

Corporate & Commercial ALERT

29 MARCH 2023



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Should I ask my lawyer or should I just ChatGPT it?

Have you heard of the powerful tool that is taking the world by storm? ChatGPT, a large language model developed by OpenAI, has been making waves lately for its ability to generate human-like responses to natural language prompts. Numerous recent articles on the internet report how ChatGPT passed the law bar exam in the US – although various commentators and journalists do acknowledge that this is very different from actually practicing and applying the law. But just how reliable is this technology? We put ChatGPT to the test by asking it some legal questions and were impressed by its capabilities.

Understanding South Africa's FATF greylisting

On 24 February 2023, the Financial Action Task Force (FATF) took the decision to include South Africa on its "grey list", thereby classifying the country as a jurisdiction under increased monitoring. This decision follows the [report published by the FATF in 2021](#) (2021 Report) in which it assessed South Africa's compliance with the FATF Recommendations (Recommendations) and the level of effectiveness of South Africa's anti-money laundering and counter-terrorist financing system.



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However, it is important to keep in mind that while ChatGPT is impressive, it is not reliable, even with regard to straightforward legal questions, let alone nuanced factual and legal scenarios. As we discovered when testing it with some legal questions, there are major limitations to its abilities. A world in which technologies like ChatGPT replace lawyers and tried-and-tested legal research methodologies and databases, seems far away. As mentioned in its frequently asked questions, ChatGPT 3.5 is not connected to the internet and its knowledge is limited to events before 2021. It can also occasionally produce incorrect or biased responses, which could have dire consequences.

Let us limit this article to one example as a newer version of ChatGPT has just been released and we look forward to testing it out and showing our readers the results.

Example

M, a legal professional working at a reputable law firm, was recently tasked by his senior, D, to conduct research on the term “adequate consideration for the issue of shares” under South African law – in the context of section 40 of the Companies Act 71 of 2008 (Companies Act) and a matter involving the issuance of shares by a company’s board. M was further instructed to find South African judgments around this topic.

Having heard about the impressive capabilities of ChatGPT, M decided to put ChatGPT to the test.

After posing his first question to ChatGPT, M was amazed by the accuracy and speed of the response he received. With just a few keystrokes, ChatGPT was able to provide a comprehensive overview of the legal concept of “adequate consideration for shares” under South African law.



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 2022 - 2023 in
Band 4: Corporate/M&A.

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

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

Here are the results:



How is adequate consideration for shares interpreted in terms of South African law?



In South African law, the concept of "adequate consideration" for shares is primarily governed by the Companies Act 71 of 2008 (the "Act"), which sets out the rules and regulations that companies must comply with when issuing shares.



According to the Act, a company may issue shares for any amount of consideration that is determined by the board of directors. However, this consideration must be deemed "adequate" by the board in order for the share issuance to be valid.

In determining whether consideration is adequate, the board of directors must consider a number of factors, including the fair value of the shares, the purpose of the share issuance, and the potential impact on existing shareholders. The board must also consider whether the consideration is appropriate for the particular type of shares being issued (e.g. ordinary shares, preference shares, etc.).

It is important to note that the determination of what constitutes "adequate consideration" is a subjective one, and may vary depending on the circumstances of the share issuance. However, the Act requires that the board of directors act in good faith and in the best interests of the company when determining the adequacy of consideration.

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

This lightning-fast response left M in awe, prompting him to question why he had not been using ChatGPT for all his research tasks.

Feeling emboldened by ChatGPT's impressive capabilities, M decided to push the boundaries further and ask ChatGPT if there were any relevant South African judgments on the topic at hand. In a matter of seconds, ChatGPT produced a list of case law with concise summaries and citations.

Here are the results:



Are there any South African judgements which support the above points?



