VAN HUYSSTEENS
COMMERCIAL ATTORNEYS

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""Don't limit yourself, Many people limit themselves to what they think they can do.
You can go as far as your mind lets you. What you believe, remember, you can achieve."
- Mary Kay Ash

LOANS AND OTHER ASSISTANCE TO DIRECTORS

The board of directors has the right to provide financial assistance to directors, prescribed officers, related juristic persons etc., provided that they conform to the requirements of Section 45 of the Companies Act, Nr. 71 of 2008 ("the Act").

Section 45 of the Act has changed, amongst others, Section 226 of the previous Companies Act, Nr. 61 of 1973 ("the 1973 Act"). Most notable changes is that the term "financial assistance," has been extended, as well as the requirement that these type of transactions shall forthwith be subject to review by the shareholders of the company. Many companies do not realise the consequences of non-compliance with the provisions of Section 45.

Financial assistance, as defined in Section 45, includes:
the lending of money,
guarantee of a loan or other obligation, and
any assistance to secure any debt or obligation by a company.

The word "includes", used in Section 45, clearly states that the listed items are not an exhaustive list. The the legislator clearly intended to broaden the meaning of the term "financial assistance".

The question arises as to when a particular activity or circumstance of a company falls within the ambit of Section 45 and requires compliance. Say for example a lease is granted to a director of the company with some substantial benefits associated with it, should it be regarded as financial assistance by the company?

It is not strictly listed as financial assistance in the Act, but the fact that the director will benefit financially from it, either directly or indirectly, as a result of the actions of the company, creates a situation where caution should be taken to the requirements of Section 45. The responsibility to ensure compliance lays heavily on the shoulders of the boards of companies, and it is advised that transactions which may trigger the mechanics of Section 45 should be referred to an specialist to determine the extent of compliance.

Law & Laughter

Q: What do you call a judge gone bad?
A: A Senator.

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INTENTION AND TRANSFER OF PROPERTY

The facts in Quatermark Investments (Pty) Ltd (Quatermark) v Mkhwanazi (Respondent) were that the Respondent was in arrears with her bond repayments and her property had been attached by her bank.

The Respondent obtained a loan from Quatermark and she signed certain documentation without being given an opportunity to read the documents. The Respondent was under the impression that she had signed loan documentation.

It transpired that the Respondent in fact signed a contract of sale for her property, a lease agreement and power of attorney to transfer her property. The Respondent only discovered later that her property had been transferred into the name of Quatermark.

The Supreme Court of Appeal had to judge the following two main issues:-

1. whether the Respondent had proven that the conduct of Quatermark amounted to fraudulent misrepresentation and

2. whether the High Court was correct in directing that the property be re-transferred to the Respondent despite the fact that she had failed to tender repayment of the benefits that she received under the agreements.

The Court found that the Respondent was in fact induced to sign the documentation by fraudulent misrepresentation. The contract of sale was null and void as she had no intention to transfer ownership. In this case the ownership did not pass despite the registration. She was also entitled to the re-transfer of her property despite failing to tender the repayment of the benefits received under the contracts. Quatermark was entitled to claim against the Respondent for unjust enrichment.

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