THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 926/2016

In the matter between:

LUDWIG WILHELM DIENER N.O.	**Appellant**
and	
THE MINISTER OF JUSTICE	**First Respondent**
MASTER OF THE HIGH COURT, PRETORIA	**Second Respondent**
CLOETE MURRAY N.O.	**Third Respondent**
WINIFRED FRANCES HARMS N.O.	**Fourth Respondent**
CHRISTIAAN FREDERIK DE WET N.O.	**Fifth Respondent**
FIRSTRAND BANK LTD	**Sixth Respondent**
SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY ASSOCIATION (SARIPA)	***Amicus Curiae***
THE BANKING ASSOCIATION OF SOUTH AFRICA (BASA)	***Amicus Curiae***
INDEPENDENT BUSINESS RESCUE ASSOCIATION OF SOUTH AFRICA (IBRASA)	***Amicus Curiae***
TURNAROUND MANAGEMENT ASSOCIATION - SOUTHERN AFRICA NPC (TMA-SA)	***Amicus Curiae***

Neutral citation: *Diener N.O. v Minister of Justice* (926/2016) [2017] ZASCA 180 (1 December 2017)

Coram: Navsa ADP and Bosielo and Majiedt JJA and Plasket and Schippers AJJA

Heard: 13 November 2017

Delivered: 1 December 2017

Summary: Companies Act 71 of 2008 – business rescue – whether, when business rescue converted to liquidation, business rescue practitioner's claim for remuneration and expenses enjoys a 'super-preference' over all creditors, secured or unsecured –

whether, when business rescue proceedings converted to liquidation proceedings, date of liquidation is date of commencement of business rescue proceedings or date liquidation application filed – whether business rescue practitioner's claim for remuneration and expenses must be proved in terms of s 44 of the Insolvency Act 24 of 1936.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Dewrance AJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Plasket AJA (Navsa ADP, Bosielo and Majiedt JJA and Schippers AJA concurring)

[1] The concept of business rescue was introduced into South African corporate law and governance by chapter 6 of the Companies Act 71 of 2008 (the 2008 Act). It replaced the system of judicial management provided for by chapter XV of the Companies Act 61 of 1973 (the 1973 Act), it having been widely acknowledged that judicial management did not succeed as a means of nursing back to health companies that, for one or other reason, were in financial distress.[1] Section 7(*k*) of the 2008 Act provides that one of its purposes is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.

[2] The term 'business rescue' is defined in s 128(1)(*b*) to mean:

'. . . proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

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[1] See Farouk H I Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev and Jacqueline Yeats *The Law of Business Structures* at 458. The authors describe judicial management as 'a dismal failure'.

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

Central to this process is the business rescue practitioner (BRP). This functionary is defined in s 128(1)(*d*) to mean 'a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings'.

[3] This appeal, in a nut-shell, concerns the claim for remuneration and expenses of a BRP when business rescue has failed and been converted into a liquidation. I shall, in due course, define the discrete issues that we are required to decide.

[4] It is necessary at the outset briefly to identify the parties. The appellant, Mr Ludwig Diener (Diener), was the BRP appointed to oversee the business rescue of J D Bester Labour Brokers CC (J D Bester). He applied to the Gauteng Division of the High Court, Pretoria, for an order reviewing and setting aside the first and final liquidation, distribution and contribution account in respect of J D Bester in liquidation. The first and second respondents – the Minister of Justice and the Master of the High Court, Pretoria – took no part in the proceedings, both in the court below and in this court. The third respondent, Mr Cloete Murray (Murray), is one of the joint liquidators of J D Bester. He opposed the relief sought in the High Court and also opposes the appeal. His co-liquidators, the fourth respondent, Ms Winifred Harms, and the fifth respondent, Mr Christiaan De Wet, took no part in the proceedings in the court below and take no part in this appeal. An interested party that was not cited as a respondent in the court below, FirstRand Bank Limited, is the sixth respondent in this appeal. It was a secured creditor of J D Bester.

