CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/18

In the matter between:

LUDWIG WILHELM DIENER N.O.	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MASTER OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, 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 LIMITED	Sixth Respondent
SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION	Seventh Respondent
BANKING ASSOCIATION OF SOUTH AFRICA	Eighth Respondent
INDEPENDENT BUSINESS RESCUE ASSOCIATION OF SOUTH AFRICA	Ninth Respondent
TURNAROUND MANAGEMENT ASSOCIATION SOUTHERN AFRICA NPC	Tenth Respondent

Neutral citation: *Diener N.O. v Minister of Justice and Correctional Services and Others* [2018] ZACC 48

Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgment:	Khampepe J (unanimous)
Heard on:	6 September 2018
Decided on:	29 November 2018
Summary:	Companies Act – Chapter 6 – sections 135(4) and 143(5) – business rescue proceedings – interpretation – during liquidation – super preference Insolvency Act – section 89(1) – ranking of claims – business rescue practitioners – secured creditors and unsecured creditors Leave to appeal refused – plain reading – purposeful and contextual reading

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The application for leave to file a replying affidavit is dismissed.
2. The application for condonation for the late filing of the third respondent's written submissions is granted.
3. Leave to appeal is refused.
4. There is no order as to costs in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] One of the purposes of the Companies Act[1] is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders.[2] Chapter 6 of the Companies Act makes provision for the execution of this purpose by introducing and regulating the concept of business rescue.

[2] This is an application for leave to appeal against the order of the Supreme Court of Appeal which dismissed the applicant's appeal.[3] The matter involves the interpretation of certain provisions of the Companies Act dealing with the ranking of claims for the remuneration and expenses of business rescue practitioners (practitioners). In particular, the matter raises the question whether, when business rescue is converted to liquidation, a practitioner's claim for remuneration and expenses enjoys a "super preference" over all creditors, whether secured or unsecured.

Parties

[3] The applicant is Mr Ludwig Wilhelm Diener, the erstwhile practitioner appointed for JD Bester Labour Brokers CC (in liquidation) (JD Bester).

[1] 71 of 2008.

[2] Id at section 7(k) of the Companies Act.

[3] *Diener N.O. v Minister of Justice* [2017] ZASCA 180; 2018 (2) SA 399 (SCA) (Supreme Court of Appeal judgment) per Plasket AJA (Navsa ADP, Bosielo and Majiedt JJA and Schippers AJA concurring).

[4] The first respondent is the Minister of Justice and Correctional Services (Minister). The second respondent is the Master of the High Court of South African, Gauteng Division, Pretoria (Master). The Minister and the Master did not take part in the proceedings and no relief is sought against them.

[5] The third, fourth and fifth respondents were the joint liquidators in the estate of JD Bester. The fourth and fifth respondents no longer occupy those positions and the third respondent, Mr Murray, is at present the sole liquidator of JD Bester.

[6] The sixth respondent is FirstRand Bank Limited (FRB) and was the secured creditor in the aforementioned estate.

[7] The seventh respondent is the South African Restructuring and Insolvency Practitioners Association (SARIPA), who was admitted as the first amicus curiae in the Supreme Court of Appeal. In this Court, SARIPA has abided the outcome of this application and has not made any submissions.

[8] The eighth respondent is the Banking Association of South Africa (BASA). The ninth respondent is the Independent Business Rescue Association of South Africa (IBRASA). The tenth respondent is Turnaround Management Association Southern Africa NPC (Turnaround). The eighth to tenth respondents all participated in the Supreme Court of Appeal proceedings as amici curiae and were cited by the applicant as respondents on this basis.[4]

Factual background

[9] JD Bester is a property holding entity. It owned one immovable property and had one major creditor – FRB, which held a mortgage bond over the property. After JD Bester breached its contractual obligations to FRB, judgment was granted against

[4] Supreme Court of Appeal judgment id at para 5.

it and an order was made declaring the immovable property executable. A sale in execution was scheduled for 15 June 2012.

[10] On 13 June 2012, a mere two days before the sale in execution, the sole member of JD Bester passed a resolution placing it in business rescue in terms of section 129(1) of the Companies Act.[5] This resolution was adopted without consultation with JD Bester's sole creditor, FRB. It is common cause that at the time JD Bester was not conducting any business, had no employees and no assets other than the immovable property over which FRB held the mortgage bond. On the same day the resolution was adopted JD Bester wrote to the Companies and Intellectual Property Commission requesting that Mr Diener be appointed as practitioner. It completed and filed the necessary form giving notice of the commencement of business rescue proceedings. On 20 June 2012, Mr Diener was appointed.

