



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 1 December 2017

STATUS Immediate

Diener v Minister of Justice & others (926/2016)

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.

The Supreme Court of Appeal (the SCA) today dismissed an appeal against a judgment that had held that the a business rescue practitioner (BRP) generally enjoyed no special preference above secured creditors in relation to his remuneration and expenses when business rescue proceedings were converted into liquidation proceedings.

Mr Ludwig Diener had been appointed as BRP to a close corporation. He was unable to formulate a business plan and applied for the business rescue proceedings to be converted into liquidation proceedings. The application was granted. The liquidators took the view that he enjoyed no preference over the close corporation's one secured creditor and that the BRP's remuneration and expenses were to be paid from the free residue of the insolvent estate. They also took the view that Mr Diener was required to prove his claim in terms of s 44 of the Insolvency Act 24 of 1936, which he had not done. Mr Diener applied unsuccessfully to the High Court to review and set aside the Master of the High Court's decision to accept the first and final liquidation, distribution and contribution account in respect of the insolvent close corporation.

The SCA was required to decide three issues. The first was whether a BRP enjoyed a special preference on the liquidation of a corporation when business rescue had failed. On an interpretation of the applicable provisions of chapter 6 of the Companies Act 71 of 2008, it held that a BRP's claim for remuneration ranked after the costs of liquidation but before those of post-commencement claims for wages by employees and secured and unsecured post-commencement finance, and was payable from the free residue of the insolvent estate.

Secondly, it had been argued that the effective date of liquidation had been the date on which business rescue proceedings commenced. The SCA held that this argument was not correct. Business rescue ended when the application to convert business rescue proceedings into liquidation proceedings was granted. Both the 1973 Companies Act and the 2008 Companies Act specified that the effective date of liquidation was the date on which an application for liquidation was filed.

Thirdly, the SCA held that as a BRP was not one of the persons identified in s 97 of the Insolvency Act as persons who were exempted from proving claims, the general rule applied

that any creditor who wishes to share in the distribution of an insolvent estate is required to prove his or her claim.

ends