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CORPORATE & COMMERCIAL **ALERT**

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Value share agreements in light of section 112 of the Companies Act and the National Credit Act

Le Sueur v Stainton and another (2091/19P) [2021] ZAKZPHC 44 (28 July 2021) (*Le Sueur v Stainton*) revolved around a value share agreement entered into between Robert Anthony Le Sueur, Roderick Robert Stainton and Rokwil Civils Proprietary Limited, a property development company wholly owned by Stainton.

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Value share agreements in light of section 112 of the Companies Act and the National Credit Act

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Preceding the conclusion of the value share agreement, Le Sueur and Stainton partnered to develop land into an industrial park providing warehousing facilities and logistic premises. In terms of the arrangement, Le Sueur would provide the funding required to purchase the land and fund the initial development costs while Stainton would manage the development. Le Sueur and Stainton had previously partnered informally in business, and Le Sueur trusted Stainton's ability to deliver the development.

It was agreed between that the performance of civil work such as earthmoving and installation of infrastructure would be conducted through a special purpose vehicle in which Le Sueur and Stainton would be equal shareholders and share value. All business opportunities in respect of civil works arising out the development would be for the special purpose vehicle. Subsequently, Le Sueur left the procurement of tenders for the civil works in Stainton's hands.

It then came to the knowledge of Le Sueur that the civil works were, contrary to his agreement with Stainton, being conducted through Rokwil, a company in which Le Sueur held no interest.

As settlement and for rectification of affairs, Le Sueur, Stainton and Rokwil concluded a value share agreement, in terms of which the value created in Rokwil as a result of the development would be calculated and shared with Le Sueur and Le Sueur and Stainton would share in certain projects and interests.

Following calculation and discussions between Le Sueur and Stainton, they agreed that the value share in Rokwil amounted to R200 million and that Le Sueur was entitled to half of the value share, R100 million (value share settlement amount). Accordingly, Le Sueur, Stainton and Rokwil signed a settlement agreement and an acknowledgment of debt (AOD). In terms of the AOD, Stainton was required to submit a payment plan to Le Sueur in terms of which the value share settlement amount would be settled by way of asset transfers, cash, or both. Le Sueur rejected the payment plan, and summons were then issued and served on Stainton and Rokwil.

After Stainton and Rokwil failed to settle the value share settlement amount, Le Sueur filed an application for judgment on confession and by default. In his defence, Stainton pursued non-compliance with section 112 of the Companies Act 71 of 2008 (Companies Act) and section 40(1) of the National Credit Act 34 of 2005 (NCA).

Section 112 of the Companies Act

Section 112 of the Companies Act applies to proposals to dispose of all or a greater part of the assets or undertaking of a company and in terms of the same, a company may not dispose of all or the

Value share agreements in light of section 112 of the Companies Act and the National Credit Act...*continued*

The High Court expressed that when it comes to the process of attributing meaning to words used in legislation, it is important to ensure that a sensible meaning is given to a word or phrase.

greater part of its assets or undertaking unless the disposal has been approved by a special resolution of the shareholders, in accordance with section 115. Stainton raised before the High Court that Rokwil's shareholders did not approve the conclusion of the value share agreement. On the other hand, Le Sueur argued that obligations agreed to by Rokwil in the value share agreement did not constitute a disposal in terms of section 112 of the Companies Act.

The High Court noted that what was agreed upon in the value share agreement did not amount to a disposal of all or the greater part of Rokwil's assets. The High Court made reference to the meaning of "*dispose*" and concluded that "*the only disposal to which it is intended to refer is one which would have the effect of permanently depriving the company of its right to ownership of the assets involved*." The High Court further referred to Rodgers AJ, with reference to *Kinloch NO and another v Kinloch* 1982 (1) SA 679 (A), which held that the ordinary meaning of "*dispose of*" is "*to make over or part with by way of sale or bargain, sell, to transfer into new hands or to the control of someone else (as by selling or bargaining away)*". The High Court agreed with Le Sueur that no reference was made to Rokwil's assets or undertaking or that the value share settlement amount would be settled by Rokwil. The value share agreement did not contain or specify any quantification, specification or detail whatsoever of the amount to be paid by Stainton and Rokwil, nor did it contain any specification or detail of any of Rokwil's assets to be transferred to Le Sueur.

