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DISPUTE RESOLUTION **ALERT**

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Setting aside dispositions – a practical approach

In winding-up proceedings, the commencement date of the winding-up and the establishment of the *concursus creditorum* (meaning the coming together of the creditors) play an important role. The purpose behind the establishment of a *concursus* is to ensure that the company's property is collected and distributed amongst its creditors in the prescribed order of preference.

Seeing eye-to-eye: The National Credit Act's applicability to settlement agreements

It is no secret that the National Credit Act, No 34 of 2005 (Act) has its problems. Courts have been called upon numerous times to interpret what should be simple provisions that confuse contracting parties. A measurable portion of the court cases involving the Act and its interpretation concern the application of the Act to agreements.

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Setting aside dispositions – a practical approach

The SCA held that when a company is placed into voluntary winding-up after a compulsory winding-up application has been issued, but before the court order in the compulsory winding-up application is granted, the "deemed commencement date" of the winding-up will be the date of the registration of the voluntary winding-up.

In winding-up proceedings, the commencement date of the winding-up and the establishment of the *concursus creditorum* (meaning the coming together of the creditors) play an important role. The purpose behind the establishment of a *concursus* is to ensure that the company's property is collected and distributed amongst its creditors in the prescribed order of preference.

Every disposition of its property by a company, made after the commencement of the winding-up, shall be void, unless a court orders otherwise. The commencement date is also important when considering certain dispositions which were made within or longer than six months before the commencement date.

Therefore, an earlier *concursus* date is always preferred by liquidators and creditors.

The commencement date of a winding-up depends on whether the winding-up is compulsory or voluntary and whether it is a winding-up of a solvent or insolvent company. For present purposes, we will only discuss the commencement date in the winding-up of insolvent companies.

- Compulsory winding-up

  Section 348 of the Companies Act, No 61 of 1973 (Companies Act) states that if a company is wound-up by the court, the winding-up shall be deemed to commence at the time of the presentation to the court of the application for the winding-up (the date of the issuing of the winding-up application);

- Voluntary winding-up of an insolvent company

  Section 352 of the Companies Act states that a voluntary winding-up shall commence at the time of the registration in terms of s200 of the special resolution authorising the winding-up.

It is possible for a compulsory winding-up and a voluntary winding-up to overlap. This can happen where the voluntary process is commenced after an application for the compulsory winding-up of the company has been issued, but before the winding-up order is granted.

The following question then arises: When was the *concursus* established? This question was recently answered by the Supreme Court of Appeal (SCA) in *Afrisam (SA) (Pty) Ltd v Maleth Investment Fund (Pty) Ltd* (651/2018) [2019] ZASCA 139 (01 October 2019).

In short, the SCA held that when a company is placed into voluntary winding-up after a compulsory winding-up application has been issued, but before the court order in the compulsory winding-up application is granted, the "deemed commencement date" of the winding-up will be the date of the registration of the voluntary winding-up, as determined by s340(2)(a) of the Companies Act.

Creditors beware

Litigation is a time-consuming process and it could take between one to two years to obtain a compulsory winding-up order in an opposed winding-up application. The long period that creditors have to wait

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Setting aside dispositions – a practical approach...*continued*

Even if a compulsory winding-up order is thereafter granted by the court, the "deemed commencement date" for purposes of s340 of the Companies Act will be the date that the voluntary winding-up is registered.

for an order to place a company under compulsory winding-up is often prolonged by business rescue proceedings being instituted, while the compulsory winding-up application is pending.

Therefore, should a company, which is being wound-up, be concerned about certain dispositions that were made within six months prior to the winding-up application being issued or any disposition made after the issuing of the application, the board of directors can delay the commencement date of the winding-up proceedings by deliberately placing the company into voluntary winding-up, before the compulsory winding-up order is granted by the court. Even if a compulsory winding-up order is thereafter granted by the court, the "deemed commencement date" for purposes of s340 of the Companies Act will be the date that the voluntary winding-up is registered.

As a result of the delays associated with litigation, attorneys are often expected to think outside the box and to present solutions to achieve urgent recoveries. Therefore, we recommend that creditors, prior to launching winding-up applications, request an undertaking that the board of directors will not place the company under voluntary winding-up, pending the outcome of the compulsory winding-up application, once issued. If the board of directors refuses to provide such an undertaking, we believe an argument can be made by the creditor to proceed with an urgent application for a provisional winding-up order (at least) as the delay of the establishment of the *concursus creditorum* could have a prejudicial effect on the setting aside of certain dispositions.

