Banking, Finance & Projects

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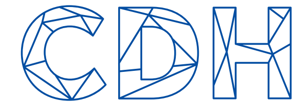

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Kenya has witnessed rapid digital transformation over the last couple of years, which was precipitated by the COVID-19 pandemic and aided by technological advancements and the increased penetration of mobile phones in the Kenyan market. As a result, there has been explosive growth in the digital lending sector with non-bank financial institutions, including telecommunication service providers and fintech companies, joining the fray.

Even so, the rapid expansion of the digital banking sector was accompanied by significant consumer protection concerns, ranging from predatory lending practices to unethical loan recovery methods in the form of random unsolicited messages, threats and embarrassment as digital lenders went to the extent of accessing a borrower's phone data and compelling a family member or friend who may have been listed as guarantors to repay the defaulted loans. This prompted the Central Bank of Kenya (CBK) to enact the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022, (Regulations) following the amendment of the Central Bank of Kenya Act (CBK Act) in 2021 by the introduction of section 33S, which outlined licensing requirements for digital credit providers (DCP).

The latest CBK report issued in October 2024 states that while more than 730 DCPs have applied for licensing, only 85 have received their licences. The rest are still in the vetting process pending submission of requisite documentation.

However, in 2024, the CBK Act was amended by deleting references to "*digital credit business*" in sections 33S and sections 57 of the CBK Act and replacing with "*non-deposit taking credit business*". It is interesting to notice that section 59 of the CBK Act still requires persons that were carrying out digital credit business prior to the coming into force of the CBK Act and are not regulated by any other law to apply for a licence from the CBK.

There seems to be a lacuna in the law relating to the licensing of DCPs given the 2024 amendments to the CBK Act. It is therefore debatable whether the DCPs that are yet to obtain their DCP licences can operate without a licence from the CBK.

In the Small Claims Court

In *SCCCOMM/E9994/2025, M-collect Limited vs. Mbwana Kalua* the Small Claims Court noted that six unlicensed DCPs had developed a concerning litigious pattern where they would file numerous claims and thereafter abandon them. Upon inquiry, the court noted that one of the

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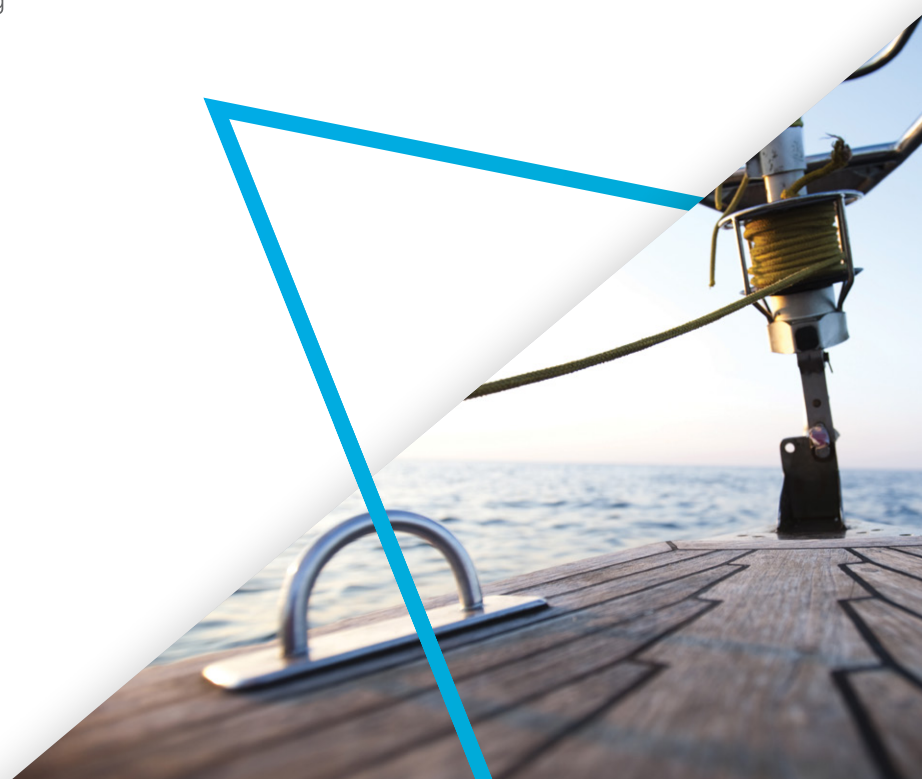
unlicensed DCPs, Aventus Technology Limited, had stated that it was in the *"pipelines of compliance"*. Consequently, the court dismissed the 139 claims that had been filed by the unlicensed DCPs by ruling that entertaining the claims by such persons without proper legal standing (by lacking the requisite licensing) would be tantamount to sanctioning illegality.

It bears noting that the six unlicensed DCPs whose claims were dismissed are compliant with the Data Protection Act, 2019 and have obtained the requisite certificates as data processors/data handlers that can be gleaned from the ODPC website, which is one of the mandatory requirements prior to being issued with a licence. Given the amendment of sections 33S and 57 of the CBK Act, it would be interesting to see the course of action to be taken by the partially compliant DCPs considering the issue of licensing under sections 33S and 57 alluded to above.

