

DISPUTE RESOLUTION ALERT

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

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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).

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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

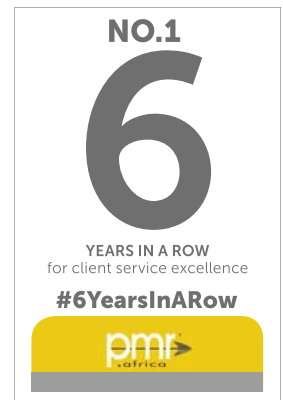
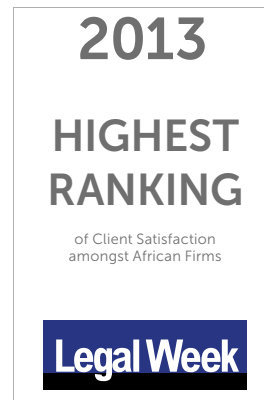
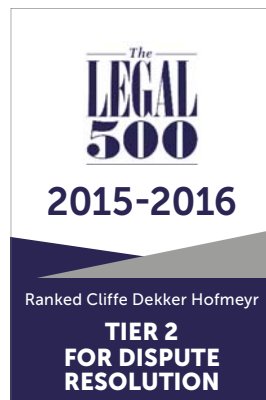


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