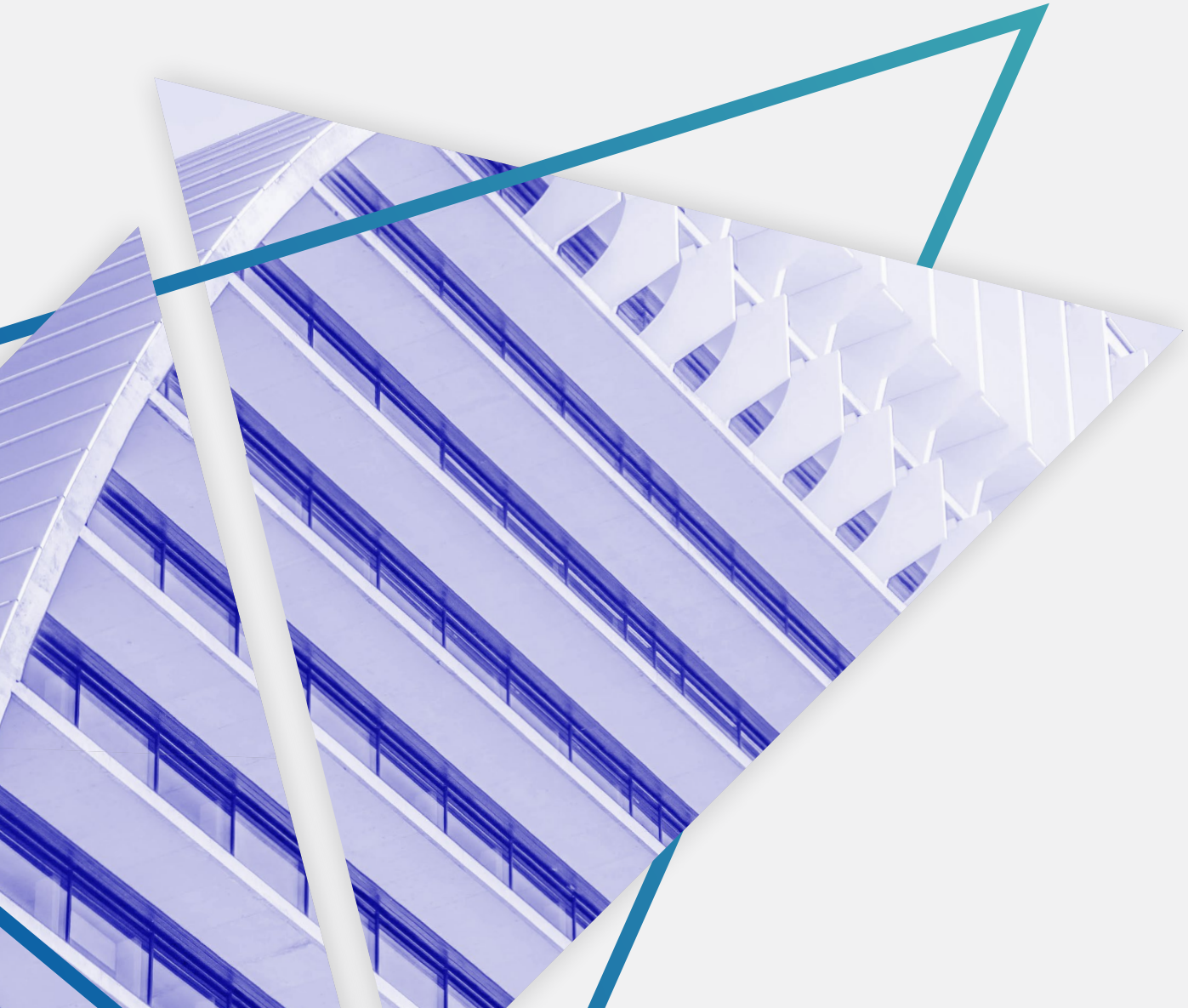
Corporate & Commercial

ALERT | 22 February 2024

CDH INCORPORATED



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SOUTH AFRICA

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For more insight into our expertise and services

