IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 7523/19

In the matter between:

MONTIC DAIRY (PTY) LTD	
(IN LIQUIDATION)	First Applicant
PETER CHARLES BOTHOMLEY N.O.	Second Applicant
SALIM ISMAIL GANIE N.O.	Third Applicant
ETHNE MARY VAN WYK N.O.	Fourth Applicant

and

MAZARS RECOVERY & RESTRUCTURING	
(PTY) LTD	First Respondent
FENWICK NEIL MILLER	Second Respondent
BYRON NORMAN CHEVALIER	Third Respondent
STUART DANIEL TERBLANCHE	Fourth Respondent

Bench: P.A.L.Gamble, J.

Heard: 16 September 2020

Delivered: 10 February 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Wednesday 10 February 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This application concerns the remuneration of business rescue practitioners ("BRP's") in circumstances where the company that was in business rescue is subsequently placed into liquidation. The facts are relatively uncontroversial but the law is the subject of some debate between the parties.

2. The applicant company, Montic Diary (Pty) Ltd ("Montic" or "the company"), owned a dairy business at Heidelberg in Gauteng. It ran into financial difficulty and commenced business rescue proceedings on 2 November 2015 pursuant to an application by the company itself under s132(1)(a) of the Companies Act, 71 of 2008 ("the new Companies Act")

3. The second and third respondents, who are employed by the first respondent, Mazars Recovery and Restructuring (Pty) Ltd, ("Mazars") were the duly appointed BRP's along with the fourth respondent who was previously employed by Mazars: on 1 January 2016, the fourth respondent took up employment with Deloitte and Touche S.A. but remained a BRP of Montic. At all material times, however, Mazars was responsible for the day-to-day administration of the business recue proceedings and for the rendering of invoices on behalf of the BRP's in respect of their remuneration and expenses.

4. The BRP's drew up a business plan for Montic which contemplated the sale of the business to a certain Cesare Cremona. However, although duly adopted, the plan came to nought when Mr. Cremona defaulted on his obligations thereunder.

Thereafter, and on 14 April 2016, Creighton Dairies (Pty) Ltd and eleven other creditors of Montic commenced proceedings ("the Creighton application") in the North Gauteng High Court in Pretoria to place Montic into liquidation. The Creighton application was enrolled for hearing on the unopposed motion roll in Pretoria on 31 May 2016.

5. On 26 April 2016, the BRP's resolved that there was no prospect of rescuing Montic but nevertheless took the somewhat cynical step of filing a notice to oppose the Creighton application on 29 April 2016. Then, on 13 May 2016, the BRP's withdrew their opposition to the Creighton application and 3 days later (16 May 2016) launched their own proceedings ("the BRP's application") in the same court for the discontinuation of the business rescue proceedings and the final winding up of Montic under s141(2)(a) of the new Companies Act, on the ground that there was no reasonable prospect of the company being rescued. On 18 May 2016, the BRP's reinstated their opposition to the Creighton liquidation application.

6. On 14 June 2016 the BRP's application to wind up the company was granted and Montic was finally liquidated. Subsequent thereto the second to fourth applicants were appointed as liquidators to wind up the company

7. During May 2016, Mazars claimed to have unpaid bills for disbursements and services allegedly rendered by the BRP's to the distressed company. Accordingly, and while they were still in control of Montic, the BRP's caused two payments totalling R1,5m to be made to Mazars: on 23 May 2016 an initial amount of R500 000 was paid to it and on 2 June 2016 a further payment of R1m was made.

8. The liquidators claim that these payments to Mazars are void in terms of s341(2) of the Companies Act, 1973 ("the old Act") and seek repayment of the amount of R1,5m to the company in liquidation. Mazars and the BRP's, on the other hand, contend that the payments were validly made. The matter is before this Court because Mazar's principle place of business is in Cape Town.

9. A virtual hearing of this matter was conducted on 16 September 2020 at which the liquidators were represented by Advs. J.C. Butler SC and M. Maddison of the local Bar while Mazars and the BRP's were represented by Adv. B.M.Gilbert of the Johannesburg Bar. Both legal teams filed detailed heads of argument as well as a combined bundle of the relevant authorities and delivered full addresses during the hearing. The Court is indebted to counsel for their helpful contributions that have assisted greatly in the drafting of this judgment. It is regretted that the consequences of the Covid-19 pandemic have delayed the delivery of this judgment.

