

4 AUGUST 2021

CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE >

Section 45 financial assistance: The pitfalls, perils, and importance of getting it right as highlighted by the recent *Steinhoff* court case

When considering the applicability of section 45 of the Companies Act in a transaction, parties would be best placed to bear in mind that financial assistance granted by domestic companies in favour of foreign corporations does fall within the application of section 45 and that where the general terms, conditions and identity of the parties to an original debt change, the relevant parties will need to be conscious that fresh financial assistance resolutions may be warranted.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

[CLICK HERE](#) 



INCORPORATING
KIETI LAW LLP, KENYA

Section 45 financial assistance: The pitfalls, perils, and importance of getting it right as highlighted by the recent *Steinhoff* court case

Where financial assistance is granted to a foreign company, a broad and open interpretation is adopted to the wording of section 45 to require such financial assistance to comply with the provisions of the Companies Act.

In The Sound of Music, we are reminded in the song Do-Re-Mi to "start at the very beginning, a very good place to start". When it comes to discussing financial assistance in terms of the Companies Act 71 of 2008 (Companies Act), the "beginning" might not be the best place to start. In order to highlight its importance, the best place to start would actually be at the very end, the consequences which arise when the provisions of the Companies Act which regulate financial assistance are not complied with.

Financial assistance is governed by sections 44 and 45 of the Companies Act, this article will, however, be limited to a discussion of section 45 of the Companies Act. As a starting point, where financial assistance (as contemplated in section 45) has been provided in a manner which is inconsistent with provisions of section 45, it is void. Section 45 goes on to provide that if the resolution or agreement granting financial assistance is void, the director or directors may be personally liable in terms of section 77(3)(e)(iv) of the Companies Act should the director or directors have been (i) present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74 and (ii) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in section 45(4) of the Companies Act.

Ultimately, the consequences of financial assistance that has been improperly granted are far-reaching. With this in mind, the recent high court decision of *Trevo Capital Ltd and Others v Steinhoff International Holdings (Pty) Ltd and Other* (2833/2021) [2021] ZAWCHC 123 (2 July 2021) (Steinhoff) is relevant. In this article, we wish to highlight how the *Steinhoff* case confirmed (i) that financial assistance granted by domestic companies in favour of foreign corporations does fall within the application of section 45 and (ii) that where the general terms, conditions and identity of the parties to an original debt change, directors who have previously authorised financial assistance need to be conscious that fresh financial assistance resolutions may be warranted in terms of section 45 of the Companies Act.

Section 45 and foreign companies

In the *Steinhoff* case, the court concluded that where financial assistance is granted to a foreign company, a broad and open interpretation is adopted to the wording of section 45 to require such financial assistance to comply with the provisions of the Companies Act. To briefly contextualise this, section 45(2) of the Companies Act provides that "[e]xcept to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to ... a related or inter-related company or corporation ... subject to subsections (3) and (4)" (own emphasis). Despite "foreign company" being defined

Section 45 financial assistance: The pitfalls, perils, and importance of getting it right as highlighted by the recent *Steinhoff* court case...continued

Section 45 of the Companies Act lays down guidelines that financial assistance must be given to (i) a specific party or a certain category of parties, (ii) in specific circumstances, (iii) for specified purposes, and (iv) which prior shareholder authorisation does not extend past a two-year period.

in the Companies Act, it is absent from section 45(2). Notwithstanding this, the court concluded that a foreign company does fall within the ambit of section 45(2) by virtue of the reference to the word "corporation". In drawing this conclusion, the court held that the reference to "corporation" must be given a wide and inclusive meaning to include foreign companies. Secondly, that the purpose of section 45 is to prevent "a company's directors abusing their powers by providing financial assistance to external entities or persons on terms which have insufficient regard to the interests of the company's creditors and shareholders", which, when read with the general purposes set out in section 7 of the Companies Act, justify an expansive interpretation being given to section 45(2).

'Fresh' financial assistance

In order to aid our discussion on the importance of the *Steinhoff* case in the context of changes to financial assistance, it would be best to make use of a brief example: Company A has borrowed a sum of money from a lender. As security for this, Company B (which is a wholly owned subsidiary of Company A and therefore a 'related person' for the purposes of the Companies Act), has agreed to provide a guarantee in favour of the lender for the amounts advanced to Company A. Prior to concluding the guarantee, Company B's board of directors would have to have complied with section 45 of the Companies Act, by passing the necessary financial assistance resolutions. Should there be a change in the parties, quantum, terms or conditions of the original debt advanced to Company A, Company B would at that stage need to

consider whether new financial assistance resolutions will need to be passed by the board of Company B.

