

DISPUTE RESOLUTION ALERT

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AMENDMENT TO THE PRESCRIBED RATE OF INTEREST ACT, NO 55 OF 1975

The Judicial Matters Amendment Act, No 24 of 2015, (commenced on 8 January 2016) has amended s1 of the Prescribed Rate of Interest Act, No 55 of 1975.

SUSPENDING LIQUIDATION PROCEEDINGS WITH A BUSINESS RESCUE APPLICATION

In order for an application for business rescue to successfully suspend commenced liquidation proceedings, it must be served on the Companies and Intellectual Property Commission (CIPC), together with all affected persons in terms of the Companies Act, No 71 of 2008 (Act). This position was confirmed in the Gauteng Local Division's decision handed down on 10 March 2016.

AMENDMENT TO THE PRESCRIBED RATE OF INTEREST ACT, NO 55 OF 1975

From 8 January 2016 the prescribed rate of interest is no longer a fixed rate but will be the repurchase rate, determined from time to time by the South African Reserve Bank (SARB), plus 3,5%.

Given that the prescribed rate of interest is linked to the repurchase rate and is no longer fixed, it is important for a litigant to confirm that the most recent and correct prescribed rate of interest is used when instituting legal proceedings which include a claim for interest.



The Judicial Matters Amendment Act, No 24 of 2015, (commenced on 8 January 2016) has amended s1 of the Prescribed Rate of Interest Act, No 55 of 1975.

Section 1 of the Prescribed Rate of Interest Act, No 55 of 1975, as amended, stipulates that:

Rate at which interest on debt is calculated in certain circumstances

- (1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.
- (2) (a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.
(b) The Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest contemplated in paragraph (a) by notice in the Gazette.

(c) The interest rate contemplated in paragraph (b) is effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank.

(3) For purposes of this section:

(a) "repurchase rate" means the rate at which banks borrow rands from the South African Reserve Bank; and

(b) "South African Reserve Bank" means the central bank of the Republic regulated in terms of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989).

From 8 January 2016 the prescribed rate of interest is no longer a fixed rate but will be the repurchase rate, determined from time to time by the South African Reserve Bank (SARB), plus 3,5%.

Given that the prescribed rate of interest is linked to the repurchase rate and is no longer fixed, it is important for a litigant to confirm that the most recent and correct prescribed rate of interest is used when instituting legal proceedings which include a claim for interest. The rate will not fluctuate after the date that proceedings have been instituted as confirmed in *Davehill (Pty) Ltd & Others v Community Development Board* [1988] 1 All SA 388 (A), where it was held that the rate is fixed at that time and remains constant in respect of those proceedings.

AMENDMENT TO THE PRESCRIBED RATE OF INTEREST ACT, NO 55 OF 1975


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The most recent publication appeared in Government Gazette No. 397895 on 4 March 2016, under s1(2)(b) of the Prescribed Rate of Interest Act, No 55 of 1975, wherein the Minister of Justice and Correctional Services published a rate of interest of 10,25% per annum as from 1 March 2016 for the purposes of s1(1) of the said Act.

Adine Abro and Muhammed Somrey




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SUSPENDING LIQUIDATION PROCEEDINGS WITH A BUSINESS RESCUE APPLICATION

The court held that the issuing of the application was insufficient and that service was required in order to suspend liquidation proceedings.

Anyone who brings an application for business rescue once liquidation proceedings have commenced should ensure that the application is not only issued but also served on CIPC and all affected persons are given notice in accordance with the Act.



In order for an application for business rescue to successfully suspend commenced liquidation proceedings, it must be served on the Companies and Intellectual Property Commission (CIPC), together with all affected persons in terms of the Companies Act, No 71 of 2008 (Act). This position was confirmed in the Gauteng Local Division's decision handed down on 10 March 2016.

Section 131(6) of the Act stipulates that if liquidation proceedings have commenced by or against the company at the time an application (for business rescue) is made, the application will suspend those liquidation proceedings until the court has adjudicated upon the application, or the business rescue proceedings have come to an end, if the court makes the order applied for.

In the matter of *Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Ltd* case no 45543/2012 (GLD), the court considered whether the mere issuing of a business rescue application, without adequate service, could suspend liquidation proceedings that had already commenced.

In this instance, *Standard Bank* had obtained a provisional liquidation order against *Gas 2 Liquids* and, on the return date, argued for a final order. *Gas 2 Liquids* then attempted to suspend the proceedings by arguing that an application for business rescue had been issued by a third party on the very same day.

Neither the appointed provisional liquidators nor the company had received service of the business rescue application. The application had also not been sent to all the creditors and employees that the third party was aware of and that were referred to in the business rescue application.

The court held that the issuing of the application was insufficient and that service was required in order to suspend liquidation proceedings.

The practical effect is that anyone who brings an application for business rescue once liquidation proceedings have commenced should ensure that the application is not only issued but also served on CIPC and all affected persons are given notice in accordance with the Act before it can have the effect of suspending the liquidation proceedings.

Despite a contrary finding in the Western Cape High Court that only required that the application be issued and not served, this decision is in accordance with the decisions in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and others* 2013 (6) SA 141 KZP and *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 GNP.

This requirement will ensure, at least for matters within the jurisdiction of the Gauteng Local Division and the Kwazulu Natal Division, that debtors meet the requirements of service before attempting to derail or delay a creditor's liquidation application.

Julian Jones and Janine Matthews

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.rhoodie@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

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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

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