The High Court expressed that when it comes to the process of attributing meaning to words used in legislation, it is important to ensure that a sensible meaning is given to a word or phrase instead of a meaning that could lead to "*insensible or unbusinesslike results or undermines the apparent purpose of the document*".

Section 40(1) of the NCA

Stainton raised that, at the time of conclusion of the AOD, Le Sueur was not registered as a credit provider in terms of section 40(1) of the NCA. Stainton submitted that the value share agreement, settlement agreement and AOD provided for the granting of credit by Le Sueur. Stainton further submitted that the reach of the NCA was wide and covered the transactions under consideration, especially with regards to the definition of credit in section 1 as "*a deferral of payment of money owed to a person, or a promise to defer such a payment*".

Section 1 of the NCA includes a number of descriptions for a credit provider, but the only applicable one in this case is found in sub-paragraph (h): "the party who advances money or credit to another under any other credit agreement".

Stainton also argued that the purpose of the NCA is to ensure that all forms of agreement which involve the advancing of credit, which is defined in section 1 as "*a deferral of payment of money owed to a person or a promise to defer such payment*", fall within the ambit of the NCA.

Value share agreements in light of section 112 of the Companies Act and the National Credit Act*...continued*

The lesson in this regard is a clear affirmation that disposal in respect of section 112 of the Companies Act means the actual transfer of an asset or an undertaking.

The High Court disagreed with the submission that when it comes to considering the definition of a credit provider, the emphasis should fall on the words *"other credit agreement"*. The purpose of the definition is to describe the credit provider, not the credit agreement, and therefore the emphasis should be on *"the party who advances money or credit"*. The High Court noted that there was no indication in the value share agreement that the plaintiff at any stage advanced money or credit to Stainton.

In *Grainco (Pty) Limited v Broodryk NO en andere* 2012 (4) SA 517 (FB), the court held that an acknowledgment of debt was not subject to the NCA as the underlying cause of the acknowledgment was not a money lending transaction, but a damages claim in which the plaintiff agreed to defer payment of such damages by the defendants. In *Ratlou v MAN Financial Services SA (Pty) Ltd* 2019 (5) SA 117 (SCA) the court held that the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA, and the subsequent impact that that would have on the settlement of disputes, would hold considerable weight.

Importantly, the High Court noted the provisions of section 4(1)(a)(i) of the NCA, which state that the NCA does not apply to credit agreements where the consumer is a juristic person whose asset value or annual turnover at the time the agreement is made exceeds R1 million. This would apply to Rokwil, in the event of it being found that the NCA applied to the agreements between Le Sueur, Stainton and Rokwil.

Through *Le Sueur v Stainton* our courts have provided a statement on the relevance of disposals in terms of section 112 of the Companies Act and the NCA on similar value share arrangements.

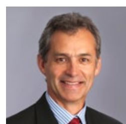
The lesson in this regard is a clear affirmation that disposal in respect of section 112 of the Companies Act means the actual transfer of an asset or an undertaking. It is also clear that agreements for purposes of the settlement of matters between parties in a dispute may not be considered to be credit agreements.

Mondli Sithole and Nonhlakanipho Mchunu

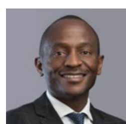
OUR TEAM

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

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin
Director
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Sector head
Director
Agriculture, Aquaculture
& Fishing Sector
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

John Gillmer
Joint Sector head
Director
Private Equity
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Ian Hayes
Director
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

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

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Brian Jennings
Director
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly
Director
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhlakanipho Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@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
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Joint Sector head
Director
Private Equity
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Sector head
Director
Mining & Minerals
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Sector Head
Director
Oil & Gas
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk
Head of Projects & Infrastructure
Director
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Emma Hewitt
Practice Development Director
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

CVS Plaza, Lenana Road, Nairobi, Kenya. PO 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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INCORPORATING
KIETI LAW LLP, KENYA