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Business Rescue Practitioners – mind the trap!

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Introduction

The payment and ranking of business rescue practitioners' ("**BRPs**") fees and disbursements has gained much attention, and has been the subject of much legal debate, over the last few years, particularly in instances where the business rescue process has failed or has been unsuccessful. A classic example of such legal debate which made it to the Supreme Court of Appeal is the case of *Diener NO v Minister of Justice 2018 (2) SA 399 (SCA)*.

The recent judgment handed down by the Western Cape High Court in the case of *Montic Dairy (Pty) Ltd (in liquidation) and Others v Mazars Recovery & Restructuring (Pty) Ltd and Others [2021] JOL 49564* ("**Montic Dairy Judgment**") on 10 February 2021 is yet another example and unfortunately for BRPs, dealt another blow to BRPs in respect of their fees and disbursements which were paid at a time when an application for the winding up of the company was pending before the Western Cape High Court.

In addition to the SCA confirming that the fees and disbursements of BRPs do not enjoy any "super preference" in terms of section 135(4) of the Companies Act 71 of 2008 ("**2008 Companies Act**") when business rescue proceedings have been converted into liquidation proceedings, the Western Cape High Court confirmed that any payment of fees or disbursements to a BRP will be voidable and capable of being set aside in terms of section 341(2) of the Companies Act 61 of 1973 ("**1973 Companies Act**") if made after the commencement of liquidation proceedings.

Facts of the Montic Dairy Judgment

Montic Dairy Proprietary Limited ("**Montic Dairy**") was placed into final liquidation on 14 June 2016 pursuant to an application instituted on 16 May 2016 by the BRPs in terms of section 141(2)(a) of the 2008 Companies Act to discontinue the business rescue proceedings on the basis that there was no longer a reasonable prospect of rescuing the company.

Mazars Recovery & Restructuring ("**Mazars**") and the BRPs claimed to have unpaid bills in respect of services rendered and disbursements incurred in relation to the business rescue proceedings of Montic Dairy and consequently, on 23 May 2016 and 2 June 2016 respectively, the BRPs caused a total of R1,5 million to be paid to Mazars from Montic Dairy.

The liquidators appointed to wind-up Montic Dairy claimed that such payments made to Mazars were void in terms of section 341(2) of the 1973 Companies Act and should be repaid to the company.

Legal discussion and judgment

Section 341(2) of the 1973 Companies Act provides that every disposition of property of a company that is being wound up and unable to pay its debts after the commencement of the winding up process shall be void, unless a court orders otherwise.

The BRPs argued that this section excludes payments made by the company to the BRPs in respect of their remuneration and expenses.

The BRPs argued further that it would be inconceivable to suggest that the Legislature would have contemplated that any payments made to the BRPs while still managing the company and incurring expenses, and even in respect of finalising the winding-up application would be void in terms of section 341(2) of the 1973 Companies Act. This would be a significant disincentive to the BRPs to conclude that there is no reasonable prospect of rescuing a company and would in turn result in unnecessary protraction of business rescue proceedings where such proceedings ought to have ended sooner.

The liquidators disagreed. They argued that in terms of section 341(2) as read with section 348, once an application for winding-up is presented to court, as is the case in this matter, the company – in the spirit of limiting the disposal of assets – is precluded from making any payments to third parties –

including the BRPs. Section 348 stipulates that winding up proceedings shall be deemed to have commenced at the time of presentation to the Court. The liquidators concluded that BRPs are entitled to some form of preference for claims arising from the business rescue process, but that that preference only exists under section 135(4) of the 2008 Companies Act in that their remuneration will only be paid from the free residue after the costs of liquidation but before the claims of employees for post-commencement wages and other claims for post-commencement finance, whether secured or not (as confirmed in the *Diener Judgment*).

Viewed together with the *Diener Judgment*, Gamble J sided with the liquidators and held that:

> *"It therefore follows that s341(2) proscribes the disposition of a company's assets after the lodging of an application to wind up (whether that application is at the behest of an ordinary unpaid creditor or a BRP who concludes that the company cannot be rescued) while s143 only affords the BRP a limited measure of priority when his/her claim for remuneration is considered by the liquidator in the winding up process.*
>
> *To grant the BRP's the relief that they seek in this case would require the Court to find that it is implicit in s143 that they have the right to be paid after the commencement of the winding up process, before a final order is granted and before the liquidators have done their work to liquidate and distribute the assets in the insolvent company. To import such an interpretation into s143 would be destructive of the whole basis of the winding up process which recognises defined classes of creditors and affords them priority in respect of their claims according to such classes.*
>
> *Put differently, the BRP's demand that they are entitled to be paid after the establishment of the concursus creditorum and ahead of secured creditors might conceivably result in the free residue in the company being wiped out to the detriment of, for example, the holder of a first mortgage bond over the insolvent company's immovable property. The purpose and context of business recue is obviously not intended to destroy the rights of a secured creditor.*
>
> *In my considered view, such a situation would not only undermine the very basis of the law of insolvency but is to be regarded as unconscionable, particularly if the BRP's were to pay out excessive and/or unsubstantiated amounts..."*

Conclusion

The *Montic Dairy* judgment may provide a disincentive to BRPs from taking appointments for fear of not being remunerated for their services should the business rescue fail or be unsuccessful. BRPs must be mindful of the "trap" when making payment to themselves after an application for the winding up of the company has been launched. This confirms the importance of the current practice – that a BRP should only accept an appointment where he or she is confident that there is a reasonable prospect of rescuing the company.

Thus, the judgment cautions against, and discourages BRPs from – once becoming aware that there is little prospect of rescuing an ailing company – embarking on business rescue activities that amount to no more than an exercise of self-enrichment. Thus, a responsible BRP, mindful of the fact that he or she does not enjoy any privilege ahead of other interested creditors in a liquidation of the company, should be careful not to incur unnecessary fees and disbursements in his or her efforts to rescue a company that has no reasonable prospect of being rescued.



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