Beneficial ownership: An update on beneficial ownership registration filings

Beneficial ownership filings have become a prominent administrative requirement since the Companies and Intellectual Property Commission (CIPC) implemented beneficial ownership filing procedures on 24 May 2023 in accordance with the then-promulgated Companies Amended Regulations, 2023 (Companies Regulations) published in the General Laws Amendment Act 22 of 2022. This alert deals with the most recent updates provided by the CIPC in Customer Notice 5 of 2024 and outlines who is required to file registration of beneficial ownership, what the updated timelines and deadlines are for filing registrations of beneficial ownership with the CIPC, and the consequences of failing to file beneficial ownership registration.

The who: Who is required to file registration of beneficial ownership?

Non-affected entities are required to disclose beneficial ownership in accordance with Regulation 32B of the Companies Regulations while affected companies, as defined in the Companies Act 71 of 2008 (Companies Act), are expected to enter the information of the persons who hold a 5% or greater beneficial interest in the securities of the company, in accordance with Regulation 32A of the Companies Regulations.

An affected company is a:

- public company;
- state-owned company; or
- private company that is a *"regulated company"* for takeover law purposes – namely where more than 10% of the shares in the company have been transferred amongst non-related persons within the preceding 24 months. Subsidiaries of regulated companies are also affected companies.

Beneficial ownership: An update on beneficial ownership registration filings

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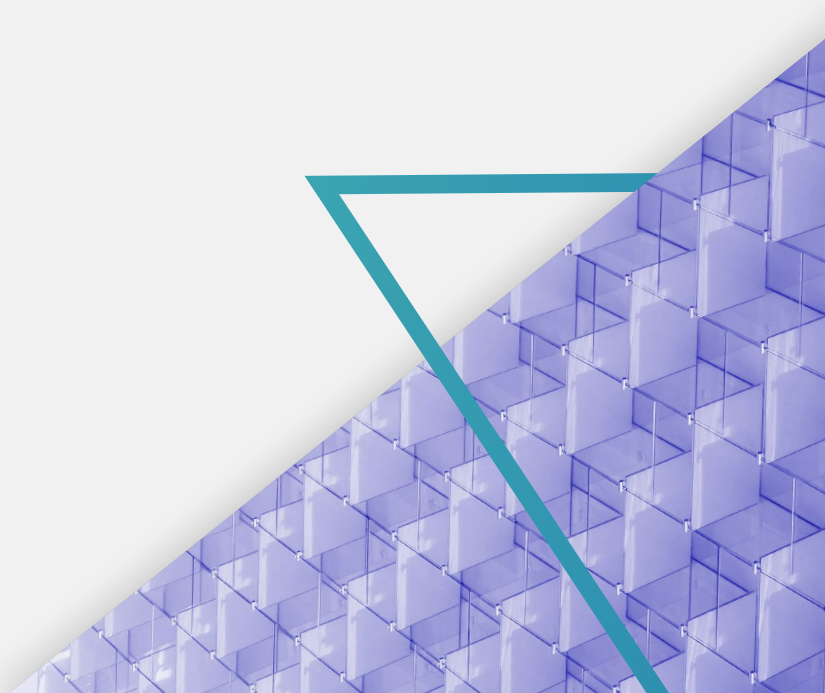
It is noteworthy to mention here that the draft Companies Amendment Bill, B 27B-2023, proposes that the test for a private company to being considered a *"regulated company"* (and therefore an *"affected company"*, for beneficial interest disclosure purposes) be overhauled. The new test will inquire into the number of *"direct or indirect"* shareholders (there would need to be at least 10 or more) and annual turnover or asset value considerations as may be prescribed in the regulations. Although it is unclear at this stage what the regulations will ultimately provide, it will be important for beneficial ownership filing purposes to identify whether a company is a non-affected or affected company, as the filing requirements differ.