THE SATUTORY FRAMEWORK

10. In terms of Items 9(1) and (2) of Schedule 5 to the new Companies Act, the relevant provisions of the old Act are preserved, and apply to the winding up of commercially insolvent companies such as Montic. This preserves the provisions of s341(2) of the old Act which reads as follows:

"341(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after **the commencement** of the winding up, shall be void unless the court otherwise orders." (Emphasis added)

11. The commencement of winding up proceedings is still governed by s348 of the old Act which is to the following effect:

"348. A winding up of a company by the Court shall be deemed to commence at the **time of the presentation** to the Court of the application for the winding up." (Emphasis added)

12. The case thus presented on behalf of the liquidators is, at first blush, relatively straightforward. On 16 May 2016, the BRP's presented their application to wind up Montic (then still under their stewardship in business rescue). The two payments by the BRP's to Mazars were made after that date (23 May and 2 June 2016) and the company was finally wound up on 14 June 2016. There is no counter-application by the BRP's for the Court to exercise its discretion under the proviso in

s342 and thus it is argued by the liquidators that the payments fall to be set aside without more.

13. Not so fast, say the BRP's. The payments can only be set aside if they were dispositions of Montic's property and, they confidently assert, they were not dispositions as contemplated under s342(1). The BRP's argument seeks to rely on the following contentions.

13.1 A purposive interpretation of s341(2) requires that payments made by the company to the BRP's during the relevant period do not constitute dispositions of its property within the meaning of the section.

13.2 The interpretation of the section, and more particularly as to what would constitute a disposition by the company of its property, must be informed by the subsequent (and therefore more recent) provisions of chapter 6 of the new Companies Act relating to business rescue, and more particularly the BRP's preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings.

13.3 The interpretation accords with s5(4)(a) of the new Companies Act which expressly provides that if there is an inconsistency between the provisions of that Act and a provision of any other national legislation (which perforce would include the continuing operative provisions of the old Act), 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, failing which the new Companies Act is to apply.

13.4 There is both South African and foreign judicial precedent in support of the BRP's argument that dispositions by the company of its property during the relevant period do not invariably constitute a disposition of the company's property falling within the ambit of s341(2) even where effectively there was a disposition by the company of its property during the relevant period.

13.5 Lastly, a finding that the payments by the company to the BRP's, even though made during the relevant period, do not constitute dispositions by the company of its property, is a desirable, sensible, business-like and principled outcome supported by judicial precedent.

THE BRP'S ARGUMENT IN JUSTIFYING THE PAYMENTS

14. Mr. Gilbert pointed out in argument that the conundrum which confronted the BRP's in this matter is one which BRP's in general will face in the proper discharge of their statutory function when it is established that there is no reasonable prospect of saving the company. What is the BRP to do in relation to disbursements and fees already incurred under business rescue but not paid, and such further fees and disbursements as may be incurred in the discharge of the obligation to place the distressed company under final liquidation?

15. The primary statutory duty of the BRP in this regard is regulated by s141(2) of the new Companies Act.

"141(2) If, at any time during business rescue proceedings, the 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;"

16. But, the BRP's counsel observed, those responsibilities do not end when the BRP's statutory duty to place the company into liquidation arises. Given that there may, for instance, be opposition by an affected party to the liquidation application with the resultant delays, it is argued that the overall statutory duty of the BRP to manage the company continues.

"140(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter [6] –

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

17. This duty ends, so it is said, only when the company is finally placed into liquidation, as s132(2) of the new Companies Act provides.

"132(2) Business rescue proceedings end when –

(a) the Court –

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;"

18. In the interim, it is said, the BRP's will continue to apply their time and resources in managing the company and are thus entitled to remuneration in that regard in addition to such expenses as may be incurred in finalizing the winding-up application itself. It is inconceivable, counsel suggested, that the Legislature could have contemplated that any payments made to the BRP's in that period were to be considered void under s341(2).

19. Should this proposition be upheld, said Mr. Gilbert, it would be a significant disincentive to BRP's to conclude that there were no reasonable prospects of rescuing the company and this in turn would result in an unnecessary protraction of the business rescue proceedings where those proceedings ought already to have been brought to an end. In such event, it was suggested, the integrity and legitimacy of the entire business rescue process would be seriously undermined.