[5] Because of the importance of the issues that arise for decision in this appeal, various parties applied for admission as *amici curiae*. They are the Banking

Association of South Africa (BASA), the Independent Business Rescue Association of South Africa (IBRASA), the South African Restructuring and Insolvency Association (SARIPA) and the Turnaround Management Association – Southern Africa NPC (TMA-SA). The *amici curiae* filed heads of argument and presented oral argument. I record the court's gratitude to the *amici curiae* and, indeed, the appellant and respondents as well, for their most helpful heads of argument and oral submissions.

Background

[6] On 13 June 2012, the members of J D Bester passed a resolution placing it voluntarily in business rescue, in terms of s 129(1) of the 2008 Act.[2] On the same day, J D Bester wrote to the Companies and Intellectual Property Commission requesting that Diener be appointed as BRP, and completed and filed the necessary form giving notice of the commencement of business rescue proceedings. On 20 June 2012, Diener was appointed as BRP to J D Bester.

[7] On 14 June 2012, after the commencement of business rescue but before the appointment of Diener, a firm of attorneys, Cawood Attorneys, was instructed by J D Bester to launch an urgent application against FirstRand Bank, a secured creditor, to stay the sale in execution of J D Bester' s immovable property, its only asset of any value. An order to this effect was granted on 14 June 2012.

[8] Cawood Attorneys later submitted its account for this work to Diener. He stated in the founding affidavit that these expenses to J D Bester were incurred with his 'knowledge and consent and after the commencement of the business rescue proceedings'. From this, he concluded that these expenses 'represent expenses in business rescue as defined in Section 143 of the new Companies Act, or at the very least, these services and expenses represent unsecured post commencement finance as defined in Section 135 of the new Companies Act'. He claimed that the account of Cawood Attorneys 'only became due after my appointment . . . and after the Close Corporation has already been placed under supervision'. As a result, he claimed that these expenses were expenses in the business rescue proceedings.

[2] Section 66(A1) of the Close Corporation Act 69 of 1984 makes chapter 6 of the 2008 Act applicable to close corporations.

[9] During August 2012, Diener decided that J D Bester could not be rescued. He instructed Cawood Attorneys to bring an application in terms of s 141(2)(*a*) of the 2008 Act, to convert the business rescue proceedings into liquidation proceedings. On 27 August 2012, an order was issued by Kubushi J in the Gauteng Division of the High Court, Pretoria, which stated that 'the business rescue proceedings with regard to the respondent [J D Bester] is terminated and that the respondent be placed under liquidation in the hands of the Master in terms of section 141(2)(*a*)(ii)' and that 'the costs be costs in the liquidation'.[3] Murray, Harms and De Wet were duly appointed by the Master as joint liquidators of J D Bester.

[10] In the founding affidavit, Diener stated that 'the accounts of Cawood Attorneys for the services provided to the Close Corporation and me after the commencement of business rescue proceedings were provided to the jointly appointed liquidators for the Close Corporation, together with my account'.

[11] The joint liquidators could not agree on how the fees and expenses of Diener and of Cawood Attorneys should be dealt with. Murray was of the view that Diener had failed to prove a claim in terms of s 44 of the Insolvency Act 24 of 1936 and that Cawood Attorneys was an unsecured creditor who, ultimately, was required to make a contribution in terms of s 106 of the Insolvency Act. Harms and De Wet took a contrary view and the issue was referred to the Master for his decision.

[12] The Master upheld the position adopted by Murray in a letter dated 12 December 2013. Diener, through Cawood Attorneys, made representations to the Master, dated 15 July 2014, in which he objected to the liquidation, distribution and contribution account that had been finalised on the basis of the Master' s decision in favour of Murray. The Master, by letter dated 4 February 2015, informed Diener that the objection had not succeeded, stating that he confirmed the liquidation, distribution

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[3] Section 141(2)(*a*) provides:

'If, at any time during business rescue proceedings, the business rescue practitioner concludes that –

(a) there is no reasonable prospect for the company to be rescued, the practitioner must –

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.'

and contribution account 'since the liquidators have successfully complied with my pre-confirmation requirements'.