Stephan Venter and Tobie Jordaan

Seeing eye-to-eye: The National Credit Act's applicability to settlement agreements

The Supreme Court of Appeal had to determine whether the Act applied to a settlement agreement concluded by the parties in circumstances where the underlying agreements to which the settlement agreement related, were not governed by the Act.

It is no secret that the National Credit Act, No 34 of 2005 (Act) has its problems. Courts have been called upon numerous times to interpret what should be simple provisions that confuse contracting parties. A measurable portion of the court cases involving the Act and its interpretation concern the application of the Act to agreements.

Contracting parties that fail to comply with the Act when concluding credit agreements face dire consequences as the Act was promulgated primarily to protect the rights of consumers. When concluding any agreement, it is therefore important for contracting parties to make sure that either the Act does not apply to the agreement or if the Act applies, that their business is fully compliant with the Act.

The Act has such wide-reaching application and may apply to a contract even when you least expect it. A prime example is in the case of *Ratlou v MAN Financial Services* (2019) ZASCA 49 in which the Supreme Court of Appeal (SCA) had to determine whether the Act applied to a settlement agreement concluded by the parties in circumstances where the underlying agreements to which the settlement agreement related, were not governed by the Act.

On 28 July 2016, MAN Financial Services (MAN) launched proceedings against Ratlou and Phapho Nkone Transport (PNT), a business owned by Ratlou, for a claim of R4,269,278.79 based on a settlement agreement. The High Court ruled that the Act was applicable to the settlement agreement and MAN was obliged to give notice in terms of s129 read with s130 of the Act, and MAN failed to do so.

The High Court, in reaching its decision, found that although the underlying agreements did not fall within the ambit of the Act, as such agreements were large agreements concluded with a juristic person, the settlement agreement constituted a new credit agreement which fell within the meaning of the Act. It was this finding, among others, that the SCA was called upon to determine.

In considering the matter, the SCA commented that the High Court correctly found that the underlying agreements did not fall within the ambit of the Act. The SCA further acknowledged that if regard was had to the terms of the settlement agreement and upon a literal interpretation of s8(4)(f) of the Act, the settlement agreement appeared to fall within the ambit of the Act, as in terms of s8(4)(f) of the Act:

> *"(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) constitutes a credit transaction if it is*
>
> ...
>
> *(f) Any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –*
>
> *(a) the agreement; or*
>
> *(b) that amount has been deferred."*

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Seeing eye-to-eye: The National Credit Act's applicability to settlement agreements...*continued*

The SCA concluded that the Act was not designed to regulate settlement agreements where the underlying agreements or causa, would not have been considered by the Act.

The importance of questions the SCA was called upon to consider was confirmed when the SCA stated that the issues on appeal raised a discrete legal point of public interest that would affect settlement agreements concluded in the future.

MAN, in opposition, argued that although upon the literal interpretation of s8(4)(f) the settlement agreement fell into the category of credit agreements, the underlying causa to the settlement agreement did not constitute a credit agreement as envisaged in the Act, and therefore, the settlement agreement did not fall within the ambit of the Act.

The SCA agreed with this argument and found that:

> *"A purposive interpretation and not a literal interpretation of section 8(4)(f) of the Act is required because it is clear that the Act was not aimed at settlement agreements. Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation."*

In reaching its conclusion, the SCA considered the judgments of *Grainco (Pty) Ltd v Broodryk NO & others* [2009] ZAFSHC 143, *Hattingh v Hattingh* [2010] ZAFSHC 173, and *Ribeiro & another v Slip Knot Investments 777 (Pty) Ltd* [2010] ZASCA 174. In consideration of these judgments, the SCA concluded that the Act was not designed to regulate settlement agreements where the underlying agreements or causa, would not have been considered by the Act. Therefore, the SCA found that the settlement agreement in the appeal did not fall within the ambit of the Act.

The SCA concluded that to apply the Act differently would result in parties being reluctant to settle disputes outside of court, which would in turn result in the court rolls being overburdened with disputes in terms of the Act, as well as parties being dragged into litigious proceedings that they neither foresaw nor had the financial means to defend.

Ngeti Dlamini and Lucinde Rhoodie

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