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DISPUTE RESOLUTION ALERT

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Residuary powers of directors of companies in provisional liquidation

It is a principle of our law, as established in *Attorney-General v Blumenthal* 1961 (4) SA 313 (T) (*Blumenthal*), that directors are divested of their powers when a company is placed in liquidation. Control of that company is then transferred to the liquidator. The assumption is that the liquidators step into the shoes of the former directors, who must now seek gainful employment and occupation elsewhere.



CLIFFE DEKKER HOFMEYR

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Residuary powers of directors of companies in provisional liquidation

A provisional liquidator enjoys specified, statutory powers listed in sections 386 to 390 of the Act. But the provisional liquidator enjoys only those powers and nothing more.

It is a principle of our law, as established in *Attorney-General v Blumenthal* 1961 (4) SA 313 (T) (*Blumenthal*), that directors are divested of their powers when a company is placed in liquidation. Control of that company is then transferred to the liquidator. The assumption is that the liquidators step into the shoes of the former directors, who must now seek gainful employment and occupation elsewhere.

But initially, and often, liquidators are appointed on a provisional basis under section 368 of the Companies Act 61 of 1973 (Act). Here the position is a little less cut and dried. A provisional liquidator enjoys specified, statutory powers listed in sections 386 to 390 of the Act. But the provisional liquidator enjoys only those powers and nothing more.

There is therefore a gap that appears between those specified powers, and the capacity of the company to act as a juristic person, which powers are normally exercised through its board. In light of this, it has subsequently been held in *O'Connell Manthe & Partners v Vryheid Minerale* 1979 (1) SA 553 (T) (*O'Connell*) that the principle established in *Blumenthal* is not without qualification.

A very important power the directors retain in provisionally liquidated companies is the power to oppose, on behalf of the company, the making of the provisional liquidation order final. This has been held

in *Ex Parte G Pagan Enterprises* [1983] 3 All SA 400 (W) (*Pagan*), and again in *ABSA Bank v Rhebokskloof* 1993 (4) SA 436 (C) at 440A-F (*ABSA*). In fact, when affirming this specific power, the court in *Pagan* held that where there is a conflict between a provisional liquidator and directors, it is the directors that speak for the company, being empowered to instruct legal representatives on its behalf, and not the provisional liquidator.

Both of these cases reached this conclusion after first asserting that directors of companies in provisional liquidation enjoy residuary powers despite not enumerating what these are in their entirety.

The court in *O'Connell* quoted a passage with approval from the English case of *Re Union Accident Insurance* (1972) 1 All ER 1105 (*Union Accident Insurance*). This passage establishes that when testing the extent of directors' residuary powers, the question is whether a power has been assumed by the liquidator. If not, then the board retains that as a residuary power. Put differently the directors of a provisionally liquidated company retain all powers not expressly removed by law.

Directors of companies placed in provisional liquidation should be mindful that they are not totally toothless or without the ability to challenge the steps being taken against the company.

Richard Marcus and Nicholas Carroll

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.

Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

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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.

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