[13] By notice of motion dated 28 April 2015, Diener launched an application in the Gauteng Division of the High Court, Pretoria, in terms of s 407(4) of the 1973 Act against the first to fifth respondents in which he sought orders:

'1 That the decision of the Second Respondent to accept the First and Final Liquidation, Distribution and Contribution Account be reviewed and set aside;

2 That the Honourable Court provides direction regarding the manner in which the First and Final Liquidation, Distribution and Contribution Account should provide for:

2.1 the cost of a business Rescue Practitioner as engaged in lawful business rescue proceedings;

2.2 the cost of service providers who provided services to a lawfully appointed business rescue practitioner in finalising business rescue proceedings;

2.3 the cost of service providers who provided services to [the] Close Corporation after the commencement of the business rescue proceedings.

3 In the alternative to prayer 2 above, that the First and Final Liquidation, Distribution and Contribution Account for J D Bester Labour Brokers CC (in liquidation) be amended to make provision for the remuneration and expenses of the Applicant in the business rescue proceedings of J D Bester Labour Brokers CC, which include the expense of Cawood Attorneys for services rendered to the Applicant and J D Bester Labour Brokers CC in the business rescue proceedings, to be payable in order of preference after the costs in liquidation and before the claims of any secured or unsecured creditors.

4 Costs of this application against any party opposing the application on an attorney and client cost scale.'

[14] The matter was heard by Dewrance AJ who dismissed the application with costs. On application by Diener, Dewrance AJ granted leave to appeal to this court.

The issues

[15] The issues that we are required to consider in relation to Diener are, in the order in which they will be dealt with: (a) the order of preference of the BRP's claim for remuneration and expenses on the liquidation of J D Bester; (b) a determination of the date of liquidation, when business rescue proceedings are converted into liquidation proceedings; and (c) whether the BRP is required to prove his or her claim

in terms of s 44 of the Insolvency Act, and the effect of Diener not having proved his claim in this case. In addition, two issues in relation to the claims for fees of Cawood Attorneys have been raised, namely (a) whether its fees in respect of the urgent application of 14 June 2002, referred to in paragraph 7 above, were to be treated as expenses in the business rescue in terms of s 143 of the 2008 Act, or post-commencement finance in terms of s 135, or, as they were dealt with, as a claim by a concurrent creditor; and (b) whether its fees in respect of the application to convert the business rescue proceedings into liquidation proceedings were costs in the liquidation or were to be treated, as they were, as a claim by a concurrent creditor.

Applicable statutory provisions

[16] The determination of the issues that I have identified involves an exercise in statutory interpretation as they concern, in one way or another, ascribing meaning to the provisions of chapter 6 of the 2008 Act and the relevant sections of the Insolvency Act.

[17] It is necessary to say something of that process of interpretation. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] Wallis JA dealt with the approach to be adopted generally when meaning must be attributed to a written document:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] ZASCA 13 para 18

for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[18] In *Panamo Properties (Pty) Ltd & another v Nel & others NNO*,[5] a case, like this one, concerning the interpretation of the business rescue provisions of chapter 6 of the 2008 Act, Wallis JA commenced his judgment by speaking of the commendable goals of chapter 6 being hampered 'because the statutory provisions governing business rescue are not always clearly drafted'.[6] He then proceeded to say that in these circumstances, a court 'must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies' and that this involves the application of two further principles of interpretation: endeavouring to 'give a meaning to every word and every section in the statute' and avoiding construing provisions as having no meaning; and reconciling sections of a statute that appear to be in conflict if that is possible.[7]

[19] In addition, s 5 of the 2008 Act also provides guidance on how its provisions are to be interpreted, particularly in relation to other legislation. The section states:

(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.

(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.

(3) . . .

(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation-

> (*a*) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
>
> (*b*) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second-
>
> (i) any applicable provisions of the-
>
> (*aa*) Auditing Profession Act;

[5] *Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA); [2015] ZASCA 76; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA); [2015] ZASCA 69 para 43.

