

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

HARD CASES MAKE GOOD LAW: BUSINESS RESCUE 1 – 0 LIQUIDATION

Sometimes different bits of legislation are, on the face of it, in conflict with each other. This is specially so when new law is introduced. The impact of new law on old law sets up contradictions, which the courts have to sort out. An interesting recent example arose in the context of business rescue.

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

HARD CASES MAKE GOOD LAW: BUSINESS RESCUE 1 – 0 LIQUIDATION

Ordinarily a payment made by an insolvent company post liquidation may be set aside in terms of the old Companies Act.

Eravin argued that the payment was not recoverable and relied on s154(2) of the new Companies Act.

Sometimes different bits of legislation are, on the face of it, in conflict with each other. This is specially so when new law is introduced. The impact of new law on old law sets up contradictions, which the courts have to sort out. An interesting recent example arose in the context of business rescue.

The issue in this case was whether a payment of R389 593.49 by Ditona – a company being wound-up – to another company Eravin, was recoverable by Ditona's liquidators as a void disposition or unrecoverable because, it was a pre-business rescue debt, which may not be enforced.

The essential dates are the following:

- the date of Ditona's liquidation, being 20 October 2010 (the date of issue of the liquidation application);
- the date of payment by Ditona to Eravin, a day after the effective date of liquidation; and
- the commencement date of the business rescue of Eravin (through a board resolution), being 26 September 2012.

Ordinarily a payment made by an insolvent company post liquidation may be set aside in terms of the old Companies Act, No 61 of 1973 (Old Act).

The business rescue was terminated on 31 May 2013 following substantial compliance with the adopted business rescue plan.

The liquidators of Ditona then sought to set aside and recover the payment effected to Eravin - on the grounds that the payment constituted a disposition made after the effective date of liquidation.

The liquidators relied on s341(2) of the Old Act which provides that:

Every disposition of its property including right of action (by any company being wound-up and unable to pay its debt) made after the commencement of the winding-up, shall be void unless the court otherwise orders.

In response, Eravin argued that the payment was not recoverable and relied on s154(2) of the new Companies Act, No 71 of 2008 (New Act) which provides that:

If a business rescue plan has been approved and implemented in accordance with this chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the business rescue plan.

In the High Court the liquidators argued that:

- the debt arose after the commencement of the business rescue proceedings and could therefore not be treated as pre-business rescue debt; and
- the debt was the same as the context in the Prescription Act, No 68 of 1969 (Prescription Act).

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

HARD CASES MAKE GOOD LAW: BUSINESS RESCUE 1 – 0 LIQUIDATION

CONTINUED

As soon as the payment was received by Eravin, it owed the amount to Ditona. As such the liquidators were not entitled to enforce the debt.



The High Court upheld the claim – the judgment went on appeal to the SCA. The SCA found that:

- the Prescription Act determines when a debt falls due, as this is when prescription begins to run. That can only be determined once the creditor knows the facts from which the debt arises and the identity of the debtor;
- section 341(2) of the Old Act and s154(2) of the New Act are different from the Prescription Act in that they focus on when a debt is owed and not when it is due or can be claimed; and
- the question which needed to be answered was when the debt was owed.

In the present circumstances the disposition was made prior to Eravin being placed in business rescue. In terms of s341(2) of the Old Act the debt is owed

as soon as the disposition is received. Therefore, as soon as the payment was received by Eravin, it owed the amount to Ditona. As such the liquidators were not entitled to enforce the debt.

As a consequence, the appeal was upheld.

The key principle to take from this judgment is that should a disposition be made to an entity prior to it being placed into business rescue, the liquidators of the liquidated entity that made the disposition will not be entitled to recover same.

One may have sympathy for the liquidators (and creditors) of Ditona. They did not know that the payment to Eravin could be set aside until it was too late. But the logic of the SCA in reaching its conclusion cannot be faulted. Hard cases make good law.

Richard Marcus and Vusiwe Ngcobo

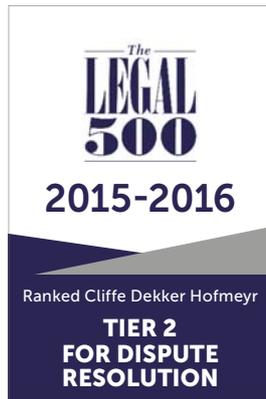


CLICK HERE to find out more about our Business Rescue, Restructuring and Insolvency team.

International Arbitration NEWS BULLETIN



CLICK HERE for more information on the **INTERNATIONAL ARBITRATION – THE DAWN OF A NEW ERA IN SOUTH AFRICA** Conference, co-organised by the International Court of Arbitration of the International Chamber of Commerce, The Arbitration Foundation of Southern Africa NPC and South Africa International Chamber of Commerce.



CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)21 405 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. 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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1342/OCT