[11] The day before the sale in execution, on 14 June 2012, after the commencement of business rescue but before the appointment of Mr Diener, Cawood Attorneys were instructed by JD Bester to launch an urgent application against FRB. The application sought to stay the sale in execution of JD Bester's immovable property, its only asset of any value. An interim order to this effect was granted on 14 June 2012.

[12] Cawood Attorneys later submitted their account for this work to Mr Diener. Mr Diener considered that, because these expenses were incurred with his knowledge and consent and after the commencement of the business rescue proceedings, they represented expenses in business rescue as defined in section 143 of the Companies Act or, at the very least, represented unsecured post-commencement finance as defined in section 135 of the Companies Act.

[5] Section 66(1A) of the Close Corporation Act 69 of 1984 makes Chapter 6 of the Companies Act applicable to close corporations.

[13] It did not take long for Mr Diener, during August 2012, to decide that JD Bester could not be rescued. He instructed Cawood Attorneys to bring an application in terms of section 141(2)(a) of the Companies Act to convert the business rescue proceedings into liquidation proceedings. An order for the liquidation of JD Bester was granted on 27 August 2012. JD Bester was therefore in business rescue from 13 June 2012 to 27 August 2012, more than two months before it was liquidated.

[14] Mr Diener then sought preference for his fees and expenses. He submitted these claims to the joint liquidators. Cawood Attorneys' fees for the interdict application and the liquidation application amounted to R34 447.51. Mr Diener's fees amounted to R112 918.40. The joint liquidators could not agree on how the fees and expenses of Mr Diener and Cawood Attorneys should be dealt with. Mr Murray was of the view that Mr Diener had failed to prove a claim in terms of section 44 of the Insolvency Act[6] and that Cawood Attorneys was an unsecured creditor who, ultimately, was required to make a contribution in terms of section 106 of the Insolvency Act. The fourth and fifth respondents took a contrary view and the issue was referred to the Master for his decision. The Master upheld the position adopted by Mr Murray and rejected Mr Diener's objections.

[6] 24 of 1936.

Litigation history

High Court

[15] On 29 April 2015, Mr Diener launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) in terms of section 407(4) of the Companies Act[7] to review and set aside the decision of the Master to approve the final liquidation and contribution account. Mr Diener also sought orders that the final account should provide for the costs of a practitioner and the cost of service providers who rendered services to a lawfully appointed practitioner in finalising business rescue proceedings.

[16] The High Court[8] agreed with the reasoning of the Master and could find no fault. The High Court held that section 135(4) of the Companies Act must be read with section 97 of the Insolvency Act[9] and, on this reading, the remuneration of the

[7] 61 of 1973.

[8] *Diener N.O. v Minister of Justice* [2016] ZAGPPHC 1251 (High Court judgment) per Dewrance AJ.

[9] Section 97 of the Insolvency Act provides:

> "Costs of sequestration
>
> (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.
>
> (3) In paragraph (*c*) of subsection (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included."

practitioner and the expenses incurred during business rescue proceedings, to the extent that these have not been paid during business rescue proceedings and during liquidation, can be paid only after the costs set out in section 97 have been paid. This conclusion, the High Court said, was dispositive of the entire application which it accordingly dismissed with no order as to costs. Though the High Court refused leave to appeal, the Supreme Court of Appeal granted it.

Supreme Court of Appeal

[17] Before the Supreme Court of Appeal, Mr Diener argued that the claim for remuneration by a practitioner was not a concurrent claim but a special class of claim created by section 135 of the Companies Act. He argued that it "enjoys a special and novel preference" and that it grants the practitioner "security over all assets, even above securities existing when the practitioner takes office". He submitted further that the position created by the Companies Act for the remuneration and expenses of the practitioner places the practitioner "in a position more favourable than the best position that can be occupied by a secured creditor".

[18] The Supreme Court of Appeal held that section 135 concerns itself with post-commencement finance and that it is in this context (while business rescue proceedings are in place) that it creates a set of preferences for the company's payment of its unpaid debts. It held that "it is only section 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".[10] This section, the Supreme Court of Appeal held, says nothing of the "super preference" contended for over secured assets. To the contrary, the Supreme Court of Appeal held that the section creates a preference over unsecured claims in favour of those claims listed in the section.[11]

[10] See Supreme Court of Appeal judgment above n 3 at para 42.

[11] Id.

[19] As regard section 143, the Supreme Court of Appeal concluded that this section is also not concerned with liquidation. Instead, it regulated the practitioner's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which practitioners are remunerated; the additional contingency-based remuneration that the practitioner may negotiate, and safeguards in that respect; and the practitioner's claim for unpaid remuneration, which ranks "in priority before the claims of all other secured and unsecured creditors".[12] The Supreme Court of Appeal held that the reference to secured and unsecured creditors in this section must be understood as a reference back to section 135. In other words, 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.