[6] Para 1.

[7] Para 27.

(*bb*) Labour Relations Act, 1995 (Act 66 of 1995);

(*cc*) Promotion of Access to Information Act, 2000 (Act 2 of 2000);

(*dd*) Promotion of Administrative Justice Act, 2000 (Act 3 of 2000);

(*ee*) Public Finance Management Act, 1999 (Act 1 of 1999);

(*ff*) Financial Markets Act, 2012;

(*gg*) Banks Act;

(*hh*) Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003); or

(ii) Section 8 of the National Payment System Act, 1998 (Act 78 of 1998).

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30(8) or 49(4); or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4).

(5) If there is a conflict between a provision of Chapter 8 and a provision of the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of that Act prevail.

(6) . . . ’

[20] I turn now to the scheme of chapter 6. Not only does it prescribe the process of business rescue and its consequences, but it also deals with the financing of a company under business rescue, the remuneration of a BRP and his or her claims for that remuneration and expenses.

[21] Chapter 6 creates two ways in which business rescue may begin. First, the board of directors of a company may pass a resolution ‘that the company voluntarily begin business rescue proceedings’ provided the board has ‘reasonable grounds to believe’ that two circumstances exist – that the company is financially distressed and that ‘there appears to be a reasonable prospect of rescuing the company.[8]

[22] The company is then required to file its resolution with the Companies and Intellectual Property Commission (the Commission), and publish a notice of the resolution, its effective date and a ‘sworn statement of the facts relevant to the grounds on which the board resolution was founded’.[9]

[8] Section 129(1).
[9] Section 129(3).

[23] Section 130(1) allows for objections to the board's resolution to be made by an affected person – a shareholder, creditor, a registered trade union representing the company's employees or an employee or his or her representative[10] – after the adoption of the resolution but before the adoption of a business plan. An objection takes the form of an application to a court to set aside the resolution,[11] the setting aside of the appointment of the BRP[12] or an order requiring the BRP to provide security.[13]

[24] The second way in which business rescue begins is by means of a court order. In terms of s 131(1), an affected person 'may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings'. The court may grant the relief sought if it is satisfied that the company is financially distressed, or it has 'failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters', or it is 'otherwise just and equitable to do so for financial reasons, and there are reasonable prospects for rescuing the company'.[14]

[25] If a court makes an order placing a company in business rescue, it may appoint a BRP, who has been nominated by the applicant, on an interim basis, subject to the appointment being ratified by 'the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated by section 147'.[15]

[26] In terms of s 132, business rescue commences either when the company files its resolution, when an affected person applies to a court or when 'a court makes an order placing the company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated by section 131(7)'.[16]

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[10] Section 128(1)(*a*).
[11] Section 130(1(*a*).
[12] Section 130(1)(*b*).
[13] Section 130(1)(*c*).
[14] Section 131(4).
[15] Section 131(5).
[16] Section 132(1).

[27] Business rescue proceedings end when a court has either set aside the resolution or order that commenced business rescue or converts the proceedings into liquidation proceedings;[17] the BRP has filed with the Commission a notice terminating the business rescue proceedings;[18] or a business plan has either been proposed and rejected and no affected person has endeavoured to extend the business rescue proceedings, or the business plan has been adopted and the BRP has filed a notice of 'substantial implementation of the plan'.[19]

[28] Business recue is not an open-ended process. Its very rationale is that it must end, either when its aim has been attained or when the realisation arises that rescue is not attainable. To this end, s 132(3) provides that if business rescue proceedings have not ended within three months of commencement or a longer period sanctioned by a court, the BRP must prepare a progress report which he or she must update monthly until the end of the business rescue proceedings, and deliver the report and each update to each affected person and to either the court (if the proceedings were the subject of a court order) or the Commission.