For more information regarding who is required to file registration of beneficial ownership and how to complete such filings, you can read our Corporate & Commercial Alert published on 5 July 2023.

The when: What is the deadline for beneficial ownership filings?

Neither the Companies Act nor the Companies Regulations gives clear guidance as to when exactly beneficial ownership filings are required to be made by non-affected companies. This has been largely left to be dealt with by way of the CIPC's guidance notes and customer notices. The most recent update from the CIPC (as of the date of publication of this Alert) by way of Customer Notice 5 of 2024 states that entities incorporated after 24 May 2023 have to file beneficial ownership information within 10 business days after the date of incorporation. Entities are required to update their beneficial ownership records within 10 business days of changes in beneficial ownership of the entity.

Entities that were incorporated prior to 24 May 2023 have had to file their beneficial ownership information with their annual returns and are now faced with a hard deadline of 24 May 2024. From 1 April 2024, the CIPC will introduce a *"hard-stop functionality"* which will have significant consequences for entities that do not comply with the 24 May 2024 deadline. The rationale for this is that by this time all companies should have reached their first anniversary since the commencement of the Companies Regulations.



Beneficial ownership: An update on beneficial ownership registration filings

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The why: What are the consequences if beneficial ownership registrations are not filed?

If this deadline is not met, not only will entities be liable for administrative fines, as initially indicated by the CIPC, but they will also be unable to file their annual returns, the consequences of which can result in the deregistration and possible withdrawal of the entity by the CIPC. However, in terms of section 171(7) of the Companies Act, there first needs to be a compliance notice issued by the CIPC (after its investigation of a breach of the Companies Act), which if not complied with by the company can give rise to an administrative fine upon application by the CIPC to the court. As for blocking further annual return filings, questions may arise regarding the exact source of the CIPC's statutory authority to impose this strong measure – and this might become an active area of administrative law litigation.

Conclusion

We advise clients to refer to the CIPC User Guidelines on Beneficial Ownership which detail the process of beneficial ownership filings. At CDH, we are able to assist with the determination of beneficial owners, advise on the filing requirements, and submit the filing on your behalf.

Ian Hayes and Sasha Schermers

Chambers Global 2024 Results

Corporate & Commercial

Chambers Global 2021–2024 ranked our Corporate & Commercial practice in: **Band 1**: Corporate/M&A and in

Chambers Global 2024 ranked our Corporate & Commercial practice (Kenya) in Band 4 Corporate/M&A.

Chambers Global 2024 positioned our Private Equity sector in the "**spotlight**".

Ian Hayes ranked by Chambers Global 2022–2024 in **Band 1**: Corporate/M&A.

David Pinnock ranked by Chambers Global 2022–2024 in **Band 1**: Private Equity.

Peter Hesseling ranked by Chambers Global 2022–2023 in **Band 2**: Corporate/M&A and in **Band 3**: Capital Markets: Equity in 2023–2024.

Willem Jacobs ranked by Chambers Global 2022–2024 in Band 2: Corporate/M&A and in **Band 3**: Private Equity.

Sammy Ndolo ranked by Chambers Global 2021–2024 in **Band 4**: Corporate/M&A.

David Thompson ranked by Chambers Global 2024 in **Band 5:** Corporate/M&A.

