

Real Estate Law ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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Authentication of documents: Back to basics

Have you ever had to sign or legalise documents within South Africa for use abroad, or vice versa?

If you have, then you have no doubt experienced the frustration of having same signed or executed only to find out later that the documents are not legally valid for use in the relevant country. We live in an era where many South Africans emigrate or conduct business abroad and the necessity for the correct authentication, legalisation or apostille of documents becomes imperative to avoid any delays.



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Authentication of documents: Back to basics

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There are different rules and processes applicable depending on if the documents are executed within South Africa for use in a foreign country or if the documents are executed abroad for use within South Africa. A broad overview of the various scenarios as well as the processes will be discussed as a practical guide to authentication.

Signing or executing of documents within South Africa for use outside of South Africa

Where the country is a party to the Hague Convention

The initial step will be to determine which country the documents will be used in and if the relevant country is a party to the Hague Convention of 5 October 1961, which treaty focuses on abolishing the requirement of legalisation for foreign public documents (Hague Convention). The Hague Convention only applies to public documents that have been executed in the territory of one contracting country and which must be produced in the territory of another contracting country.

If the country is a party to the Hague Convention, the relevant non-public documents are signed and/or executed in the presence of a Notary Public – these types of documents would include agreements or powers of attorney. The Notary Public can then attach their certificate of authentication to authenticate the origin of the underlying document which must bear their signature, stamp and seal. Documents are then forwarded by the Notary Public to The High Court or other competent authority in the area in which the Notary Public practices where the court or other competent authority will attach an Apostille Certificate (Apostille). If the document is an original public document, for example a document issued by the Department of Home Affairs, it does not require authentication by the Notary Public, an Apostille is directly attached to the original public document.

It is important to note that an Apostille does not certify the content of the underlying public document or that the legal requirements for



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proper execution of the underlying document are met, nor does it certify that the public document was executed in accordance with any legal requirements. An Apostille also does not expire and may therefore not be rejected solely based on when it was issued. Where multiple public documents issued by different public officials or authorities are presented to be apostilled, a separate Apostille must be issued for each document. The Hague Convention makes provision for the issuing of Apostilles in electronic form (e-Apostilles) however, the e-Apostilles are currently not accepted in many countries, but we may see that changing in near future, with legislation like the Electronic Communications and Transactions Act 25 of 2002 touching on such basic notarial certifications

being done via advanced electronic signatures. That said, the use of available technologies has not spread far enough within South Africa's authoritative bodies for this option yet.

Where the country is not a party to the Hague Convention

If the country is not a party to the Hague Convention, a distinct and longer authentication process must be followed to ensure the documents are legally valid for use in the relevant country. The documents are signed and/or executed in the presence of a Notary Public. The Notary Public will then attach their certificate of authentication to the documents which must bear their signature, stamp and seal. Documents are then forwarded by the Notary Public to The High Court or other competent

authority in the area in which the Notary Public practices where the court or other competent authority will attach an Apostille to certify the signature of the Notary Public.

The documents are then submitted to the Legalisation Section of the Department of International Relations and Co-operation (DIRCO), based in Pretoria, to be legalised. The documents can only be submitted to DIRCO via registered post or courier with an estimated turnaround time of six to eight weeks. DIRCO also has certain requirements which the documents must comply with to be legalised. Once legalised by DIRCO, the documents are then forwarded to the embassy or consulate of the country in which they are intended to be used for



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final authentication, if required by the relevant country. It is important to note that documents issued or executed in a foreign language will require a translation as well as a translation certificate from a sworn translator to be submitted together with the documents to be authenticated. It is advisable to contact the relevant embassy or consulate prior to submitting the documentation as it can be extremely costly, and clients must be advised accordingly.

Signing or executing of documents outside South Africa for use within South Africa

Rule 63 of the Uniform Rules of the High Court (Rule 63) regulates the requirements for authentication where documents are executed outside South Africa for use within South Africa and the country of origin is not a party to the Hague Convention.

Rule 63 determines that a document is sufficiently authenticated by means of:

- a Certificate of Authentication which bears the signature and seal of office of:
 - the head of a South African diplomatic or Consular Mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or
 - a consul-general, consul, vice-consul or consular agent of the UK or any person acting in any of the aforementioned capacities or a pro-consul of the UK; or
 - any government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or
- any person in such foreign place who shall be shown by a certificate of any person referred to in the points above, or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country; or
- a Notary Public in the United Kingdom of Great Britain and Northern Ireland (England or Ireland); Zimbabwe; Lesotho; Botswana; Swaziland; or
- a Commissioner Officer of the South African Defence Force as defined in section 1 of the Defence Act 4 of 1957 in the case of a document executed by any person on active service.



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Where the country of origin is also a party to the Hague Convention, authentication in terms of the provisions of the convention may be done instead of following the procedure as set out in Rule 63.

Interesting exceptions to the general rules

Section 2(1) of the South African Citizens in Antarctica Act 55 of 1962, determines that documents executed in Antarctica do not require authentication and that the laws in the Republic of South Africa are applicable to South African citizens whilst in Antarctica.

Namibia is a party to the Hague Convention, however documents executed in Namibia for use in South Africa cannot be authenticated before a Notary Public. The process in terms of the Hague Convention must therefore followed.

A power of attorney which is executed in Lesotho, Botswana, or Swaziland, and which gives authority to a person to take, defend or intervene in any legal proceedings in a Magistrate's Court within South Africa, shall not require authentication. However, the power of attorney must be duly signed, and the relevant signature must have been attested by two competent witnesses.

[Suné Kruger](#)



OUR TEAM

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



Muhammad Gattoo

Practice Head & Director:
Real Estate Law
T +27 (0)11 562 1174
E muhammad.gattoo@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



Bronwyn Brown

Director:
Real Estate Law
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Mike Collins

Director:
Real Estate Law
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Simone Franks

Director:
Real Estate Law
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo

Director:
Real Estate Law
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Simone Immelman

Director:
Real Estate Law
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



Muriel Serfontein

Director:
Real Estate Law
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber

Director:
Real Estate Law
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Alex de Wet

Director:
Real Estate Law
T +27 (0)11 562 1771
E alex.dewet@cdhlegal.com



Natasha Fletcher

Counsel:
Real Estate Law
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Samantha Kelly

Counsel:
Real Estate Law
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com

OUR TEAM

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



Robert Kaniu Gitonga

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E robert.gitonga@cdhlegal.com



Bridget Witts-Hewinson

Senior Associate:
Real Estate Law
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com



Lutfiyya Kara

Senior Associate:
Real Estate Law
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Sune Kruger

Senior Associate:
Real Estate Law
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



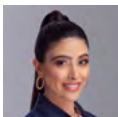
Lulama Lobola

Senior Associate:
Real Estate Law
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



Ceciley Oates

Senior Associate:
Real Estate Law
T +27 (0)11 562 1239
E ceciley.oates@cdhlegal.com



Fatima Essa

Associate:
Real Estate Law
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com



Zahra Karolia

Associate:
Real Estate Law
T +27 (0)11 562 1701
E zahra.karolia@cdhlegal.com



Ebun Taigbenu

Associate:
Real Estate Law
T +27 (0)11 562 1049
E ebun.taigbenu@cdhlegal.com



Muneerah Hercules

Associate Designate:
Real Estate Law
T +27 (0)11 562 1579
E muneerah.hercules@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 cdh Stellenbosch@cdhlegal.com

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