

# Oddities make act complex

SECTION 45 of the Companies Act allows a company to provide financial assistance to a related or inter-related company by guaranteeing an obligation of that company. The assistance must be authorised by a special resolution of the shareholders, and the directors must be satisfied that after providing the financial assistance the company would satisfy the solvency and liquidity test.

After adoption, the company must give written notice of the resolution to all shareholders and to any trade union representing employees of the company. The terms of the financial assistance must be fair and reasonable to the company.

The meaning of related and inter-related persons is set out in section 2. A person includes a juristic person and includes a trust. A juristic person is related to another juristic person if either is a subsidiary of the other.

The definition of "related" includes persons connected to one another and also includes control of one person or entity by another. For example, a person controls a trust if that person can control the votes of the trustees or change beneficiaries



of the trust. However, in practice it is unlikely that one person would control a trust.

Failure to comply with section 45 would render the financial assistance void by virtue of the provisions of section 45 (6). The directors who participate in passing a resolution to give such financial assistance would be liable in terms of section 77 for any loss or damages.

The oddity is that if a company ("the first company") wishes to guarantee the obligations of a second company with which it has no relationship, the first company is not obliged to comply with the provisions of section 45 because section 19 of the act stipulates that a company has all the legal powers and capacity of an individual, except where it is unable to do so.

For example, a company is incapable of marriage. However, it is un-

usual for a company to guarantee the obligations of another if there is no relationship between the two.

Another oddity is that in terms of section 20 (7), a person who deals with a company in good faith is entitled to presume that the company, in exercising its powers, has complied with the requirements of the act unless the person knew or reasonably ought to have known of a failure to comply. Therefore section 20 (7) stipulates that in the absence of knowledge one can presume a company has complied with the act while section 45 (6) provides that a resolution is void if inconsistent with the section.

Brave would be the creditor who did not make enquiries about compliance with the act and instead chose to rely on the presumption afforded by section 20 (7).

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