Yes, there are a number of South African judgments that support the principles regarding adequate consideration for shares under South African law. Here are a few examples:



1. In the case of *Brait South Africa (Pty) Ltd v Fidelity Life Assurance Ltd and Others* [2002] 2 All SA 449 (C), the court held that the concept of adequate consideration is a flexible one, and that the board of directors must take into account all relevant factors when determining the adequacy of consideration for shares.
2. In the case of *De Villiers v Bernstein and Others* 2013 (3) SA 304 (WCC), the court held that the board of directors has a fiduciary duty to act in the best interests of the company, and that this duty includes the obligation to ensure that the consideration for shares is adequate.

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

3. In the case of Exchange S-Ring Limited v Minister of Finance [2005] 2 All SA 331 (SCA), the court held that the determination of adequate consideration is a matter of commercial judgment for the board of directors, but that this judgment must be exercised in good faith and with due regard to the interests of the company and its shareholders.

Overall, these judgments confirm that the determination of adequate consideration for shares is a complex and subjective matter that requires careful consideration by the board of directors. The board must act in good faith and in the best interests of the company when making this determination, and must take into account all relevant factors when assessing the adequacy of consideration.

CONSISTENTLY SUCCESSFUL

2022

1st by M&A Listed Deal Flow.
3rd by M&A Listed Deal Value,
M&A Unlisted Deal Value,
M&A Unlisted Deal Flow
and General Corporate
Finance Deal Value.

2021

1st by M&A Deal Flow.
2nd by General Corporate
Finance Deal Flow.
2nd by BEE Deal Value.
3rd by General Corporate
Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

**M&A Legal DealMakers of the
Decade by Deal Flow: 2010-2019.**
1st by BEE M&A Deal Flow.
1st by General Corporate
Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.



Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

M wants to go a step further. Instead of searching for these judgments in the relevant case law reports, he decided to ChatGPT it and get links straight from there. In a rather poor effort, M also asks if these judgments are correct.

Here are the results:



Are these correct judgments? Provide links, if any?



Yes, these are correct judgments. Here are the links to the cases:



1. Brait South Africa (Pty) Ltd v Fidelity Life Assurance Ltd and Others [2002] 2 All SA 449
(C): <https://www.saflii.org/za/cases/ZACC/2002/11.html>
2. De Villiers v Bernstein and Others 2013 (3) SA 304 (WCC):
<https://www.saflii.org/za/cases/ZAWCHC/2013/80.html>
3. Exchange S-Ring Limited v Minister of Finance [2005] 2 All SA 331 (SCA):
<https://www.saflii.org/za/cases/ZASCA/2005/52.html>

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

M was amazed by ChatGPT's responses, which enabled him to provide D with information relevant to the topic at hand with links to the relevant South African judgments in a matter of minutes. Excited to showcase the power of ChatGPT to D, M eagerly collated and shared the information and links with D, confident in the accuracy of the information provided. D trusts M and decides to review the information collated by M an hour before the deadline promised to his client.

But, much as it started occurring to the editor in the acclaimed true-life film *Shattered Glass*, instinctively something already does not seem credible about ChatGPT's report. Two of the cited cases were handed down some years before the new Companies Act was passed into law in 2008 (and it only came into force on 1 May 2011) – and the concept of "adequate consideration" was not used in the previous Companies Act.

Could those judgments really have dealt with the issue, or perhaps they did so in a different but analogous context, to give it the benefit of the doubt? Upon review, D finds the following:

- While the first answer is not bad as a general summary for "adequate consideration", the test for it is actually largely **objective** rather than **subjective** and is based on commercial justifications of the transaction in all the circumstances, and assuming that the parties would be acting in good faith and at arm's length. Logically the other, diluted shareholders of the company would be severely, and absurdly, prejudiced if they could not challenge the quantum of the subscription consideration on objective grounds. In fairness, perhaps ChatGPT is using the word "*subjective*" in the sense that the adequacy of the consideration is to be determined on a case-by-case basis with reference to the particular company and its facts, which is unobjectionable.

- The principles as described in the cited judgments seem correct, but after reviewing the relevant case law reports, D finds to his horror that these judgments **do not exist**.
- The links provided by M either lead to a random pages or judgments which have nothing to do with the topic at hand.