[20] The Supreme Court of Appeal further held that the argument that the practitioner'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 section 95 of the Insolvency Act. Section 95 provides that the proceeds of secured property shall, after deductions in respect of the costs of maintenance, conservation and realisation of the property,[13] be "applied in satisfying the claims secured by the said property, in their order of preference". The Supreme Court of Appeal held that it could not be said "without doing unjustifiable violence to the language of section 95" that the payment of remuneration to a practitioner 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.

[21] For all these reasons, the Supreme Court of Appeal concluded that sections 135(4) and 143(5), whether taken individually or in tandem, do not create the

[12] Id at para 43.

[13] Section 95 of the Insolvency Act above n 6.

"super preference" contended for by Mr Diener. Section 135(4) provides the practitioner, after the conversion of business rescue proceedings into liquidation proceedings, with no more than a preference to claim remuneration against the free residue after the costs of liquidation. But this is before the claims of employees for post-commencement wages, those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.

[22] The appeal was therefore dismissed. No costs were awarded as the Supreme Court of Appeal found that the issues raised were of considerable importance and required clarification.[14]

Submissions

[23] In this Court, Mr Diener submits that the Supreme Court of Appeal's interpretation was incorrect. He argues that it approached the matter from the premise that section 135 deals with post-commencement finance only, which he says is incorrect in the sense that employees' claims are given a preference over assets secured during business rescue – which in itself causes an inroad on the provisions of section 95 of the Insolvency Act. Mr Diener argues that the Supreme Court of Appeal's reliance on section 135 is incorrect and contrary to an ordinary reading in the context of that section. The qualification being the exception in respect of the liquidation costs. Mr Diener submits that if the notion were also to restrict its effect in liquidation in respect of security, the section would have provided so expressly.

[24] Mr Diener argues further that section 143 is a self-standing, substantive provision that has no bearing on section 135. It arranges fully for the remuneration of the practitioner and creates a preference that can rightly be described as a

[14] Supreme Court of Appeal judgment above n 3 at para 65.

"super preference". It does not refer back to section 135, but is incorporated into section 135 by reference.

[25] Mr Murray submits that JD Bester was never a suitable candidate for business rescue as it did not conduct business and could not be rescued. Notwithstanding this, JD Bester adopted a section 129 resolution and appointed Mr Diener as its practitioner. Even the most basic enquiries would have made it clear to Mr Diener that JD Bester had no money, business or employees and could not be rescued. Notwithstanding this, Mr Diener did not immediately terminate the business rescue proceedings (as a prudent practitioner would have done) but kept the corporation under his supervision in pursuit of fees.

[26] Mr Murray submits that a correct interpretation of sections 143(5) and 135 of the Companies Act, read with the relevant provisions of the Insolvency Act, results in a conclusion that in liquidation, claims by practitioners are payable out of the free residue after payment of the liquidation costs mentioned in section 97. He submits that Mr Diener's proposition for a regime in terms of which the practitioner's claim for payment of his remuneration and expenses in liquidation rank, not only above the claims of secured creditors, but effectively also above the costs of liquidation (that are paid from the free residue) after payment of all secured claims, is absurd. Last, he submits that the Supreme Court of Appeal's interpretation should be preferred because of the potential for abuse in the approach suggested by Mr Diener, which it submits is evident from the facts of this case.

[27] FRB submits that Mr Diener's argument is untenable and is not a proper balancing of interests underpinning the Companies Act. It argues that section 134 creates an order of preference in respect of what happens after business rescue commenced but relates only to business rescue proceedings. Therefore, while a company is in business rescue, the preference in this section applies. As between those post-business rescue expenses, the preference is retained in liquidation. Section 143(5) makes no mention of liquidation and the reference to secured and

unsecured creditors has no influence thereon. Had section 143(5) been intended to apply to liquidation, it would have so provided, in the simplest terms. FRB submits further that if Mr Diener's interpretation is accepted, practitioners would have every reason (as in this case) to pursue an unmeritorious business rescue, and no reason at all to terminate business rescue proceedings. They would be prepared to gamble on the outcome of business rescue, at the risk of secured creditors. This, FRB submits, is not in line with the purpose of the Companies Act.

[28] BASA submits that section 135(4) of the Companies Act retains the preference created by section 135(3) of certain claims in the event of a conversion of business rescue proceedings into liquidation. But, on a proper construction, the section does not create a preference for the practitioner's fees and expenses over a secured claim in respect of secured assets. BASA submits that section 143(5) of the Companies Act also does not create this preference as it does not relate to the conversion of business rescue proceedings into liquidation proceedings nor does it import that preference into section 135(4).