[29] The effect of business rescue is that, subject to certain exceptions, a general moratorium on legal proceedings against the company comes into effect[20] and the property interests of the company are protected:[21] for instance, the company may only dispose of or agree to dispose of property in the ordinary course of its business; in a bona fide arm's length transaction for a fair value approved in advance and in writing by the BRP or in 'a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152'.[22]

[30] Section 135 deals with post-commencement finance, which includes the remuneration and expenses of the BRP. It provides:

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[17] Section 132(2)(*a*).
[18] Section 132(2)(*b*).
[19] Section 132(2)(*c*).
[20] Section 133.
[21] Section 134.
[22] Section 134(1)(*a*).

‘(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee-

(*a*) the money is regarded to be post-commencement financing; and

(*b*) will be paid in the order of preference set out in subsection (3)(*a*).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-

(*a*) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(*b*) will be paid in the order of preference set out in subsection (3)(*b*).

(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-

(*a*) in subsection (1) will be treated equally, but will have preference over-

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company; or

(*b*) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.’

[31] Chapter 6 regulates closely the appointment, qualifications, removal and remuneration of the BRP. Section 138 prescribes the qualifications of a BRP. He or she must be a ‘member in good standing of a legal, accounting or business management profession accredited by the Commission’;[23] be licensed by the Commission;[24] may not be a person who has been placed under probation (for delinquency as a director) by a court in terms of s 162(7) of the 2008 Act;[25] would not be disqualified from acting as a director of a company;[26] does not have a conflict of

[23] Section 138(1)(*a*).
[24] Section 138(1)(*b*).
[25] Section 138(1)(*c*).
[26] Section 138(1)(*d*).

interest in relation to the company under business rescue;[27] and is not related to a person involved in the company.[28]

[32] A BRP may be removed by a court either in terms of s 130, pursuant to an objection to a business rescue resolution, or because of his or her incompetence or failure to perform his or her duties;[29] failure to exercise a proper degree of care in the performance of business rescue functions;[30] involvement in 'illegal acts or conduct';[31] no longer meeting the qualifications for the office;[32] having a conflict of interest or lacking independence;[33] or on account of being 'incapacitated and unable to perform the functions' of the office, and being 'unlikely to regain that capacity within a reasonable time'. [34]

[33] Section 140 prescribes the powers, and limitations on the powers, of a BRP during business rescue. He or she:[35]

'(*a*) has full management control of the company in substitution for its board and pre-existing management;

(*b*) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(*c*) may-

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(*d*) is responsible to-

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.'

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[27] Section 138(1)(*e*).
[28] Section 138(1)(*f*).
[29] Section 139(2)(*a*).
[30] Section 139(2)(*b*).
[31] Section 139(2)(*c*).
[32] Section 139(2)(*d*).
[33] Section 139(2)(*e*).
[34] Section 139(2)(*f*).
[35] Section 140(1).

[34] In terms of s 140(2), the BRP may not, except with the approval of a court, appoint any person to the management of the company or as an advisor to himself or herself or to the company who has a relationship with the company that would lead a reasonable person to infer a lack of integrity, impartiality or objectivity on that person's part, or a person who is related to such a person.

[35] Section 140(3) sets out the responsibilities of the BRP. It provides:

'During a company's business rescue proceedings, the practitioner-

(*a*) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(*b*) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and

(*c*) other than as contemplated in paragraph (b)-

(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.'

In terms of s 140(4), if business rescue is converted to liquidation proceedings, the BRP who oversaw the business rescue process is ineligible to be appointed as liquidator of the company.

[36] Section 143 deals with the remuneration of a BRP. It states:

'(1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).

(2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-

(*a*) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or

(*b*) the attainment of any particular result or combination of results relating to the business rescue proceedings.

(3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-

(*a*) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145 (4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and

(*b*) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

(4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that-

(*a*) the agreement is not just and equitable; or

(*b*) the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).'

Does a BRP enjoy a 'super-preference' on the liquidation of a company?