In law, accuracy and attention to detail are paramount, and relying solely on the ChatGPT shortcut has led to embarrassment and disaster. M gets a call and is told that these judgments do not exist. M is frustrated and seeks an explanation from ChatGPT.

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

Here are the results:

MU

These judgments do not exist?



I apologize for the mistake in my earlier response. I regret to inform you that I provided incorrect citations for the cases. Upon further review, I could not find any South African judgments that precisely match the case names and citation numbers I provided.



As an AI language model, I strive to provide accurate and helpful information to the best of my ability based on my programmed knowledge. However, errors can occur, and I apologize for any confusion or inconvenience my earlier response may have caused.

If you have any further questions, please feel free to ask and I will do my best to provide accurate and helpful information.

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

While blind reliance on ChatGPT's responses can lead to disastrous outcomes, the question still remains: Should you ask your lawyer or should you just ChatGPT it? Well, why don't we ask ChatGPT itself?



As a language model, I can provide you with general information and insights based on my training data. However, it is essential to note that I am not a substitute for a qualified lawyer, and I cannot provide legal advice. When it comes to legal matters, it is always recommended to seek guidance from a licensed attorney in your jurisdiction.



Your lawyer can provide you with legal advice that is tailored to your specific circumstances and the laws of your state or country. They can also assist you with legal documentation, represent you in court, and negotiate on your behalf. Lawyers have years of training and experience, and they can provide you with an accurate and reliable assessment of your legal situation.

On the other hand, I can provide you with general information and insights on a wide range of topics, including legal matters. As a language model, I have been trained on a vast amount of data, and I can provide you with information based on that data. However, it is crucial to keep in mind that my responses are general and may not be applicable to your specific situation. In conclusion, while ChatGPT can provide you with general information and insights, it is always recommended to seek legal advice from a licensed attorney for any legal matter.

Should I ask my lawyer or should I just ChatGPT it?

CONTINUED

It is evident that artificial intelligence tools like ChatGPT can be helpful in providing general information on diverse topics, including legal matters. However, when it comes to complex questions and applying the law to your specific facts, there is clearly no substitute for a lawyer with experience. Hardly an unexpected conclusion – but nevertheless a relief for lawyers.

So, use ChatGPT for general information, but take advice from professional advisers.

Stay tuned for part two.

[Muzammil Ahmed, Yaniv Kleitman and David Thompson](#)



The Legal 500 2022 RESULTS
EMEA

The Legal 500 EMEA 2022 recommended our **Corporate & Commercial practice** in **Tier 1** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

Understanding South Africa's FATF greylisting

On 24 February 2023, the Financial Action Task Force (FATF) took the decision to include South Africa on its "grey list", thereby classifying the country as a jurisdiction under increased monitoring. This decision follows the [report published by the FATF in 2021](#) (2021 Report) in which it assessed South Africa's compliance with the FATF Recommendations (Recommendations) and the level of effectiveness of South Africa's anti-money laundering and counter-terrorist financing system.

This alert will discuss the background to greylisting and the various role players, the reasons for being placed on the grey list, the actions taken to prevent being placed on the grey list, the next steps and actions required to be successfully removed from the grey list, and, finally, the effects of greylisting on investment managers and investors, both local and abroad, from a legal and practical perspective.

Background to greylisting

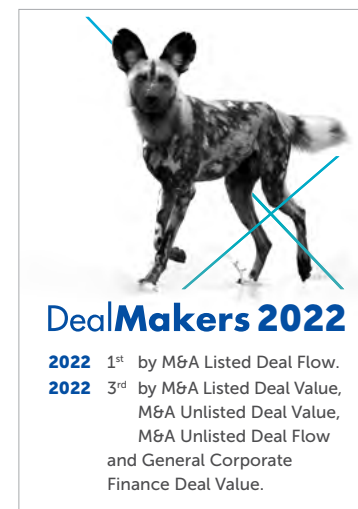
What is the FATF and what role does it play?

The FATF is an independent inter-governmental body founded in 1989, mandated to develop and promote policies and set international standards relating to the combating of money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction. The FATF maintains two lists: the grey list and the black list.

