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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

REMUNERATION OF BUSINESS RESCUE PRACTITIONERS – THE REQUIREMENT TO PROVE CLAIMS AGAINST THE INSOLVENT ESTATE

A recent development in the ever-evolving jurisprudence associated with business rescue proceedings relates to the remuneration of the business rescue practitioner in the event that a business rescue fails. The Supreme Court of Appeal in *Diener N.O. v Minister of Justice* (926/2016) [2017] ZASCA 180 has recently confirmed that the practitioner's fees do not hold a 'super preference' in a liquidation scenario and the practitioner is required to prove a claim against the insolvent estate like all other creditors.

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The argument before the SCA on behalf of the business rescue practitioner was that the remuneration and expenses of the practitioner, after the costs of liquidation, took a 'super-preference' over all other creditors, regardless of whether they were secured or not. In other words, the business rescue practitioner enjoys a special preference and has security over all assets, even above securities existing when the practitioner is appointed.

This argument was based on s135(4) and s143(5) of the Companies Act, No 71 of 2008. Section 143(5) provides that a business rescue practitioner's claim for remuneration and expenses "rank[s] in priority before the claims of all other secured and unsecured creditors". The difficulty with this provision is that, at face value, it undermines or diminishes the security held by creditors. The Court therefore, in determining the correctness of this argument, had regard to the overall context and purpose of the business rescue chapter in the Companies Act, and then dealt with the above two sections specifically in turn.

In relation to s135, the Court said that the section is concerned with post-commencement finance, and "it is in this context, ie while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts". The practitioner's remuneration is one such debt, and is ranked first. There is, for the most part, no mention of liquidation in this section, save to state that if liquidation occurs, the set of preferences created in this section, ie in relation to the post-commencement finance, remain in force, subject to the costs of liquidation. Simply put, the section only creates a set of preferences in relation to claims that are listed within s135, and those claims enjoy a preference over unsecured claims – it does not create a super preference which places the practitioner in a more favourable position than the best position that can be occupied by a secured creditor.

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Section 143 of the Companies Act similarly does not deal with a liquidation scenario, but rather regulates the practitioner's remuneration during business rescue.

Section 143 of the Companies Act similarly does not deal with a liquidation scenario, but rather regulates the practitioner's remuneration during business rescue. In this regard, the Court held that where the section states that the practitioner's remuneration ranks "in priority before the claims of all other secured and unsecured creditors", this must be understood as a reference back to s135. It only creates a priority over those persons who have provided the company with post-commencement finance, whether secured or unsecured, and not to the company's pre-business rescue creditors.

The Court further held that in the context of the Insolvency Act, No 24 of 1936, a business rescue practitioner is not a person who 'renders services in connection with the sequestration proceedings' (as such people do not have to prove a claim). The Court reasoned that a business rescue practitioner could not be such a person because of the distinction between business rescue proceedings and liquidation proceedings, as business rescue terminates when a company is placed in liquidation.

The SCA has thus clarified and confirmed the position for business rescue practitioners that have claims against liquidated companies for unpaid remuneration – they are creditors of the liquidated company, and are required, like all other creditors, to prove claims against the companies in terms of s44 of the Insolvency Act. The preference that they hold is no more than to claim against the free residue after the costs of liquidation, but before the claims of employees for post-commencement wages, before those who have provided other post-commencement finance, and before any other unsecured creditors.

This ruling may cause business rescue practitioners to be more circumspect in terms of the appointments they may take, and/or in relation to their fee arrangements in respect of such appointments.

Timothy Baker and Siviwe Mcetywa

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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

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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@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

Grant Ford
Director
T +27 (0)21 405 6111
E grant.ford@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

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@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

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

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

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

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

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

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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.

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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CLIFFE DEKKER HOFMEYR