20. Counsel stressed that it is precisely in circumstances such as these - where the BRP is bound to conclude that there are no reasonable prospects for rescuing the company - that the affected parties' best interests are served by the BRP

launching the requisite liquidation application without fear that any such payments as are made in the interim will become voided.

THE LIQUIDATORS' REPLY

21. Mr Butler submitted that there was no conundrum because the provisions of s341(2), read with s348, was clear: after presentation of the application for winding-up to the court (*in casu* 16 May 2016) the company was precluded from making any payments to third parties. The fact that the BRP's sought to pay themselves what they claimed was due pursuant to the business rescue provisions of the new Companies Act did not change the clear wording of the old Act in relation to the applicable procedure for winding up the company.

22. The rationale for the limitation of the disposal of the assets of a company that is facing liquidation is obvious. Once the application to wind up is lodged with the court, the public at large is informed of the true state of affairs in the company – essentially that it is unable to pay its debts and/or that its liabilities may exceed its assets. The lodging of the application then results in a *concursus creditorum* and the hand of the court is thus placed on the insolvent company to preclude the dissipation of its remaining assets otherwise than in accordance with the scheme of payments sanctioned under the old Act.[1]

23. Most certainly, the managers of the company are not be entitled to demand payment of loans and/or emoluments due to them at that stage. They must wait their turn with the rest of the creditors and may then only be paid in accordance with the ranking of claims which the old Act sanctions. How then can it be said that the BRP's, who are charged with the management of the same entity, are entitled to receive preference in respect of monies which they claim are due as a consequence of services rendered to the company in an endeavour to save it from financial collapse?

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[1] Henochsberg on the Companies Act, APPI -20(1); Herrigel NO v Bon Roads Construction Co (Pty) Ltd 1980 (4) SA 669 (SWA); Lane NO v Olivier Transport 1997 (!) SA 383 (C)

24. Mr. Butler noted that in advancing that argument, the BRP's seek to rely on s143 of the new Companies Act which provides for their remuneration in accordance with the stipulated circumstances, as the case may be[2]. Of importance in that regard is s143(5) which provides that –

"143(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."

In this case the BRP's seek to push the envelope, as it were, and interpret that subsection as entitling them to avoid the strictures of s341(2).

25. However, the liquidators argue that such an interpretation would afford the BRP's a preference not contemplated under the winding up provisions of both the old Act and the new Companies Act. Mr. Butler submitted that the BRP's only have a preference under s135(4) to payment of their remuneration from the free residue after deduction of the costs of liquidation but before the claims of employees for post-commencement wages and other claims for post commencement finance, whether those claims are secured or not. This much was confirmed by the Supreme Court of Appeal in Diener[3]

26. Further, Mr. Butler stressed that the impact of the *ratio* in Diener was to grant BRP's some form of preference for their claims arising from the business rescue process but certainly not the so-called "super preference" that was contended for on behalf of the BRP's in that matter. The Supreme Court of Appeal ("SCA") put it thus.

"[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

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[2] S143(1) read with s143(6) provides for a tariff in accordance with which BRP's may charge, while ss143(2) and (3) provide for BRP's to agree with the company to charge an additional contingency fee.

[3] Diener NO v Minister of Justice and others 2018 (2) SA 399 (SCA) at [42] *et seq.*

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

[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 [37] above, seen in proper perspective is consonant with that conclusion." (Internal references omitted)

DISCUSSION

27. I consider that, while the facts in Diener are not on all fours with the present matter, the *ratio* therein certainly is applicable here. The SCA has confirmed that s143 of the new Companies Act does not relate to liquidation proceedings while s341(2) and 348 of the old Act (and, for that matter s81[4] of the new Companies Act) do. There is thus no inconsistency or clash between the various provisions of the two statutes.

28. It has been established law for more than a century that the effect of s348 is to establish the *concursus creditorum* at the time that the application for winding up is lodged.[5] The retention of that provision from the old Act as part of the

[4] S81 provides for the winding up of a solvent company, inter alia, on the application of its directors, shareholders, creditors or a BRP who has concluded that it is incapable of being rescued.

[5] Walker v Syfret N.O. 1911 AD 141 at 160;166; Adminstrator, Natal v Magill, Grant and Nell (Pty) Ltd

overall matrix of the law relating to the winding up of companies means that the Legislature intended it to apply both to insolvent companies wound up under the old statutory dispensation and to companies wound up under the new Companies Act where business rescue proceedings have not achieved the desired result and s141(2)(ii) is implemented.

