details around member composition, regularity of meetings, quorum, voting and scope of work.
2. Committees should meet regularly and keep minutes of meetings. This will facilitate transparency and accountability.
3. Committees should be required to report regularly to the board on their activities. This should ensure that the board is aware of the committee's progress and that it can provide guidance and support as needed.

4. Committees are not a substitute for good board governance. Even with committees in place, the board still has ultimate responsibility for the company's direction.

### Conclusion

Committees can be a valuable tool for a company, but they are not without their disadvantages. The board should ensure that any committee is properly structured, and that membership has the correct mix of qualifications and experience. Clear committee terms of reference and policies will facilitate accountability to the board. By following these guidelines, companies can maximise the benefits of committees while minimising the risks.

[Muzammil Ahmed, David Thompson and Lara Sneddon](#)



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:



### Ian Hayes

Practice Head & Director:  
Corporate & Commercial  
T +27 (0)11 562 1593  
M +27 (0)83 326 4826  
E [ian.hayes@cdhlegal.com](mailto:ian.hayes@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](mailto: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](mailto:sammy.ndolo@cdhlegal.com)

### Kate Anderson

Director:  
Corporate & Commercial  
T +27 (0)11 562 1105  
M +27 (0)82 418 3784  
E [kate.anderson@cdhlegal.com](mailto:kate.anderson@cdhlegal.com)

### Tessa Brewis

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

### Vivien Chaplin

Sector Head: Mining & Minerals  
Director: Corporate & Commercial  
T +27 (0)11 562 1556  
M +27 (0)82 411 1305  
E [vivien.chaplin@cdhlegal.com](mailto: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](mailto:clem.daniel@cdhlegal.com)

### Johan de Lange

Director:  
Corporate & Commercial  
T +27 (0)21 481 6468  
E [johan.delange@cdhlegal.com](mailto:johan.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](mailto: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](mailto:john.gillmer@cdhlegal.com)

### Allan Hannie

Director:  
Corporate & Commercial  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E [allan.hannie@cdhlegal.com](mailto:allan.hannie@cdhlegal.com)

### Peter Hesselning

Director:  
Corporate & Commercial  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E [peter.hesselning@cdhlegal.com](mailto: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](mailto:quintin.honey@cdhlegal.com)

### Willem Jacobs

Director:  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E [willem.jacobs@cdhlegal.com](mailto:willem.jacobs@cdhlegal.com)

### Brian Jennings

Director:  
Corporate & Commercial  
T +27 (0)11 562 1866  
M +27 (0)82 787 9497  
E [brian.jennings@cdhlegal.com](mailto: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](mailto: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](mailto: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](mailto:justine.krige@cdhlegal.com)

### Dane Kruger

Director:  
Corporate & Commercial  
T +27 (0)21 481 6362  
M +27 (0)74 914 1402  
E [dane.kruger@cdhlegal.com](mailto: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](mailto:andre.delange@cdhlegal.com)

### Jaco Meyer

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

## OUR TEAM

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

### Anita Moolman

Director:  
Corporate & Commercial  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E [anita.moolman@cdhlegal.com](mailto: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](mailto: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](mailto: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](mailto:david.pinnock@cdhlegal.com)

### Allan Reid

Director:  
Corporate & Commercial  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E [allan.reid@cdhlegal.com](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto:andrew.vanniekerk@cdhlegal.com)

### Njeri Wagacha

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [njeri.wagacha@cdhlegal.com](mailto:njeri.wagacha@cdhlegal.com)

### Charl Williams

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

### Christelle Wood

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

### Emma Hewitt

Practice Development Director:  
Corporate & Commercial  
T +27 (0)11 562 1635  
M +27 (0)82 896 1332  
E [emma.hewitt@cdhlegal.com](mailto:emma.hewitt@cdhlegal.com)

### Alecia Pienaar

Counsel:  
Environmental Law  
T +27 (0)82 863 6279  
M +27 (0)82 863 6272  
E [alecia.pienaar@cdhlegal.com](mailto:alecia.pienaar@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.

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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](mailto: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](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> 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](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

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