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Business Rescue, Restructuring & Insolvency

NEWSLETTER

DISPUTE RESOLUTION

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INCORPORATING
KIETI LAW LLP, KENYA



Tobie Jordaan

Sector Head | Director
Business Rescue,
Restructuring & Insolvency

"And breathe". These were the thoughts of many South Africans on Sunday night after the Springboks secured a pulsating victory against host nation France at the Rugby World Cup over the weekend. Similarly, many a South African are holding their breath as we approach the year's end, both companies and individuals are gearing up for the end of the year, ensuring that everything is wrapped up to savour the festive season.

The the final push to the festive season can be felt across South Africa. The Boks are putting in every effort to secure our fourth Rugby World Cup final.

Back on South African soil, the government is still pushing to tackle our energy crisis and resolving the strain of loadshedding. In some recent positive news with the return of Kusile Unit 1 at Eskom to supply electricity to the South African grid. Despite various challenges faced by the nation, including rising inflation rates, significant fuel price hikes, and increased living costs, South Africans remain resilient.

As we welcome the culmination of our collective efforts and anticipate the rewards of our hard work, it's crucial to take a moment to look back on the journey we've traversed this year, drawing valuable lessons from it. The Boks have been uniting under the phrase *"Stronger Together"* which is a sentiment the Business Rescue & Insolvency team echo and share.



We are indeed stronger together and we express our heartfelt gratitude to all our readers and clients for their unwavering support throughout a year that has demanded much from us all. We wish everyone a peaceful festive season and eagerly anticipate the opportunity to connect and collaborate once again in 2024.

In this month's newsletter, Lucinde Rhoodie, Kara Meiring and Luke Kleinsmidt discuss a recent judgment that explores setting aside voidable transactions in terms of the section 26(1) of the Insolvency Act 24 of 1936.

Tobie Jordaan



Tobie Jordaan

Sector Head

Director

T +27 (0)11 562 1356

M +27 82 417 2571

E tobie.jordaan@cdhlegal.com



Kgosi Nkaiseng

Director

T +27 (0)11 562 1864

M +27 76 410 2886

E kgosi.nkaiseng@cdhlegal.com

Undoing what has been done: Setting aside transactions in terms of the Insolvency Act

The Western Cape High Court recently illustrated that timing and the nature of a transaction are key when relying on section 26(1) of the Insolvency Act 24 of 1936 (Act) for the purpose of setting aside voidable dispositions.

The case involved a claim by the liquidators of Free Agape Enterprises (Pty) Ltd (Free Agape) (the liquidators) for the repayment of money made by Free Agape to Ms Le Roux (the defendant) within the two-year period prior to the winding up of Free Agape.

Prior to its winding up, Free Agape conducted an investment scheme under the name and style "Free Agape" and other trading names. The nature of the scheme was such that Free Agape collected deposits from clients/investors. These funds were then used either to repay earlier deposits or to distribute what were termed as "*dividends*" to other clients. During March 2018, Free Agape was placed in liquidation and its business, along with all investment related agreements with third parties were declared illegal, unlawful and void.

The liquidators advanced two claims against the defendant, one for R1,044,500 in terms of section 26(1) of the Act (which allows for the setting aside of dispositions of property made without value by an insolvent person within two years before the sequestration of their estate) and the other for R240,000 in terms of section 29(1) of the Act. While the second claim was successful, the court declined to grant judgment in terms of the first claim and provided reasons for this decision. In our view, these reasons serve as a useful guideline for liquidators seeking to set aside dispositions in terms of section 26 of the Act.

Section 26(1) of the Act provides that if a person, who later becomes insolvent, transfers property without receiving its equivalent value in return:

- more than two years before their assets are seized, the transfer can be reversed if, right after the transfer, their debts exceeded their assets; or



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- within two years before their assets are seized, the transfer can be reversed unless the beneficiary can show that after the transfer, the person's assets were greater than their debts.

However, if the liabilities ever exceeded the assets by an amount smaller than the transferred property's value, only that excess amount can be reversed.

Section 29(1) of the Act provides that any property transfer by a debtor made less than six months before their assets are seized (or their death if they die insolvent) can be reversed if such a transfer unfairly favoured one creditor over others. This is the case unless the beneficiary can prove the transfer was routine business and was not meant to favour any particular creditor.

