

Corporate & Commercial ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Back to basics: Financial assistance in terms of section 45 of the Companies Act

Section 45 of the Companies Act 71 of 2008 (Companies Act) governs direct and indirect financial assistance to directors and prescribed officers as well as certain companies and corporations, with the purpose of protecting shareholder and creditor interests by preventing the board of a company from exploiting its power of providing financial assistance which may unduly burden the company for the benefit of directors.



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Back to basics: Financial assistance in terms of section 45 of the Companies Act

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The essential questions

What is financial assistance?

Section 45(1)(a) of the Companies Act prescribes that financial assistance includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation and excludes:

- i) *lending money in the ordinary course of business by a company whose primary business is the lending of money;*
- ii) *an accountable advance to meet:*
 - *legal expenses in relation to a matter concerning the company; or*
 - *anticipated expenses to be incurred by the person on behalf of the company; or*
- iii) *an amount to defray the person's expenses for removal at the company's request."*

Previously, it was unclear in law whether the list of financial assistance contemplated in section 45(1)(a) of the Companies Act was open ended. Many companies took the

conservative view that the list was non-exhaustive, until December 2023 when the burning question was finally answered by the Supreme Court of Appeal in *Constantia Insurance Company Limited v The Master of the High Court, Johannesburg and Others* (512/2021) [2022] ZASCA 179 (13 December 2022) which held, *inter alia*, that the list is a closed and exhaustive.

Who can it be provided to?

Section 45(2) of the Companies Act provides that the board of a company may, except to the extent that a company's memorandum of incorporation provides otherwise:

"... authorise a company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member ..."



**Corporate, Commercial/M&A
2023 Rankings**

Corporate & Commercial practice is ranked in Tier 1.

CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.

Leading Individuals:
Willem Jacobs | David Pinnock

Recommended Lawyers:
Vivien Chaplin | Peter Hesselting
Justine Krige | Sammy Ndolo
David Thompson | Roxanna Valayathum
Njeri Wagacha

Next Generation Lawyers:
Justine Krige

Hall of Fame:
Ian Hayes

Back to basics: Financial assistance in terms of section 45 of the Companies Act

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Companies are cautioned that although foreign companies do not fall within the definition of a "company" in terms of the Companies Act, they are not excluded from the realm of section 45 as courts have construed the term "corporation" to be wide enough to include foreign companies.

How is it provided?

In terms of section 45(3) read with section 45(4) of the Companies Act, the board of a company may not authorise financial assistance unless:

- it is provided pursuant to an employee share scheme; or
- it is provided pursuant to a special resolution of the shareholders which is adopted within the previous two years of approving the financial assistance; and
- the board has considered that:
 - the solvency and liquidity test shall be satisfied immediately after financial assistance is provided;

- the terms under which the financial assistance is given are fair and reasonable to the company; and
- the terms and conditions of the company's memorandum of incorporation are satisfied insofar as they relate to financial assistance.

It is important to bear in mind that if financial assistance is renegotiated or changed (whether it be the parties, quantum or terms of financial assistance), the company providing financial assistance will have to reconsider the solvency and liquidity test and whether new resolutions will need to be passed.

Non-compliance with the section 45 of the Companies Act

Financial assistance improperly granted in terms of section 45 of the Companies Act can materially affect the company, its transactions and the directors in their personal capacity. It can be regarded as a misappropriation of the company's money and may constitute as a ground for delinquency for directors.

The effect of providing financial assistance in a manner inconsistent with section 45 of the Companies Act or the company's memorandum of incorporation results in the financial assistance being void, which cannot subsequently be ratified.

Although a contravention of section 45 is not a criminal offence, a director may, in terms of section 77(3)(e)(iv) of the Companies Act, be held personally liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director if the director was:

"... 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 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)."

Back to basics: Financial assistance in terms of section 45 of the Companies Act

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A time for change

The Department of Trade, Industry and Competition published the Draft Companies Amendment Bill which introduced the insertion of the new sub-section (2A) stating that:

"The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries".

The legal effect thereof excludes a holding company from compliance with section 45 of the Companies Act when it provides financial assistance

to its subsidiaries. The legislature's rationale to remove the regulatory red tape is founded on the basis that the protection offered by section 45 of the Companies Act is not applicable to holding companies providing financial assistance to their subsidiaries. However, the inverse is not true and subsidiaries providing financial assistance to their holding company or to its other subsidiaries must continue to do so in the domain of section 45 of the Companies Act.

Deepesh Desai and Tessa Brewis



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2021 - 2023
ranked our Corporate & Commercial practice in
Band 1: Corporate/M&A and in
Band 2 Capital Markets: Debt and Capital
Markerts: Equity.

Ian Hayes ranked by
Chambers Global 2022 - 2023
in **Band 1:** Corporate/M&A.

David Pinnock ranked by
Chambers Global 2022 - 2023 in **Band 1:**
Corporate/M&A: Private Equity.

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

Willem Jacobs ranked by
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Corporate/M&A and in **Band 3:**
Corporate/M&A: Private Equity.

Sammy Ndolo ranked by
Chambers Global 2021 - 2023 in
Band 4: Corporate/M&A.

David Thompson ranked by
Chambers Global 2022 - 2023 in
Band 4: Corporate/M&A.

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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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