It also remains to be seen whether there will be further amendments to the CBK Act and the Regulations noting the fact that the amendments introduced in 2024 deleted references to licensing of digital credit businesses whilst some DCPs have applied for licences.

Stella Situma and Faith Obunga



Does providing security to a lender amount to a disposal in terms of section 112 of the Companies Act?

In terms of section 112 of the Companies Act No. 71 of 2008 (Companies Act), the disposal of the whole or a greater part of a company's assets or undertaking must be approved by a special resolution of that company's shareholders. A question that arises in secured lending transactions is whether or not the enforcement of security provided as part of a funding transaction constitutes a disposal as contemplated in section 112 of the Companies Act.

This question arises where the subject of security provided to a lender constitutes more than 50% of a security provider's assets. In those circumstances, if the borrower defaults on its repayment obligations, its lender will be entitled to perfect its security, and in that way acquire the greater part of the security provider's assets. The argument made is, if that lender elects to enforce its rights under the security, the security provider will have effectively disposed of the whole or a greater part of its assets as contemplated in section 112 of the Companies Act. The question is thus whether the security provider's shareholders should pre-emptively (i) authorise the provision of security constituting the whole or a greater part of a company's assets and (ii) authorise the disposal of such assets at the time a lender is entitled to perfect its security, in order to comply with section 112 of the Companies Act.

This becomes more relevant where a full due diligence investigation has not been undertaken in respect of the security provider(s), and it is unknown whether or not the security provided does in fact constitute the whole or a greater part of a company's assets or undertaking. In an effort to take the 'conservative' approach, one might argue that the provision of certain security constitutes a disposal under section 112 of the Companies Act and must therefore be authorised pre-emptively.

Defining a disposal

The first step in answering the question is defining a disposal under section 112 of the Companies Act. This section is drafted with similar language to section 228 of the Companies Act 61 of 1973 (Old Act). It is a standard tool of legislative interpretation by the courts to consider the interpretation of similarly drafted provisions of the Old Act to interpret the provisions of the Companies Act.

In the case of *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others 2010* (1) SA 634 (WCC) (Hunkydory), the court considered whether the registration of a mortgage bond constituted a disposal requiring shareholder approval in terms of section 228 of the Old Act. Having considered the ordinary meaning of "*dispose of*" as being "*to transfer into new hands or to the control of someone else (as by selling or bargaining away)*", Rogers AJ held that one would not ordinarily describe a transaction whereby a debtor agrees to the hypothecation of his property as one where the debtor disposes of the property to the creditor or to anybody else.

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The court found that the disposal of the property, as a result of a default, is not the "*wish or intention of the debtor but because the creditor has rights under the bond which … the creditor can enforce whatever the debtor's wish may be*". The court further found that in the event that there was no security at all, the creditor is able to obtain a judgment on its loan and then, in any event, attach the property for sale in execution. As such, the registration of a mortgage bond is not considered a first step towards a disposal. This decision has been favourably referred to by various courts.

Following the court's interpretation, neither the entry into security documents nor perfection by a lender constitutes a disposal for purposes of section 112 of the Companies Act. As such, the disposal of any property contemplated in security documents, pursuant to a default by a borrower, does not require the prior approval of the security provider's shareholders. Were this to be the case, the result would be misaligned with the *Hunkydory* decision. In addition, it would lead to a non-commercial position that would allow the shareholders of a security provider to obstruct the lender from exercising its rights under security documents, after a default. There would also arise a legal complexity relating to enforceability of the security documents themselves given that in terms of section 112 of the Companies Act, any disposal must have been authorised pre-emptively.

The applicability of section 112 of the Companies Act to security for funding transactions is yet to be tested in court. However, it appears from the aforementioned decision that there needn't be a requirement for the security provider to comply with section 112 of the Companies Act. If a lender wishes to take a more conservative approach, the following must be borne in mind:

- resolutions have the ability to be revoked – to safeguard against this, it is advisable that:
    - such resolutions should also provide for the acknowledgement by the shareholders that the resolutions are for the benefit of the lender and are irrevocable without the prior written consent of the lender; or
    - alternatively, a separate notice is addressed by the shareholders to the lenders to this effect;
- there are strict requirements for special resolutions authorising disposals in terms of section 112, these are set out more fully in this previous article. A key requirement to note is that the resolutions must authorise a specific transaction. As such, a general authority to effect a disposal in the future would be insufficient; and
- do not overlook section 115(2)(b) of the Companies Act: if the security provider has a holding company, and on a consolidated basis the assets in question also happen to constitute the whole or greater part of the holding company's assets, a shareholders' special resolution at the holding company will be required as well.

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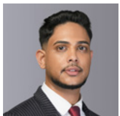
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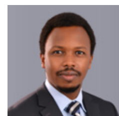
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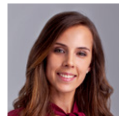
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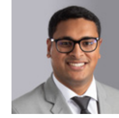
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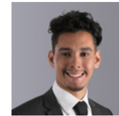
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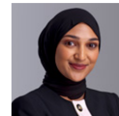
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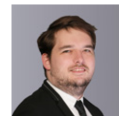
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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