

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

EMPLOYMENT CONTRACTS ARE SUSPENDED FROM DATE OF PROVISIONAL ORDER OF LIQUIDATION

Employment contracts were previously deemed to be suspended on the date of liquidation, being the date that the application for liquidation of the company is presented and issued at court in terms of s348 of the Companies Act, No 61 of 1973 (Old Companies Act). However, this position has since changed.

EMPLOYMENT CONTRACTS ARE SUSPENDED FROM DATE OF PROVISIONAL ORDER OF LIQUIDATION

Employment contracts are suspended from the date that the provisional order of liquidation (or the final order if it is granted without the provisional order) is granted in terms of s38 of the Insolvency Act.

The Company's employees alleged that their contracts of employment were suspended on 3 February 2012 by virtue of the operation of s38(1) of the Insolvency Act and that they were entitled to claim their salaries and other benefits for the period from 10 November 2011 to 3 February 2013.



Employment contracts were previously deemed to be suspended on the date of liquidation, being the date that the application for liquidation of the company is presented and issued at court in terms of s348 of the Companies Act, No 61 of 1973 (Old Companies Act). However, this position has since changed.

The Johannesburg High Court in the case of *Reginald Ngwato and Another v Liebenberg Dawid Ryk van der Merwe N.O and Others*, case number 2014/28470, handed down on 6 May 2016 held that employment contracts are suspended from the date that the provisional order of liquidation (or the final order if it is granted without the provisional order) is granted in terms of s38 of the Insolvency Act, No 24 of 1936 (Insolvency Act) and employees are entitled to prove a claim for salaries during the period between the date of presentation of the application for liquidation and the granting of the provisional order.

Facts

The application for the winding-up of Petzetakis Africa (Pty) Ltd (Company) was presented to court on 10 November 2011. The company was placed in provisional liquidation on 3 February 2012 and a final order was granted on 23 October 2012.

The Company's employees, and specifically Mr Reginald Ngwato, alleged that their contracts of employment were suspended on 3 February 2012 by virtue of the operation of s38(1) of the Insolvency Act and that they were entitled to claim their salaries and other benefits for the period from 10 November 2011 to 3 February 2013.

The liquidators of the company disputed the employee's claim, arguing that the obligation to pay Ngwato's salary for the period 10 November 2011 to 3 February 2012 constituted a disposition within the meaning of s341(2) of the Old Companies Act (as read with s2 of the Insolvency Act) as it arose after the presentment and issuing of the liquidation application ie the date of the *concursum creditorum* in terms of s340 of the Old Companies Act and as such it could not be enforced unless a court order was granted.

Moreover, the liquidators submitted that if Ngwato was correct, the effect of a declaration in his favour would be to increase the value of concurrent claims made against the Company by some R20.8 million to the detriment of the Company's general body of creditors.

Crux of the Dispute

The crux of the dispute was the determination of the date upon which contracts of employment are suspended. Was it the date of the provisional order (or if the final order is granted without the provisional order, the final order), or the retrospective date of the presentment of the liquidation application in terms of s348 of the Old Companies Act?

EMPLOYMENT CONTRACTS ARE SUSPENDED FROM DATE OF PROVISIONAL ORDER OF LIQUIDATION

CONTINUED

If employees obtained alternative employment during the various periods between 1 May 2011 (when the company ceased carrying trading) and 3 February 2012 (the date of provisional liquidation), they would be excluded.



Judgment

In deciding the matter, the court considered two issues of interpretation, firstly the meaning of s38 of the Insolvency Act and secondly, the proper interpretation of s341(2) of the Old Companies Act.

In respect of s38 of the Insolvency Act, the court noted that the meaning of this section is clear and the contracts of service of employees are suspended with effect from the date of the granting of a sequestration order as read with s339 of the Old Companies Act. The contracts therefore remain extant until then.

In considering the payment of salaries and whether it constituted a disposition, the court noted that s341(2) envisages the situation where a company, in anticipation of the consequences of being wound up, makes dispositions of its property in order to advantage other creditors to the potential prejudice of others. Payment of salaries arising out of a valid and binding contract of service does not fall within

this provision. Payment of salaries is to be construed as part of the continuation of operations until such time as the liquidation order is granted, if it is granted.

However, the court further noted that not all of the Company's employees would be entitled to claim in terms of the judgment. If employees obtained alternative employment during the various periods between 1 May 2011 (when the company ceased carrying trading) and 3 February 2012 (the date of provisional liquidation), they would be excluded. Since it was common cause that all employees had a claim up to 10 November 2011 (date of presentment and issuing of the application) such employees each had a further claim for the periods that they were not otherwise employed between 10 November 2011 and 3 February 2012. Each claim has to be proved separately with the liquidators.

Julian Jones and Roxanne Wellcome

CDH has one of the leading banking, refinancing, restructuring and insolvency teams in South Africa.



CLICK HERE to find out more about our in-depth experience and expertise.

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

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@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

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@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)11 562 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 TWO CONTRIBUTOR

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 1070/MAY