The liquidators argued that the payment of R1,044,500 made by Free Agape to the defendant should be set aside in terms of section 26(1) of the Act because (i) the payment was made less than two years prior to the liquidation; (ii) that they were entitled to reclaim all payments made by Free Agape to the defendant which exceeded payments/investments made by the defendant to Free Agape; and (iii) since during the two-year period the defendant made no payments to Free Agape, the entire amount of R1,044,500 was reclaimable.

Findings

In coming to its decision, the court focused on three specific aspects.

Firstly, the court made it clear that relief under section 26 is time-bound. For dispositions made more than two years prior, the trustee must show that the transfer was without equivalent value and the

debtor's liabilities exceeded their assets. For dispositions within the two-year period, the recipient has the burden to demonstrate that, post-transfer, the debtor had more assets than liabilities. In this case, however, the liquidators only relied on a six-month period within which it claimed that the defendant had made no payments to Free Agape, yet received payment in return. The court held that the entire two-year period should be considered.

Secondly, the court held that in order to satisfy the onus set out in section 26, a trustee or liquidator cannot merely claim that after a transfer, the debtor's liabilities surpassed their assets. In cases where trustees aim to reverse transfers to third parties, it is unreasonable for courts to speculate whether the second requirement set out in section 26 has been met and whether the burden of proof is accordingly

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fulfilled. On the liquidators' own version, repayments or dividends were only made by Free Agape to the defendant, after having received a deposit for investment from the defendant.

Thirdly, the court found that just because Free Agape's business was deemed illegal, unlawful, and void, and all its investment agreements with third parties were nullified, it does not automatically imply that every transaction it made was without value. It is a well-established principle that "*disposition not for*

value" essentially means "*without any value whatsoever*". This concept is closely tied to the type of transactions that persons in insolvency engage in before their assets are seized, or they are liquidated. With reference to previous cases, the court found that just because an agreement could not be enforced by a court of law, does not mean it cannot be recognised by the law for certain purposes.

In dismissing the claim under section 26(1), the court held that based on the liquidators' own account, it is not accurate to claim

that the payments made to the defendant were dispositions without value as per section 26(1). If a creditor, who benefited from a transaction, can show that the insolvent individual gained value directly from that transaction, then value was indeed derived. In the end, it is up to the court's discretion to reverse a disposition without value, but only if it's demonstrated that right after the transaction, the insolvent party's debts exceeded their assets.

**Lucinde Rhoodie, Kara Meiring
and Luke Kleinsmidt**



OUR TEAM

For more information about our Business Rescue, Restructuring & Insolvency sector and services in South Africa and Kenya, please contact:

**Tobie Jordaan**

Sector Head: Business Rescue,
Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

**Desmond Odhiambo**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

**Christine Mugenyu**

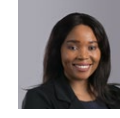
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

**Sammy Ndolo**

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

**Lucinde Rhoodie**

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

**Muwanwa Ramanyimi**

Senior Associate:
Dispute Resolution
T +27 (0)21 405 6093
E muwanwa.ramanyimi@cdhlegal.com

**Thabile Fuhrmann**

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

**Belinda Scriba**

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

**Nseula Chilikhuma**

Associate:
Dispute Resolution
T +27 (0)11 562 1067
E nseula.chilikhuma@cdhlegal.com

**Richard Marcus**

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

**Roxanne Webster**

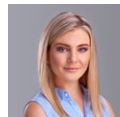
Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

**Kara Meiring**

Associate:
Dispute Resolution
T +27 (0)21 481 6373
E kara.meiring@cdhlegal.com

**Kgosi Nkaiseng**

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

**Kylene Weyers**

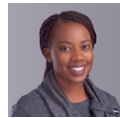
Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

**Jessica Osmond**

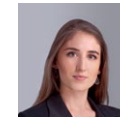
Associate:
Dispute Resolution
T +27 (0)11 562 1067
E jessica.osmond@cdhlegal.com

**Vincent Manko**

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

**Nomlayo Mabhena-Mlilo**

Senior Associate:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

**Jessica van den Berg**

Associate:
Dispute Resolution
T +27 (0)11 562 1617
E jessica.vandenberg@cdhlegal.com

**Mongezi Mpahlwa**

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@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.

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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

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. 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 cdh Stellenbosch@cdhlegal.com

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