[37] It was argued on behalf of Diener that, in relation to his remuneration and expenses, he enjoyed, after the costs of the liquidation, a 'super-preference' over all other creditors, whether secured or not. The term 'super-preference' appears to originate in Henochsberg in relation to the 'preference' (if such it be) created by s 143(5) of the 2008 Act.[36] (I shall revert to this description below.) This argument was not supported by either of the respondents or any of the *amici curiae*.

[38] It was argued that the claim for remuneration by a BRP is not a concurrent claim but a special class of claim created by s 135 of the 2008 Act, that it 'enjoys a special and novel preference' and that it grants the BRP 'security over all assets, even above securities existing when the practitioner takes office'.[37] Indeed, it was submitted further on Diener's behalf that 'the position created [by the 2008 Act] for the remuneration and expenses of the practitioner is novel, and places the

[36] P A Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (Vol 1) at 500.
[37] The appellant's heads of argument, para 13.

practitioner in a position more favourable than the best position that can be occupied by a secured creditor'.[38]

[39] Diener's argument is based on the provisions of s 135(4) and s 143(5) of the 2008 Act which, he says, are clear: in particular, s 143(5) states that a BRP's claim for remuneration and expenses 'will rank in priority before the claims of all other secured and unsecured creditors'. The effect, it is conceded by Diener, is that new and significant inroads are made into the security that is held by secured creditors.

[40] In determining the correctness of this argument, the starting point is the context and purpose of chapter 6. It is apparent, when regard is had to the central provisions of chapter 6, as I have done above, that it is intended to create an efficient, regulated and effective mechanism to facilitate the rescue of companies in financial distress – as long as they are capable of rescue – in a way that balances the rights and interests of the stakeholders.[39]

[41] Although the chapter makes provision for business rescue failing in some instances, and hence allows for conversion of business rescue proceedings into liquidation proceedings,[40] its overwhelming focus is on business rescue and the mechanics of business rescue, rather than on liquidation.

[42] The two sections upon which Diener's argument is largely based are cases in point. Section 135 concerns itself with post-commencement finance and it is in this context, i.e. while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts. It does so as part of the regulation of the affairs of the financially distressed company. It is only s 135(4) that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. This section, to the limited extent that it has to do with liquidation, says nothing of the 'super-preference' contended for

[38] The appellant's heads of argument, para 16.6.
[39] *FirstRand Bank Limited v K J Foods CC* 2017 (5) SA 40 (SCA); [2017] ZASCA 50 para 75; *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA); [2013] ZASCA 68 para 29; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* (note 5) para 42.
[40] Section 132(2)(*a*)(ii) and s 141 (2)(a)(ii).

over secured assets. To the contrary, it creates in favour of those claims listed in the section, a preference over unsecured claims.[41]

[43] Section 143 is also not concerned with liquidation. Instead, it regulates the BRP's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP's are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP's claim for unpaid remuneration, which ranks 'in priority before the claims of all other secured and unsecured creditors'. The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg's commentary, referred to in paragraph 37 above, seen in proper perspective is consonant with that conclusion.[42]

[44] From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance, s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal 'would be sufficient to fully discharge the indebtedness protected by that person's security'; and then the company must pay the person promptly up to the company's indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others*,[43] namely that the 'purpose and

[41] Section 135(3).
[42] Henochsberg (note 36) stated with reference to s 143(5): 'The purpose of this provision is not entirely clear. It seems unrealistic and impractical to expect a successful business rescue plan to be implemented in circumstances where there are insufficient funds to pay the business rescue practitioner's fees; however, should this be the case the amount of the practitioner's remuneration and expenses that remain unpaid will be paid as a "super-preference" in priority to all the secured and unsecured claims against the company.'
[43] *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) para 18.

context' of business rescue 'are not aimed at the destruction of the rights of a secured creditor'.

[45] This leads me to the place of the preference created by s 135(4) in the broader scheme of the Insolvency Act. Section 135(4) contains a strong indication when it provides that the claims that it deals with rank after the costs of sequestration.

