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DISPUTE RESOLUTION ALERT

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There has always been a degree of uncertainty when it comes to a business rescue practitioner's costs and expenses incurred in the business rescue proceedings of an entity when the business recue proceedings are, for whatever reason, converted to liquidation proceedings.

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Standard Bank (Bank) sued Mr Naidoo on a loan advanced to him, which was secured by a mortgage bond.

After issuing summons against Mr Naidoo the Bank applied for a default judgment, which was later granted.

When a consumer is in default of a credit agreement,the National Credit Act, No 34 of 2005 (Act) requires the credit provider to bring the consumer's default to his, or her attention in writing and to alert the consumer to the various options available to them (referral to a debt counsellor, alternative dispute resolution agent, etc).

In general, in terms of s65(2) of the Act, if no method has been prescribed in the credit agreement for the delivery of a particular document to a consumer, the credit provider must:

a) make the document available to the consumer through one or more of the following mechanisms:

   (i) in person, at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

   (ii) by fax;

   (iii) by email; or

   (iv) by printable web-page; and

b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a) above.

It has been held in previous Constitutional Court judgments that the credit provider must:

a) show that it has effected the s129 notice by registered mail;

b) prove that the s129 notice was delivered to the correct post office; and

c) in order to prove delivery, furnish a post-despatch (track and trace) printout from the post office website.

Is strict compliance with these requirements required?

The Supreme Court of Appeal (SCA) recently considered these requirements in the matter of *Navin Naidoo v The Standard Bank of South Africa Limited* [2016] ZASCA 9 March 2016.

Standard Bank (Bank) sued Mr Naidoo on a loan advanced to him, which was secured by a mortgage bond. The Bank alleged that it had complied with the requirements of s129 and had drawn Mr Naidoo's attention to his default and the options available to him. After issuing summons against Mr Naidoo the Bank applied for a default judgment, which was later granted.

Mr Naidoo appealed the default judgment and the matter was finally considered by the SCA. Notwithstanding Mr Naidoo's acknowledgment of receipt of the s129 notice, Mr Naidoo alleged that the Bank had failed in its obligations in terms of s129 as it did not strictly comply with the requirements as set out by the Constitutional Court above.

Given Mr Naidoo's admitted receipt of and response to the notice, the SCA was reluctant to allow reliance on technical arguments regarding a strict mechanical compliance with s129(1).

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At first glance, it may appear that the SCA was satisfied that the Bank did not strictly comply with the Constitutional Court's requirements in relation to s129 notices.

The SCA disagreed with Mr Naidoo and confirmed that, "All that is required of a credit provider is to satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer. Ultimately, the question is whether delivery as envisaged in the Act has been effected".

So what now?

At first glance, it may appear that the SCA was satisfied that the Bank did not strictly comply with the Constitutional Court's requirements in relation to s129 notices. However, this departure from the Constitutional Court's requirements was permitted by the SCA given Mr Naidoo's acknowledgment of the s129 notice. It is upon this recognition of the notice by Mr Naidoo that influenced the SCA's finding that strict compliance was not necessary.

The above is the position notwithstanding the application of the *stare decisis* principle in this instance and that the Constitutional Courts' judgments take precedence over any decision made by the lower courts.

We therefore, suggest that credit providers err on the side of caution and comply with all the s129 requirements as set out by the Constitutional Court.

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BUSINESS RESCUE PROCEEDINGS SUPERSEDED BY LIQUIDATION ORDER: NO PROOF OF COSTS, NO CLAIM!

The court considered whether the costs for professional services rendered by a business rescue practitioner had to be included as deemed administration costs in the liquidation and distribution account.

There has always been a degree of uncertainty when it comes to a business rescue practitioner's costs and expenses incurred in the business rescue proceedings of an entity when the business recue proceedings are, for whatever reason, converted to liquidation proceedings.

In the recent High Court decision of *Ludwig Wilhelm Diener NO v Minister of Justice and Others* case number: 30123/2015, the court considered whether the costs for professional services rendered by a business rescue practitioner had to be included as deemed administration costs in the liquidation and distribution account of a liquidated close corporation.

The Liquidator argued that the remuneration and other expenses incurred by the business rescue practitioner do not fall within the ambit of the definition of 'administration costs' in s97 of the Insolvency Act, No 21 of 1936.

JD Bester Labour Brokers CC (CC) commenced business rescue proceedings. Shortly thereafter the Ludwig Wilhelm Diener, in his capacity as business rescue practitioner, brought an application to court to place the CC in liquidation, which application was granted. The Master of the High Court (Master) appointed joint liquidators to the CC, of which Cloete Murray was one (Liquidator).

The first and final liquidation, distribution and contribution account (Account) that was submitted by the Liquidator to the Master did not include charges for the business rescue practitioner's remuneration. The business rescue practitioner unsuccessfully applied to the Master to have the Account set aside. The business rescue practitioner took the Master's decision (to confirm the Account) on review to the High Court.

In the review proceedings, the Liquidator argued that the remuneration and other expenses incurred by the business rescue practitioner do not fall within the ambit of the definition of 'administration costs' in s97 of the Insolvency Act, No 21 of 1936 (Insolvency Act), thereby affording such costs a preferential status. The Liquidator argued that the business rescue practitioner could not be paid pursuant to a mere demand for payment, in the absence of submitting a claim against the insolvent estate, as such payment would result in the creditor getting paid in respect of an unproven claim, which goes against the entire structure of the Insolvency Act.

The business rescue practitioner argued that the costs of his services, should have been included as part of his expenses incurred and must be paid to him in terms of s135(4) of the Companies Act, No 71 of 2008 (Companies Act). The business rescue practitioner also argued that his costs represented a "claim of a super preferent nature" (affording him preference over any secured creditor's claim against an encumbered asset) and should be dealt with as such in the account.

Section 143(5) of the Companies Act affirms the "claim of a super preferent nature" argument of the business rescue

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BUSINESS RESCUE PROCEEDINGS SUPERSEDED BY LIQUIDATION ORDER: NO PROOF OF COSTS, NO CLAIM!

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The Master ruled that s143(5) and s135(4) of the Companies Act do in fact afford the business rescue practitioner with a preferential claim above the claims of all other secured and unsecured creditors.

practitioner in stating that, to the extent that the business rescue practitioner's remuneration and expenses are not fully paid, the business rescue practitioner's claim will rank in priority before the claims of all other secured and unsecured creditors. Section 135(4) of the Companies Act further states that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of s135 will remain in force, except to the extent of any claims arising out of the costs of liquidation.

The Master ruled that s143(5) and s135(4) of the Companies Act do in fact afford the business rescue practitioner with a preferential claim above the claims of all other secured and unsecured creditors. However, these sections do not provide that the costs of the business rescue practitioner shall be deemed as administration costs of the insolvent estate. Therefore, the business rescue practitioner is not automatically entitled to these costs and he still had to submit and prove his claim against the insolvent estate.

Accordingly, it is clear from the wording of s135(4) of the Companies Act, read together with s143(5) of the Companies Act, that a preference is created for the business rescue practitioner's remuneration and expenses as a "claim of a super preferent nature". However, this claim is subject to any claims arising out of the costs of liquidation in terms of s97 of the Insolvency Act, which claims will first be executed in terms of the liquidation, distribution and contribution account and only thereafter the business rescue practitioner's costs will be paid, provided the business rescue practitioner has proven such a claim.

This decision is a warning to all business rescue practitioners that - other than their costs incurred during business rescue proceedings which are recognised as "claims of a super preferent nature" - they have to be pro-active in submitting and proving their remuneration and other expenses as a claim against the insolvent estate of a company or close corporation.

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