

Coal for Christmas – Diener N.O. v Minister of Justice and others

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It is that magical time of the year where images are abound of Christmas trees, fairy lights, delicious pudding, family gatherings and all things warm and fuzzy. However, what would this festive season be without Santa Clause, riding on a beautifully adorned sleigh pulled by his reindeer with presents, placing presents under the Christmas tree and filling stockings. Not all presents, however, bring joy. For some, Santa gives gifts that bring reflection...a lump of coal. This year Santa came early and dumped a truck load of fossil fuel.

In the much anticipated decision of *Diener N.O. v Minister of Justice and Others*, the SCA was faced with determining three critical issues – namely, when a company is placed in liquidation following an unsuccessful [business rescue](#) (BR) whether a BRP's claim for his or her expenses and remuneration, enjoys preference over all secured and unsecured creditors and whether such a claim must be proved, in the ordinary course of the winding-up of a company. Further, the court was asked to determine on what date the liquidation is said to have commenced.

In this matter, a close corporation by the name of JD Bester Labour Brokers CC (JD Bester) was placed in voluntary BR by its board of directors and Ludwig Diener was appointed the BRP by the Companies and Intellectual Property Commission (CIPC). Prior to Mr Diener's appointment as BRP, but following the commencement of the corporation's BR proceedings, Cawood Attorneys, on the instructions of the corporation launched proceedings, successfully, to stay the sale in execution by FirstRand Bank (a secured creditor of the corporation) of the corporation's only valuable asset. Further, and during August of 2012, on the instruction of the BRP, Cawood Attorneys launched an application to court to place JD Bester in liquidation on the basis that there was no longer a reasonable prospect of it being rescued, in terms of section 141(2)(a)(ii) of the Companies Act 71 of 2008 (Companies Act). The court obliged.

The joint liquidators of JD Bester could not reach agreement on how to treat the accounts of Cawood Attorneys and that of Mr Diener and referred the decision to the Master of the High Court (Master) for determination. The Master held that Mr Diener was required to prove a claim in the estate of JD Bester and that Cawood Attorneys was to be treated as an unsecured creditor, and as with all concurrent creditors, would be liable for the payment of a contribution towards the costs of the liquidation, if any.

Mr Diener challenged the decision of the Master, on application to the Gauteng Division of the High Court, Pretoria. The High Court dismissed Mr Diener's application but granted him leave to appeal to the SCA.

On appeal to the SCA, Mr Diener argued that by virtue of section 143(5) of the Companies Act he enjoyed a 'super-preference' over all creditors (secured or not), after the costs of liquidation, for payment of his fees and expenses.

However, the SCA held that –

- the reference to 'secured and unsecured' creditors in section 143(5) should be understood within the context of section 135, i.e. to refer to post commencement financiers (PCF), both secured and unsecured, and not to the company's pre-business rescue creditors. That is, the SCA didn't find any indication that, in BR proceedings, pre-commencement security is to be diluted or undermined in any way; and

- section 135(4) provides a BRP, after the conversion of BR proceedings into liquidation proceedings, with no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation, but before claims of employees for post-commencement wages and other PCF, whether those claims are secured or not, and of any other unsecured creditors.

Mr Diener further argued that the effective date of the liquidation is the date on which the resolution to commence BR is filed with the CIPC, so that everything done after that date by a BRP forms part of the costs of liquidation and should therefore enjoy a preference. The SCA found, however, that this argument was flawed and held that it remained trite law that the effective date of a liquidation is the date on which the application for liquidation is filed with a Court in terms of section 348 of the old Companies Act 61 of 1973.

Lastly, Mr Diener argued that he was not required to prove a claim, the SCA noted that in terms of section 44 of the Insolvency Act 24 of 1936 the general rule is that 'a creditor who wishes to share in the distribution of the assets in an insolvent estate must prove his or her claim against the estate at any meeting of creditors to the satisfaction of the officer presiding at such meeting' and that the BRP is one such creditor who is required to prove a claim.

Although the SCA declined to pronounce on the claims of the BRP's consultants, it will be prudent for consultants to BRPs to also prove claims in the estate of liquidated companies/corporations.

The decision of the SCA is a welcome gift for secured creditors which will give them peace of mind over the festive season, whilst leaving BRPs with much to ponder.



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