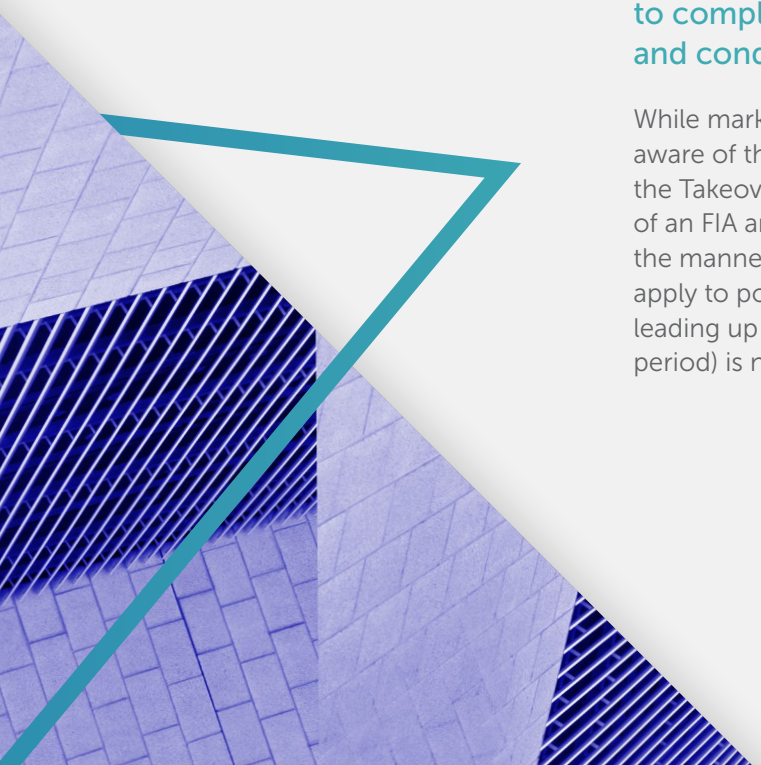
Vivien Chaplin ranked by Chambers Global 2024 in **Band 5**: Corporate/M&A.

Chambers TOP RANKED Global 2024

Cliffe Dekker Hofmeyr

Don't throw cautionaries to the wind: Navigating communication about potential affected transactions

In the context of "*affected transactions*", which are transactions that are regulated in terms of the Takeover Regulations (see section 117(1)(c) of the Companies Act 71 of 2008 (Companies Act)), it is well-established and understood that the publication of a "*firm intention announcement*" (FIA) in respect of an affected transaction is a watershed event. The publication of an FIA triggers the commencement of the "*offer period*" (firm offer period) in respect of an affected transaction. From this point, the applicable offeror is bound to make a firm offer to the offeree-regulated company or its shareholders, as applicable, and to see the affected transaction to completion on and subject to the salient terms and conditions set out in the FIA.



While market participants and advisors are generally well aware of the regulatory framework that kicks in under the Takeover Regulations with effect from the publication of an FIA and commencement of the firm offer period, the manner and extent to which the Takeover Regulations apply to potential affected transactions in the period leading up to the publication of the FIA (the pre-firm offer period) is not as well understood or appreciated.

In fact, in many instances, during the pre-firm offer period, would-be offerors pursuing potential affected transactions often neglect to consider the impact of, or take measures to ensure compliance with, the Takeover Regulations altogether. Neglecting to procure compliance with the Takeover Regulations during the pre-firm offer period may materially detrimentally impact the transaction process in respect of an affected transaction. In certain instances, such a failure may even be fatal to the successful completion of an affected transaction given that the Takeover Regulations provide that an affected transaction may not be implemented unless the Takeover Regulation Panel (Panel), being the regulatory authority empowered with jurisdiction to regulate affected transactions, has (i) issued a "*compliance certificate*"; or (ii) granted an exemption, prior to the affected transaction being implemented (see section 121(b) of the Companies Act).

Among the most common instances of non-compliance with the Takeover Regulations during the pre-firm offer period is the way communications or announcements in respect of potential affected transactions are required to be made during this period.

This was illustrated by the recent decision of the Takeover Special Committee (TSC) in the case of *Caxton and CTP Publishers and Printers Limited, Takeover Regulation Panel, and Mpact Limited (8 March 2023)* (Caxton TSC decision) as well as the recent announcement issued by the Panel in respect of communications published in relation to the potential affected transaction involving Multichoice Group Limited (Multichoice).

