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

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***Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* (526/2021) [2022] ZASCA 135 (13 October 2022)**

The Supreme Court of Appeal (SCA) today dismissed an appeal against an order by the Gauteng Division of the High Court, Pretoria (high court). The appeal addressed the remuneration of fees of business rescue practitioners in respect of work performed after an application to convert business rescue proceedings to liquidation proceedings, but before the final winding-up order.

Business rescue proceedings commenced in respect of the first respondent, Montic Dairy (Pty) Ltd (In Liquidation) (the company) on 2 November 2015. The business rescue practitioners (the BRPs) (the first, second and third appellants), all of whom were then in the employ of the first appellant, Mazars Recovery & Restructuring (Pty) Ltd (Mazars), were appointed with effect from that date. On 14 April 2016, a number of the company's creditors commenced liquidation proceedings against the company. The proceedings were opposed by the BRPs, and on 26 April 2016, the BRPs resolved that there was no longer any prospect of the company being rescued. On 16 May 2016, the BRPs made their own application to convert the business rescue proceedings into liquidation proceedings on the grounds that there was no reasonable prospect of the company being rescued.

On 23 May, and again on 2 June 2016, two payments to the tune of R1 500 000 were made to Mazars, by the BRPs in respect of their fees in the business rescue. On 14 June 2016, the high court ordered that the business rescue proceedings be discontinued and the company be placed in liquidation while the BRPs were appointed the liquidators of the company. In October 2018, the liquidators approached the high court, challenging the payments made to Mazars and sought

a declaration that both payments were void in terms of s 341(2) of the Companies Act 61 of 1973 (the 1973 Act). In terms of Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 (the 2008 Act) certain provisions of the 1973 Act remained preserved and applied to the winding-up of commercially insolvent companies.

In view of s 348 of the 1973 Act, the deemed commencement date of the winding-up of the company was 16 May 2016. The payments made by the BRPs to Mazars were accordingly made after the commencement of the winding-up of the company. It thus came to be accepted by the appellants that the provisions of ss 341(2) and 348, if applied according to their terms, would have rendered the payments void. The appellants contended that the payments did not constitute dispositions by the company and that the interpretation of s 341(2) was underpinned by the more recent provisions in the 2008 Act related to business rescue, particularly those that made provision for practitioners' statutorily recognised preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings. The appellants relied on ss 143(1), 135(3) and 143(5) as the provisions that entitled them to payment. Additionally, the appellants had to prove that ss 143 and 135 conferred a right to be paid a fee post commencement of the litigation.

This Court, however, found that none of the provisions relied upon supported such reliance and the sections concerned did not confer such rights. Payments made to a BRP before the presentation of the application for the winding-up were unaffected by s 341(2). Thereafter, a BRP was in the same position as all other creditors. Section 341(2) dictated that every disposition made after the commencement of the winding-up was void, unless the court had ordered otherwise. The Court, therefore, confirmed that unless a creditor availed him- or herself of the remedy provided in the proviso in s 341(2), payments made after the commencement of the winding-up were void. However, a BRP was not left without a remedy. A BRP could have approached a court in terms of the proviso to s 341(2) to have a payment validated and a court that heard such an application would have had a wide discretion. A BRP ranked after the costs of liquidation and would have enjoyed a preference in the ranking of creditors in the winding-up. These remedies catered entirely for any undue hardship that the appellants could have relied upon. The exercise of the court's discretion under the proviso in s 341(2) served to balance all relevant interests. The argument that the appellants had advanced would not only have rendered nugatory the discretion conferred upon a court by the proviso in s 341(2), but would also have placed all payments made by BRPs in the relevant period beyond judicial scrutiny. This Court found that that could hardly have been the intention of the Legislature.

The case of the respondents was simple and relatively straightforward. It complied with the unambiguous provisions of the 1973 Act - the payments were void and should have been repaid. The appeal accordingly had no merit and was dismissed.

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