

# Dispute Resolution

## ALERT

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INCORPORATING  
**KIETI LAW LLP, KENYA**

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### Dear friends with money: Are you a registered credit provider?

Have you ever lent money to a friend or family member who did not hold up their end of the deal to pay you back? Or perhaps you have sent them a letter of demand, and even threatened to sue your friend for the money they owe you? If you have concluded a contract, and provided that all elements of a valid contract are present, you would ordinarily be able to bring an action on breach of contract. However, the High Court, in the case of *Blacher v Josephson* (A15/22) [2023] ZAWCHC 27 (14 February 2023), has shed light on this grey area of law.



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## Dear friends with money: Are you a registered credit provider?

Have you ever lent money to a friend or family member who did not hold up their end of the deal to pay you back? Or perhaps you have sent them a letter of demand, and even threatened to sue your friend for the money they owe you? If you have concluded a contract, and provided that all elements of a valid contract are present, you would ordinarily be able to bring an action on breach of contract. However, the High Court, in the case of *Blacher v Josephson* (A15/22) [2023] ZAWCHC 27 (14 February 2023), has shed light on this grey area of law.

In the matter, a total sum of R3,8 million was advanced by the conclusions of acknowledgments of debt (AODs), of which the loans included an interest repayment of capital debts. On demand of repayment of the loans, the borrower denied liability and, subsequently, questioned whether the lender was a registered credit provider in terms of the National Credit Act 3 of 2005 (NCA) at the time of the conclusion of the AODs in terms of which the monies were advanced. A further defence raised was whether a credit assessment of the borrower was done prior to the conclusion of the AODs in order to determine whether borrower was in a financial position to enter into such loans and to repay them.

The consequence of this, in terms of the NCA, is that a credit agreement will be unenforceable, at the time when the agreement was entered into, if the credit

provider was an unregistered credit provider. Furthermore, if a credit provider concludes an agreement without having conducted a credit assessment, it may constitute reckless credit, which is liable to be set aside by a court, and the AODs concluded will be deemed void.

As set out in *National Credit Regulator v Opperman and Others* [2013] (2) BCLR 170 (CC), it is a basic principle in our law that in order for an agreement to be valid, it must also be lawful. Therefore, in terms of South African common law, a contract which is unlawful is generally considered to be null and void, and unenforceable. As a result of this, a party cannot acquire rights under an unlawful contract, nor can they claim for specific performance or damages.

The High Court held that AODs would ordinarily constitute credit agreements in terms of section 8(4)(f) of the NCA, which states that an



## Dear friends with money: Are you a registered credit provider?

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agreement, irrespective of its form, constitutes a credit transaction if it is any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of that agreement. Since the lender was not a registered credit provider at the time when the AODs were entered into, the AODs are unlawful.

The court held that a party attempting to claim an amount R500,000 or more will have to be a registered credit provider in terms of sections 40(1) and 42(1) of the NCA.

This judgment highlights a few do's and don'ts for those lending money to friends and family. First, avoid handshake agreements, and ensure that any agreement whereby

money is being lent includes a formal written agreement or contract, which meets all elements of a valid contract, particularly that it is lawful. And, second, always be wary of the amount of money, with interest payable, that is being lent, because once this amount surpasses R500,000, if you have not done a credit assessment on the borrower and you are not a registered credit provider, your 'friend' might walk away scot-free.

Mostly importantly, always seek legal advice prior to the conclusion of agreements.

**Corné Lewis and Tiffany Alves**



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2022 - 2023** ranked our Dispute Resolution practice in **Band 2: Dispute Resolution**.

**Chambers Global 2018–2023** ranked us in **Band 2** for Restructuring/Insolvency.

**Tim Fletcher** ranked by **Chambers Global 2022 - 2023** in **Band 2: Dispute Resolution**.

**Clive Rumsey** ranked by **Chambers Global 2019 - 2023** in **Band 4: Dispute Resolution**.

**Tobie Jordaan** ranked by **Chambers Global 2022 - 2023** in **Band 4: Restructuring/Insolvency**.

**Lucinde Rhoodie** ranked by **Chambers Global 2023** in **Band 4: Dispute Resolution**.

**Jackwell Feris** ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

**Kylene Weyers** ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

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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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