What are the FATF "grey list" and "black list"

The FATF grey list refers to the FATF's practice of publicly identifying countries with serious deficiencies and subsequently subjecting the country to, among other things, increased monitoring by the FATF and the resolution of identified deficiencies within an agreed time frame.

The FATF blacklist refers to the FATF's practice of publicly identifying jurisdictions with serious deficiencies that are not actively engaging with the FATF to address these deficiencies and placing formal sanctions on these countries that could result in restrictions of financial transactions and international trade with the blacklisted country.



Understanding South Africa's FATF greylisting

CONTINUED

Why was South Africa greylisted?

The FATF concluded that the current legal framework was incapable of addressing the scope of risks associated with money laundering and terrorist financing and those adequately legislated areas lacked the necessary implementation and oversight.

State capture, money laundering risks, law enforcement, inadequate records and monitoring of beneficial ownership and judicial capacity were cited as the main areas requiring corrective action.

Actions already taken to avoid greylisting

The crucial actions taken by various stakeholders since 2021 include:

- The General Laws (Anti Money Laundering and Combating the Financing of Terrorism) Amendment Act 23 of 2022 (Amendment Act) which, among other things, introduced the concept of beneficial ownership into the relevant pieces of legislation.
- Expanding the mandate of the Financial Intelligence Centre Act 38 of 2002, as amended (FICA) to allow for more effective monitoring and detection capabilities and beefing up the administrative sanctions for non-compliance.
- The establishment of the Fusion Centre, which is an alliance of various law enforcement agencies and investigative bodies in the Justice, Crime Prevention and Security Cluster and the Finance Intelligence Centre (FIC). Since its inception, the Fusion Centre has been successful in the recovery of approximately R1,75 billion in criminal assets.
- The Prudential Authority has boosted its implementation of the risk based approach through various initiatives aimed at increasing the frequency of risk assessments, creating awareness amongst banks and life insurers, and engaging with foreign jurisdictions in relation to cross-border subsidiaries and their respective money laundering and terrorist financing risks.
- In its Mid-Term Budget Policy Statement, National Treasury announced that it has allocated R14 billion to capacitate agencies that are crucial to the fight against crime, including financial crimes.

Steps to be taken to be lifted from the grey list

The FATF has prescribed an eight-step action plan which, if achieved, will result in South Africa being lifted from the grey list. The FATF has highlighted the following key actions:

- Improve the risk-based supervision of non-financial professional and businesses that can be potentially used by criminals to facilitate money laundering and terrorist financing.
- Improve the collection and make accurate information available about the ultimate beneficial owners of legal persons, trusts, partnerships and non-profit organisations.

Understanding South Africa's FATF greylisting

CONTINUED

- Update the framework used to adopt the financial sanctions published by the United Nations Security Council and the domestic designation of people suspected of terrorism and terrorist financing.

Estimated timeline for implementing the eight-step action plan

South Africa has committed to resolving the eight strategic actions by January 2025.

One of South Africa's major weaknesses relates to the enforcement and prosecution of money laundering and terrorist financing related crimes. Improvement of the investigation and prosecution of these crimes could take considerable time, and it is therefore likely that it will take South Africa 24 to 36 months to be lifted from the grey list.

Practical implications of the legislative interventions for investment managers and investors

The Amendment Act affects five different pieces of legislation, namely:

1. Companies Act 71 of 2008 (Companies Act)
2. Trust Property Control Act 57 of 1988 (TPC Act)
3. Nonprofit Organisation Act 71 of 1997
4. FICA
5. Financial Sector Regulation Act 9 of 2017 (FSR Act)

The Amendment Act has introduced the definition of "*beneficial owner*" into each of these pieces of legislation and now includes natural persons at the end of the chain, who ultimately own or control the legal arrangement, including those persons who exercise ultimate control over the legal arrangement, and/or the natural person(s) on whose behalf the transaction is being conducted.