[46] Section 96 of the Insolvency Act provides that the first call on the free residue of an insolvent estate – that 'portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention'[44] – is in respect of funeral expenses and death bed expenses of the insolvent and his or her family. This is followed, in s 97, by the costs of sequestration. Section 97(1) and (2) states:

'(1) Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection (1) of section eighty-nine.

(2) The costs of the sequestration shall rank according to the following order of priority-

(*a*) the sheriff's charges incurred since the sequestration;

(*b*) fees payable to the Master in connection with the sequestration;

(*c*) the following costs which shall rank *pari passu* and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration (as defined in subsection (3), the fee mentioned in section 16(5), the remuneration of the *curator bonis* and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of section 89 (1), any expenses incurred by the Master or by a presiding officer in terms of section 53(2) and the salary or wages of any person who was engaged by the *curator bonis* or the trustee in connection with the administration of the insolvent estate.'

[47] The argument that the BRP's claim for remuneration takes preference over secured claims against the company (other than those in respect of post-commencement finance) also flounders on the wording of s 95 of the Insolvency Act. It provides that the proceeds of property which is secured shall, after deductions in

[44] Insolvency Act, s 2.

respect of the costs of maintaining, conserving and realising the property,[45] be 'applied in satisfying the claims secured by the said property, in their order of preference'. It cannot, in my view, be said, without doing unjustifiable violence to the language of s 95, that the payment of remuneration to a BRP from the proceeds of property secured in favour of someone else amounts to applying the proceeds of the property to the satisfaction of a claim secured by that property.

[48] The argument advanced on behalf of Diener leads to other anomalies as well. For instance, if, after business rescue proceedings were converted to liquidation proceedings, there was no free residue in an insolvent estate to meet the costs of liquidation, the argument that has been advanced about the 'super-preference' would mean that as a matter of fact, and in conflict with s 97 of the Insolvency Act and s 135(4) of the 2008 Act, the BRP would be paid his or her remuneration out of realised secured property, while the costs of liquidation would not be. In this example, the effect of the 'super-preference' contended for is that the claim for remuneration of the BRP would, in fact, rank ahead of the costs of liquidation. That result could not have been intended.

[49] For these reasons, I conclude that s 135(4) and s 143(5), whether taken individually or in tandem, do not create the 'super-preference' contended for on behalf of Diener. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, 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, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.

[50] The first question we were required to answer thus must be answered against Diener.

The effective date of liquidation

[45] Insolvency Act s 89(1).

[51] It was argued by Diener that the effective date of the liquidation of J D Bester was 13 June 2012, the date on which it filed its resolution to commence business rescue proceedings. On this basis, it is argued that everything done after that date by the BRP is part of the costs of liquidation.

[52] The argument advanced is flawed for three reasons. First, it fails to draw a distinction, as the 2008 Act does, between business rescue proceedings and liquidation proceedings. Section 132(1) of the 2008 Act provides that business rescue commences, inter alia, when the director's resolution is filed and s 132(2)(*a*) provides that business rescue ends, inter alia, when a court converts business rescue proceedings into liquidation proceedings. In the context of this case, the 2008 Act clearly envisages an end to business rescue proceedings and a commencement of liquidation proceedings.

[53] Secondly, the 2008 Act, by creating in s 135(4), the preference on liquidation for post-commencement finance, including the BRP's remuneration, and ranking these claims after the costs of liquidation, drew a clear distinction between the costs of business rescue and the costs of liquidation.

[54] Thirdly, irrespective of whether the 1973 Act or the 2008 Act applied to the liquidation of J D Bester, the effective date of the liquidation would be the same. In terms of item 9 of Schedule 5 of the 2008 Act, despite the repeal of the 1973 Act, chapter XIV of that Act continued to apply to the 'winding-up and liquidation of companies under this Act, as if that Act had not been repealed'. This is made subject , inter alia, to item 9(2) which provides that '[d]espite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company. . .'. The effect of items 9(1) and 9(2) is that the relevant provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies, while the 2008 Act applies directly to the winding-up of commercially solvent companies.[46]

[55] In all likelihood, J D Bester was commercially insolvent, so the 1973 Act applied. If this is so, s 348 of that Act states that a winding-up of a company 'shall be

[46] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA); [2013] ZASCA 173 paras 22-23.

deemed to commence at the time of the presentation to the Court of the application for the winding-up'. If J D Bester was commercially solvent, which seems unlikely, the 2008 Act applied. In these circumstances, s 81(4)(*a*) provides that a winding-up of a company commences when 'an application has been made to the court in terms of subsection 1(*a*) or (b)'.

