

CORPORATE & COMMERCIAL ALERT

9 NOVEMBER 2022



INCORPORATING
KIETI LAW LLP, KENYA

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Section 45 financial assistance in terms of the *Van den Heever* case

Section 45 of the Companies Act 71 of 2008 (Companies Act) is a section which is encountered across various financing transactions. This section deals with direct and indirect financial assistance to directors and prescribed officers as well as certain companies and corporations. This includes, *inter alia*, lending money, guaranteeing a loan or other obligations, and securing any debt or obligation.



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The aim of section 45 is to safeguard the company that is providing the financial assistance by including requirements which must be met before the board of the company can approve the financial assistance. These requirements assist in preventing the board from acting against the interest of shareholders of the company by unduly burdening the company with obligations for the benefit of other companies or directors.

The board may not authorise financial assistance unless: (i) it is pursuant to a special resolution (adopted within the previous two years approving the financial assistance) or an employee share scheme; (ii) the solvency and liquidity test is satisfied; (iii) the terms under which the financial assistance is given is fair and reasonable to the company; and (iv) all provisions in terms of the company's memorandum of incorporation are met. If certain thresholds are met, there is also a requirement for the board to notify shareholders and any trade union representing its employees if the board adopts the resolution.

Any contravention of section 45 will render the financial assistance void and will result in personal liability for the board.

DO ALL GROUP TRANSACTIONS CONSTITUTE FINANCIAL ASSISTANCE?

It is, however, noted that not all group transactions constitute financial assistance. In *Van Den Heever N.O. v Van Tonder* [2021] JOL 51490 (GJ), the court had to decide on, *inter alia*, whether certain group payments constituted financial assistance in terms section 45.

In this case, the respondent was appointed as a business rescue practitioner of a group of companies which were subsequently placed in liquidation. The appellants were the liquidators of the group of companies. The liquidators claimed against the respondent for losses suffered by a group company called Baobab as the respondent allegedly used funds, collected from Baobab's debtors, to extinguish obligations of certain group companies, without compliance with section 45.



The Legal 500 EMEA 2022 Results graphic features a dark blue background with a white and yellow diagonal stripe in the bottom right corner. The text is white and yellow. The logo 'The LEGAL 500' is at the top left, with 'EMEA' below it. To the right, '2022 RESULTS' is written in large white letters. Below this, there are four lines of text, each starting with 'The Legal 500 EMEA 2022' followed by a recommendation for a firm or individual in the 'Corporate & Commercial practice' or 'Hall of Fame' for commercial, corporate/M&A.

The LEGAL 500
EMEA

2022 RESULTS

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.

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The court looked at the fact that the management of the group of companies operated together and interdependently. Each company was responsible for a particular function because no single company in the group held all of the assets or employees to service a contract. Therefore, Baobab (which held the contracts) would invoice the client for a specific contract and in turn Baobab would receive payment from the client. Baobab would then use those funds to pay the expenses of all the companies in the group for each of their specific functions.

The court also referred to the case of *Treasure-General v Lippert* [1880] ISC 291 where the court held that one must refer to the real transaction between the parties as opposed to what the transaction is described to be.

Accordingly, in the *Van den Heever* case, the court held that paying the expenses of the other companies did not constitute “*financial assistance*” in terms of section 45 of the Companies Act. This was because the payments from Baobab to the other companies did not constitute loans but were payments for services rendered.

This judgment demonstrates that not all group transactions will trigger financial assistance and that one should always bear in mind what the actual transaction is between the parties. In this case, providing payment to related parties, which operate interdependently, for services rendered did not constitute financial assistance.

**SIDASHA SINGH AND
JENNI DARLING**



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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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