



Case Review | September 30, 2022

## The Transfer of Businesses Act: Drawing the line in Corporate Insolvency Practice

### Introduction

Afrasia Bank Limited won its appeal to the High Court against an arbitrator's refusal to find the Transfer of Businesses Act (the Act) applicable to the transfer of part of the assets and liabilities of Chase Bank Kenya Limited under receivership to SBM Bank (Kenya). We analyse this case below.

### Facts

In 2016 Afrasia Bank deposited USD 7.5 million in an interest earning account at Chase Bank for one month. Before the deposit could mature, Chase Bank was placed under receivership.

This process led to certain assets and liabilities of Chase Bank being transferred to SBM Bank (Kenya) Limited, in a sale overseen by the Central Bank of Kenya (CBK) through the Kenya Deposit Insurance Corporation.

Afrasia Bank sued SBM for its deposit on the basis that SBM had failed to issue the notices required by the Transfer of Businesses Act. The Arbitrator rejected the claim and held the Act was inconsistent with the Banking Act. As this was transfer of banking business, the Arbitrator found the Banking Act superseded the Transfer of Business Act.

At the time of the transfer, SBM had issued notices under the Banking Act and the Kenya Deposit Insurance Act. It however did not issue the notice under the Act. This notice, most significantly to this case, specifies whether or not the party to whom business is being transferred is assuming all the liabilities of the business.

### Decision

The High Court found no inconsistency in the notices required under the three laws. These notices complemented each

other to protect the public by ensuring transparency in transfer of businesses and banks. Complying with the provisions of the Kenya Deposit Insurance Act and Banking Act, did not excuse failing to comply with the Act. As a consequence of this non-compliance, SBM was held liable by the Court for all debts of Chase Bank including Afrasia's debt.

### Impact

SBM have indicated that it will appeal the decision, and as such the final position will only be known once the appeal process is concluded.

The immediate impact of the decision is to make distressed sales less attractive and more cumbersome to implement. Purchaser interest in distress sales will be affected where the purchaser must wait two months to ensure unwanted liabilities do not attach.

Obviously, the decision has placed a huge spot light on how the Transfer of Businesses Act, a 1930 law last amended in 1978 may not reflect present realities. The Act excludes transfers of business or assets pursuant to a reconstruction or winding up done under the Companies Act. This would ideally mean that transfers pursuant to the Companies Act or the 2015 Insolvency Act should be excluded. However, out of caution, it would be prudent to ensure any transfer of business complies with the requirements of the Act.

The Act needs to be amended to exclude transactions under Kenyan insolvency laws and self-contained sector specific laws. Updates to the Act to reflect today's business environment are long overdue.

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