29. It therefore follows that s341(2) proscribes the disposition of a company's assets after the lodging of an application to wind up (whether that application is at the behest of an ordinary unpaid creditor or a BRP who concludes that the company cannot be rescued) while s143 only affords the BRP a limited measure of priority when his/her claim for remuneration is considered by the liquidator in the winding up process.

30. To grant the BRP's the relief that they seek in this case would require the Court to find that it is implicit in s143 that they have the right to be paid after the commencement of the winding up process, before a final order is granted and before the liquidators have done their work to liquidate and distribute the assets in the insolvent company. To import such an interpretation into s143 would be destructive of the whole basis of the winding up process which recognises defined classes of creditors and affords them priority in respect of their claims according to such classes.

31. Put differently, the BRP's demand that they are entitled to be paid after the establishment of the *concursus creditorum* and ahead of secured creditors might conceivably result in the free residue in the company being wiped out to the detriment of, for example, the holder of a first mortgage bond over the insolvent company's immovable property. The purpose and context of business recue is obviously not intended to destroy the rights of a secured creditor.[6]

32. In my considered view, such a situation would not only undermine the very basis of the law of insolvency but is to be regarded as unconscionable,

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(in liquidation) 1969 (1) SA 660 (A) at 671G-H

[6] Diener [44]

particularly if the BRP's were to pay out excessive and/or unsubstantiated amounts. In this regard, it must be noted that at an enquiry already held in this matter in terms of s417 of the old Act, the commissioner (a retired judge) expressed concern about the extent of the payments which the BRP's made to Mazars, as well as the basis upon which the expenses were allegedly incurred.

33. Counsel for the BRP's cautioned against an interpretation of the new Companies Act which might scare off BRP's from taking appointments as such lest they are not remunerated for their services. The flip side of that coin is that BRP's are to be discouraged from embarking on business rescue exercises where there is little prospect of salvaging the ailing company and where their involvement becomes no more than an exercise in self-enrichment.

34. In Diener the SCA remarked as follows regarding the purpose of business rescue.

"[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'…

[28] Business rescue 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, s132(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…

[40]… (T)he starting point is the context and purpose of ch 6 [of the new Companies Act]. It is apparent, when regarded is had to the central provisions of ch 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.

[41] Although the chapter makes provision for business rescue failing in some instances, and hence allows for conversion of business risk proceedings into liquidation proceedings, its

overwhelming focus is on business rescue and the mechanics of business rescue, rather than on liquidation."

35. To that must be added that embarking on business rescue is not intended to be utilised by the management of a company in financial distress to obtain the respite afforded by the general moratorium on legal proceedings in terms of s133 of the new Companies Act in order to rearrange the proverbial deck chairs on the Titanic.

36. Responsible BRP's, mindful of these parameters discussed by the SCA, will thus not be encouraged to chase up unnecessary costs in a company that has little prospect of being rescued if they are aware of the fact that they do not enjoy a privilege to be remunerated ahead of all other interested parties.

CONCLUSION

37. In the light of the aforegoing, I conclude that the payments made by the BRP's herein to Mazars after their application for an order of liquidation had been lodged on 16 May 2016 is hit by the provisions of s341(2) of the old Act and fall to be repaid by Mazars.

ORDER OF COURT

Accordingly, the following orders are made:

1. It is declared that the payments by the first applicant to the first respondent on 23 May 2016 in the amount of R500 000.00 (Five Hundred Thousand Rand) and on 2 June 2016 in the amount of R1 000 000,00 (One Million Rand) are void in terms of section 341(2) of the Companies Act, 1973;

2. The first respondent, alternatively the second, third and fourth respondents, the one paying the others to be absolved, are hereby directed to pay to the first applicant:

2.1 R1 500 000,00 (One Million Five Hundred Thousand Rand);

2.2 Interest on R500 000,00 (Five Hundred Thousand Rand) at the rate of 9,5% per annum calculated from 23 May 2016 to date of payment

2.3 Interest on R1 000 000,00 (One Million Rand) at the rate of 9,5% per annum calculated from 2 June 2016 to date of payment;

3. The first, second, third and fourth respondents are declared to be jointly and severally liable for payment of the first applicant's costs of suit herein, including the costs of two counsel where so employed, and are directed to pay such costs, the one paying, the others to be absolved.

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GAMBLE, J