[56] In either event, the effective date of the liquidation is 1 August 2012, the day, according to the bill of costs of Cawood Attorneys, that the liquidation application was filed.

Was Diener required to prove a claim?

[57] Section 44(1), (3) and (4) of the Insolvency Act provides:

'(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

(2) . . .

(3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section seventy-five: and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in subsection (4), he shall be deemed to have tendered proof of his claim at that meeting.

(4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the

estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security. The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.'

[58] It is common cause that Diener never proved a claim in terms of s 44 for his remuneration and expenses as BRP. It was argued on his behalf that he was not required to prove a claim and that his position as BRP was similar to that of a liquidator, who is usually not required to prove a claim.

[59] The general rule, however, is that 'a creditor who wishes to share in the distribution of the assets in an insolvent estate must prove his claim against it at any meeting of creditors therein to the satisfaction of the officer presiding at such meeting'.[47]

[60] The authors of *Mars* draw a clear distinction between those who are required to prove claims in terms of s 44 and those who are not required to do so. They say:[48]
'Creditors of the estate as discussed in this chapter are limited to creditors for pre-sequestration debts. Persons who render services in connection with sequestration proceedings or the administration of the estate, have to submit an account which is payable as part of the costs of administration. The latter are generally not deemed to be 'creditors' in terms of the Act.'

[47] Eberhard Bertelsmann, Roger G Evans, Adam Harris, Michelle Kelly-Lowe, Anneli Loubser, Melanie Roestoff, Alistair Smith, Leonie Stander and Lee Steyn *Mars: The Law of Insolvency in South Africa* (9 ed) para 18.1. (hereafter referred to as *Mars*.)
[48] *Mars* para 17.1.

[61] Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in s 97. They are the sheriff, the Master, a debtor who has voluntarily surrendered his or her estate, a creditor who has applied for the sequestration of an estate, a *curator bonis*, a trustee, persons employed by a *curator bonis* or a trustee to administer an insolvent estate and a presiding officer. A BRP is not included in this list. He or she could not be included because of the distinction between business rescue proceedings and liquidation proceedings.

[62] In the result, Diener, in his capacity as BRP, was a creditor of J D Bester and, in respect of his remuneration and expenses, he was required to prove his claim in terms of s 44 of the Insolvency Act.

The fees and disbursements of Cawood Attorneys

[63] A complaint was made by Diener on behalf of Cawood Attorneys that its fees and disbursements in respect of the urgent application to interdict the sale in execution, on the one hand, and its fees and disbursements in respect of the application to convert the business rescue proceedings into liquidation proceedings, on the other, ought to have been treated differently by the liquidators: either as expenses in the business rescue proceedings or as post-commencement finance, rather than as a concurrent claim, in the first instance, or as costs in the liquidation, rather than as a concurrent claim, in the second instance. Cawood Attorneys proved these claims. It is not a party to these proceedings and Diener has no standing to litigate on its behalf. The issues raised on its behalf are consequently not properly before us, and do not require our attention.

Costs and the order

[64] This matter has significant implications for business rescue proceedings and BRPs. For that reason, the matter was postponed so that *amici curiae* representing the views of as many stakeholders as possible could join the proceedings. Because of the importance of the issues that are dealt with in this judgment, the matter was, in reality, a test case. It was of considerable importance that the issues raised in this case were clarified. For that reason, we have decided that no order as to costs should be made.

[65] The appeal is dismissed.

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C M Plasket
Acting Judge of Appeal

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