Don't throw cautionaries to the wind: Navigating communication about potential affected transactions

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Announcements and communications during the pre-firm offer period

In terms of the Takeover Regulations, the underlying principles that regulate communications and engagements in relation to a potential affected transaction during the pre-firm offer period are that:

- all negotiations between an independent board and an offeror must be kept confidential;
- price-sensitive information may be provided to select persons on a confidential basis only; and
- confidentiality must be generally maintained prior to an FIA or cautionary announcement being published (see Regulation 95 of the Takeover Regulations).

The confidentiality provisions contained in Regulation 95 of the Takeover Regulations go on to require that if there is a leak, or a reasonable suspicion of a leak, of price-sensitive information in relation to an affected transaction, the leaked information must be immediately disclosed to the public by way of a cautionary announcement.

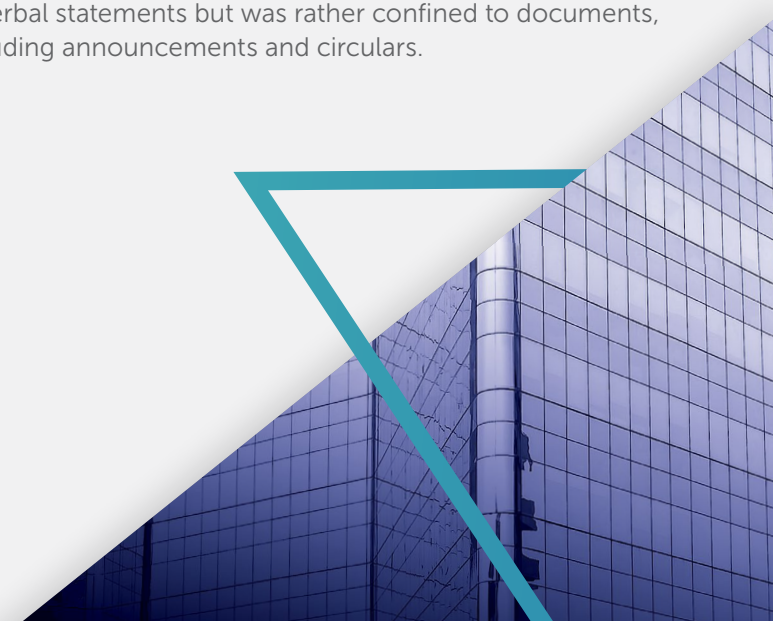
The Takeover Regulations also include specific regulations in respect of announcements in relation to affected transactions. Regulation 117 provides that "*[a]ll documents relating to an affected transaction as defined under section 117(c) of the [Companies] Act, including announcements and circulars, must be approved by the Panel before being posted or published*".

The Caxton TSC decision

The Caxton TSC decision dealt with an appeal against a ruling of the Panel in relation to public statements made by Caxton and CTP Publishers and Printers Limited (Caxton) regarding a potential offer to acquire a controlling interest in Mpact Limited (Mpact). These statements were made after the negotiations between Caxton and the Mpact board in relation to the transaction had collapsed.

In its ruling, the Panel found against Caxton and ruled that "*Caxton is prohibited from making any further public statement in any form and on any platform about the acquisition of Mpact without the approval of the Panel under Regulation 117*".

On appeal, Caxton argued that the Panel had no jurisdiction over the impugned public statements as (i) there was no offer on the table and therefore the statements did not relate to a live affected transaction but rather a potential affected transaction; and (ii) the scope of Regulation 117 of the Takeover Regulations did not extend to verbal statements but was rather confined to documents, including announcements and circulars.



Don't throw cautionaries to the wind: Navigating communication about potential affected transactions

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While the TSC ultimately agreed with Caxton that the provisions of Regulation 117 of the Takeover Regulations apply only to the publication of documents (such as announcements and circulars) in relation to affected transactions, and not to other communications or verbal statements, the TSC found that the confidentiality provisions contemplated in Regulation 95 of the Takeover Regulations were nevertheless applicable to these communications.

