THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 23 March 2016

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***Eravin Construction CC v Bekker NO* (20736/2014) [2016] ZASCA 30 (23 March 2016).**

The Supreme Court of Appeal (SCA) today handed down judgment concerning the recoverability of a payment made by a close corporation after the effective date of its winding-up – a void disposition – to a company that was later placed under business rescue.

An application for the winding-up of Ditona Construction (Pty) Ltd (Ditona) was brought in the North West Division of the High Court, Mahikeng on 20 October 2010, being the effective date of the winding-up in terms of s 348 of the Companies Act 61 of 1973 (the old Act). A provisional winding-up order was made on 9 December 2010, and a final order was granted on 3 March 2011. However, on 21 October 2010, a day after the effective date, a payment of R389 593.49 was made by Ditona to the appellant, Eravin Construction CC (Eravin). On 24 September 2012, Eravin's board resolved to place it under business rescue in terms of s 132 of the Companies Act 71 of 2008 (the new Act). Notice to commence business rescue proceedings was filed in the offices of the Companies and Intellectual Property Commission (CIPC) on 26 September 2012, thus beginning the business rescue process. A business rescue practitioner was appointed on 5 October 2012 and a business rescue plan was adopted on 25 January 2013. The business rescue was terminated on 31 May 2013 and a notice was filed that substantial compliance with the business rescue plan had been achieved.

Ditona's liquidators, the respondents in the appeal, having established that the disputed amount had been paid to a firm of attorneys, Grobler, Levin and Soonius Inc, instructed their attorneys to ascertain the basis of the payment. They did so on the premise of s 341(2) of the old Act, which provides that dispositions of property made by a company being wound-up are void unless the court orders otherwise. Eravin's argument, on the other hand, was that s 154(2) of the new Act precluded the liquidators from recovering the debt. This section provides that a creditor may not recover a pre-business rescue debt.

It had been argued by the liquidators in the court a quo that the entire business rescue proceedings were void and therefore that s 154(2) of the new Act did not bar the recovery of debt. It was argued that this was so because Eravin had not complied with s 129 of the new Act in that the business rescue practitioner had not been appointed within five business days of the filing of the resolution as required by s 129(3)(*b*) of the new Act. This argument was rejected by the court a quo. It was also argued that the debt was not a pre-business rescue debt owed by Eravin to Ditona as it only became

due after the commencement of the business rescue proceedings, and was thus recoverable. The court a quo had found that this was indeed so and had granted the liquidators' application on that basis.

On appeal, in respect of the first argument, the SCA held that it had now been settled by the court in *Panamo Properties (Pty) Ltd & another v Nel & others NNO* [2015] ZASCA 76; 2015 (5) SA 63 (SCA), that non-compliance with s 129 did not vitiate the business rescue proceedings automatically, but that what was required in order to achieve that result was an application to court.

In respect of the second argument, the SCA found that s 341(2) of the old Act and s 154(2) of the new Act are both concerned with when debts are owed, rather than when they are claimable (or fall due). The court found on this account that the prescription analogy that had been adopted by the court a quo was misleading for determining when the debt was owed.

The SCA held that s 341(2) of the old Act expressly provides that a disposition in the terms contemplated by it 'shall be void'; and thus that the recipient has no right, on this account, to retain property so disposed. Consequently, the recipient owes a debt to the body that made the prohibited disposition, and that that debt is owed as soon as the disposition had been received.

The SCA further held that s 154(2) of the new Act which provides that if a debt was owed by a company 'before the beginning of the business rescue process', ie before the filing of the resolution when a company places itself under business rescue – then the creditor 'is not entitled to enforce' that debt. The Court held that in this case, the payment was made on 21 October 2010 and, being void, its repayment was immediately owed by Eravin. Its business rescue proceedings had begun on 26 September 2012, being the date on which the resolution had been filed with the CIPC. As the debt had been owed prior to 26 September 2012, the debt was a pre-business rescue debt and could not be recovered.

On the further argument that was raised for the first time on appeal, the SCA held that all creditors – as opposed to only those creditors who had been given notice of the business rescue proceedings, as had been argued by the appellant – are precluded from enforcing pre-business rescue debts. The court held that there was no justification for reading into the section which was not expressly provided for.

The appeal thus succeeded and the order of the court below granting the liquidators' application was set aside and replaced with an order dismissing the application with costs.

--- ends ---