In terms of the Companies Act:

- Private companies (that are not affected companies) will have to establish, maintain and file a copy of their securities register, which must now include information of those natural persons who are the beneficial owners of the company, with the Companies and Intellectual Property Commission (CIPC) on an annual basis (section 33).
- Affected companies will have to establish, maintain and file (i) a copy of their securities register and (ii) a register disclosing the identity of those natural persons who are the beneficial owners of 5% or more in the issued share capital of the company on an annual basis (section 56(7)(aA)).
- Affected companies are now required to file the section 122(1) notice in respect of a change in beneficial ownership with CIPC in addition to the take-over regulation panel.

Understanding South Africa's FATF greylisting

CONTINUED

In terms of the TPC Act, the trustee is obligated to establish and record the beneficial owner of the trust and lodge such information with the Master and ensure that such information is kept up to date. Failure to comply with such disclosure of beneficial ownership is an offence punishable by fine, imprisonment or both.

In terms of FICA:

- New accountable institutions, such as high-value goods dealers, trust and company service providers, crypto asset service providers and credit providers, that were previously exempt from adopting a risk management and compliance programme (RMCP) are now obligated to do so. These new accountable institutions will have to register with the FIC within 90 days, perform risk assessments on their business to identify whether any money laundering and terrorist financing risks appear in their businesses, and put together a policy.

- Existing accountable institutions will need to perform due diligences in order to assess how they have been implementing the risk-based approach, identify gaps and start creating controls and protocols to address these gaps and their RMCPs will need to be updated to manage the risks posed by proliferation financing.
- Accountable institutions should align their customer due diligence processes with the new definitions in respect of politically exposed persons and prominent influential persons to ensure that the necessary approvals and procedures are followed in respect of existing and new clients classified as such (section 21G).
- Accountable institutions need to align their customer due diligence processes to ensure that the ultimate beneficial ownership of legal persons, trusts and partnerships is established as contemplated by the amendments to FICA in sections 21B(2)(ii), 21B(2)(b)(ii) and 21B(4).

- Accountable institutions need to ensure that they comply with all applicable provisions of FICA, as non-compliance with certain provisions of FICA, especially with respect to reporting, is punishable by an administrative sanction.

The Amendment Act also creates a new chapter in the FSR Act regarding beneficial owners and states that where a regulator's directive is made, a financial institution, key person, representative or contractor must comply with the directive.

Practical consequences of greylisting for investors and investment managers in SA and abroad

Greylisting carries with it a certain degree of reputational damage.

Foreign jurisdictions, banks and investors will likely implement enhanced due diligence procedures when doing business in South Africa and dealing with South African investors.

Understanding South Africa's FATF greylisting

CONTINUED

Due to the additional documentation required as a result of enhanced due diligence procedures, the main consequence for ordinary investors will be a delay in the execution of offshore transactions and an increase in the cost of doing business.

South African clients' risk rating would be increased at many international institutions, such as the European Union and in the UK. This will strain the prospects of doing business internationally for both South African companies and individuals owing to high premiums.

It is anticipated that greylisting could discourage foreign investors from doing business in South Africa, which could in turn affect South Africa's GDP by approximately 1-3%.

Greylisting will most likely lead to less capital inflow and we may see increased incidences of foreign direct investment leaving the country as well as the limitation of the ability to do business within South Africa.

Although the negative impact on South Africa's capital flow as a result of greylisting will likely impact the currency and the local bond and equity markets over time, many commentators are of the opinion that, due to the high probability of South Africa's greylisting, the market had already factored in the effects of greylisting prior to the February 2023 announcement.

Experts are of the opinion that the economic impact would be minimal depending on how South Africa addresses these concerns, while some, on the other hand, point to a more severe situation for South Africa. To read a more detailed version of this article, please [click here](#).

**John Gillmer, Nuhaa Amardien,
Jenny Harwin and Luke Kleinsmidt**



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

Kate Anderson

Director:
Corporate & Commercial
T +27 (0)11 562 1105
M +27 (0)82 418 3784
E 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

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

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

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

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:

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

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E 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

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.

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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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CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com



INCORPORATING
KIETI LAW LLP, KENYA