In this regard, the TSC expressed that strict confidentiality on the part of the offeree-regulated company and the potential offeror during the pre-firm offer period must be adhered to, with the release of a cautionary announcement in respect of a leak of price sensitive information, or reasonably suspected leak, being the only exception to this general requirement to maintain confidentiality in the pre-firm offer period.

The TSC was also explicit that the fact that the firm offer period in respect of the Mpact transaction had not yet commenced did not release Caxton from the restrictions that apply to confidentiality in respect of affected transactions and its announced intention to conclude a potential affected transaction in respect of Mpact. The TSC was also of the view that the collapse of negotiations between Caxton and Mpact did not release Caxton from the confidentiality restrictions.

Announcements in relation to the potential Multichoice transaction

The reasoning set out in the Caxton TSC decision is, in our experience, consistent with the Panel's approach in recent times around regulating the publication of announcements in respect of potential affected transactions during the pre-firm offer period.

In its application of the Takeover Regulations, the Panel has been increasingly consistent in adopting the position that no announcements in respect of potential affected transactions will be permitted during the pre-firm offer period, other than (i) the FIA (once all pre-requisites for publishing the FIA have been fulfilled); or (ii) cautionary announcements in respect of a leak, or reasonably suspected leak, of price sensitive information.

That being the case, market observers may have been surprised by the cautionary announcement published on SENS on 1 February 2024 by Multichoice, which appeared to be inconsistent with the recent approach of the Panel in relation to such announcements. In the

Don't throw cautionaries to the wind: Navigating communication about potential affected transactions

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announcement, Multichoice informed shareholders that it had received a non-binding expression of interest letter from Groupe Canal+ SA in respect of a potential affected transaction, including the indicative pricing contemplated in the expression of interest letter.

This inconsistency appears, in some respects, to have been explained in the announcement of the Panel published in response to thereto on 5 February 2024, in terms of which the Panel referred to "*various communications and announcements … issued to the public in relation to Multichoice*" which the Panel confirmed were not sanctioned or approved by the Panel. The Panel went on to say that it was "*taking this matter seriously and currently investigating various aspects of the current status of this matter on an urgent basis*".

Conclusion

Having regard to the Caxton TSC decision and the Panel's announcement in relation to the potential Multichoice transaction, it is clear that potential offerors and offeree-regulated companies are required to administer their negotiations, as well as all communications, with strict adherence to the confidentiality principles set out in Regulation 95 of the Takeover Regulations.

Moreover, all documents and announcements to be published in relation to potential affected transactions must first be submitted to the Panel for approval. In doing so, parties should be cognisant that the present view of the Panel is that such an announcement will not be approved unless (i) it is in the form of an FIA and all pre-requisites for publishing an FIA are fulfilled; or (ii) it is a cautionary announcement in the context of a leak, or suspected leak, of price sensitive information in relation to a potential affected transaction.

Dane Kruger and Jenny Harwin

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

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
Sector Head: Mining & Minerals
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

Johan de Lange
Deputy Practice Head:
Finance & Banking
Director: Projects & Infrastructure
T +27 (0)21 481 646
M +27 (0)78 642 5573
E 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

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
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E 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

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

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

Martha Mbugua
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E martha.mbugua@cdhlegal.com

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

OUR TEAM

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

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
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
Joint Sector Head:
Financial Institutions, Services & Fintech
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
Joint Sector Head: Pharmaceuticals
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.comm

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

Alistair Young
Director:
Corporate & Commercial
T +27 (0)11 562 1258
M +27 (0)84 676 1171
E Alistair.young@cdhlegal.com

Emma Hewitt
Practice Management Director:
Corporate & Commercial
T +27 (0)11 562 1635
M +27 (0)82 896 1332
E emma.hewitt@cdhlegal.com

Alecia Pienaar
Counsel:
Environmental Law
M +27 (0)82 863 6272
E 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

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

CDH INCORPORATED