In this regard, the *Steinhoff* case looms large. As a departure point, it was emphasised that courts must consider a transaction for what it actually is, and is intended to be, and not what it is described as being and the court cautioned against viewing the applicability of section 45 too narrowly. It was held "that the restatement of a debt on different terms and conditions and involving at least one different party, is in terms of law the creation of a fresh debt". Ultimately, as a matter of principle, it is the issue of new financial assistance and/or the creation of 'fresh debt' or fresh obligations which may drive the application of section 45. This is because the creation of this fresh debt may require the granter of the original financial assistance, in terms of section 45, to re-pass the new authorising resolutions. When considering this 'fresh debt'/'fresh obligations' interplay and whether, especially in the context of a change to the terms or parties to the financial assistance, financial assistance resolutions need to be re-passed, according to the *Steinhoff* case, the following must be considered –

- Section 45 of the Companies Act lays down guidelines that financial assistance must be given to (i) a specific party or a certain category of parties, (ii) in specific circumstances, (iii) for specified purposes and (iv) which prior shareholder authorisation does not extend past a two-year period. What this means is that, when considering whether new financial assistance resolutions are required to be passed, directors cannot only

Section 45 financial assistance: The pitfalls, perils, and importance of getting it right as highlighted by the recent *Steinhoff* court case...continued

The consequences of advancing financial assistance in a manner which is non-compliant with section 45 of the Companies Act are perilous and there are numerous places in section 45 where parties may trip up.

consider the extent of the financial obligations which were previously authorised. Each of the parties, terms, circumstances and purpose of the financial assistance warrant consideration. Put differently, the consideration of whether a change in the terms of the debt require fresh financial assistance resolutions cannot be considered by only having regard to the quantum of the original debt, or in the context of our above example, the limit on the financial obligations of Company B's guarantee. There are other relevant factors such as the "actual or potential recipient and the terms of such assistance".

- When considering whether new financial assistance resolutions should be passed, regard must also be had to whether the directors, at the time that they passed the original financial assistance resolution, "envisaged or authorised" the company to negotiate new terms in the debt or amend the parties to the debt. Where this was neither envisaged nor authorised, the financial assistance resolutions would likely be required to be repassed.

The consequences of advancing financial assistance in a manner which is non-compliant with section 45 of the Companies Act are perilous and there are numerous places in section 45 where parties may trip up. Ultimately, when considering the applicability of section 45 of the Companies Act in a transaction, parties would be best placed to bear in mind that financial assistance granted by domestic companies in favour of foreign corporations, does fall within the application of section 45 of the Companies Act and that where the general terms, conditions and identity of the parties to an original debt change the relevant parties will need to be conscious that fresh financial assistance resolutions may be warranted in terms of section 45 of the Companies Act.

Jess Reid and James Wewege

2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

DealMakers

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.

2018

1st by M&A Deal Flow.
 1st by M&A Deal Value.
 2nd by General Corporate Finance Deal Flow.
 1st by BEE M&A Deal Value.
 2nd by BEE M&A Deal Flow.
 Lead legal advisers on the Private Equity Deal of the Year.

2017

2nd by M&A Deal Value.
 1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
 1st by General Corporate Finance Deal Value.
 2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
 2nd by BEE Deal Flow and Deal Value.

2021 RESULTS

CDH's Corporate, Commercial and M&A practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.

Ian Hayes is ranked in the Hall of Fame in Corporate & Commercial and M&A in THE LEGAL 500 EMEA 2021.

David Pinnock is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Willem Jacobs is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Justine Krige is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Johan Latsky is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Peter Hesseling is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Rachel Kelly is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Vivien Chaplin is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

Roux van der Merwe is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.

CDH's Investment Funds practice is ranked in Tier 3 in THE LEGAL 500 EMEA 2021.

John Gillmer is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.

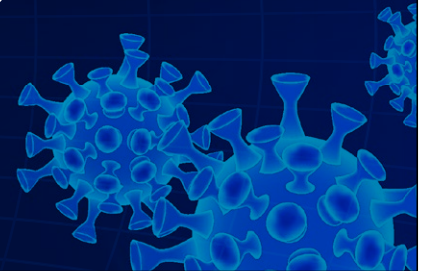
Mark Linington is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.

Wayne Murray is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2021.



CDH'S COVID-19 RESOURCE HUB

Click here for more information 

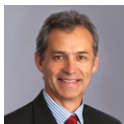


OUR TEAM

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 Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@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

Nonhla 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

Jerain Naidoo
Director
T +27 (0)11 562 1214
M +27 (0)82 788 5533
E jerain.naidoo@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

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

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

©2021 10279/AUG



INCORPORATING
KIETI LAW LLP, KENYA



CORPORATE & COMMERCIAL | cliffedekkerhofmeyr.com