[29] IBRASA supports Mr Diener's interpretation. It submits that the Supreme Court of Appeal's interpretation will have an impact on the willingness of practitioners to accept appointments, thus militating against the business rescue regime. Like IBRASA, Turnaround also submits that Mr Diener's interpretation is correct and should prevail. In their view, practitioners should submit a claim in accordance with section 44 of the Insolvency Act for any unpaid remuneration and expenses in the event that business rescue proceedings are superseded by liquidation proceedings. Claims for outstanding remuneration and expenses by practitioners should be treated as "super preferent claims" in liquidation proceedings ranking after liquidation costs but above all other claims, including secured creditors. They should be payable out of the proceeds of secured assets insofar as the free residue is insufficient to meet these expenses.

Jurisdiction

[30] Section 167(3)(b)(ii) of the Constitution empowers this Court to hear matters that raise an arguable point of law of general public importance. The threshold for "arguable" point of law is a necessary factor for the grounding of jurisdiction in this Court for matters that do not engage constitutional issues. This threshold is necessarily lower than the threshold for "reasonable prospects of success", one of the factors taken into account when determining whether leave to appeal should be granted. This Court in *Paulsen* held that "arguable" in this context means that the point of law must have *some* prospects of success.[15] I am satisfied that this matter raises an arguable point of law of general public importance. The correct interpretation of sections 135(4) and 143(5) of the Companies Act and whether these sections confer a "super preference" on practitioners will have a significant impact on credit providers, and therefore the public, and should be considered. I will deal below with the question of whether the application has "reasonable" prospects of success. First, I consider the ancillary applications in this matter.

Application for leave to file replying affidavit

[31] Mr Diener has sought special leave to file a replying affidavit to the opposing affidavit of Mr Murray. He states that this is required because certain facts relating to the public importance of the matter are incorrectly set out in Mr Murray's opposing affidavit, which he says may seriously prejudice him. This application is opposed by Mr Murray who submits that to allow Mr Diener to file the replying affidavit would be tantamount to allowing him to include new evidence in reply without affording the Mr Murray an opportunity to respond thereto.

[15] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 22.

[32] The rules of this Court, for good reason, do not make provision for a replying affidavit to be filed in applications for leave to appeal.[16] This Court retains the discretion to admit further affidavits if it is in the interests of justice to do so.[17] The affidavit relates to a factual dispute between the parties, which has no bearing on the issues before this Court.

[33] The application falls to be dismissed.

Condonation

[34] Condonation has been sought for the late filing of the Mr Murray's written submissions. Mr Murray has advanced good reasons for the delay and the delay is slight. There was no prejudice suffered by any of the parties as a result of the late delivery of the submissions, and the condonation application is not opposed. It is therefore in the interests of justice to grant condonation.

Leave to appeal

[35] Notwithstanding that this Court has jurisdiction, leave to appeal may still be refused if it is not in the interests of justice that this Court should hear the appeal.[18] In considering the interests of justice, prospects of success are an important factor and Mr Diener who seeks leave to appeal must show that there are reasonable prospects that this Court will reverse or materially alter the decision of the lower court.[19]

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[16] *Cross-Border Road Transport Agency v Central Africa Road Services (Pty) Ltd* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 52.

[17] Id.

[18] See *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 13; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 25-6; *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) at paras 15-6.

[19] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-2.

[36] The question of whether to grant leave to appeal consequently involves consideration of the merits of the matter to establish whether there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal. In order to determine whether Mr Diener's interpretation of sections 135(4) and 143(5) of the Companies Act has reasonable prospects of success, it is necessary to consider both a plain language reading of the sections as well as their meaning in context. I do this below.

Interpretation

Plain reading

[37] The ordinary rule and starting point in an interpretative exercise entails a determination of the plain meaning of words in the relevant statutory provision to be construed.[20]

[38] Business rescue proceedings are intended 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.[21] Business rescue proceedings can begin in one of two ways.[22] First, the board of the company may voluntarily decide to initiate business rescue proceedings, provided there are "reasonable grounds" to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company.[23] However, this may only occur "if liquidation proceedings have [not] been initiated by or against the company."[24]

[20] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 70 and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 58.

[21] Section 7(k) of the Companies Act above n 1. See also *Panamo Properties (Pty) Ltd v Nel* [2015] ZASCA 7; 2015 (5) SA 63 (SCA) (*Panamo Properties*) at para 1.

[22] Section 132(1) of the Companies Act above n 1.

[23] Sections 129(1) of the Companies Act above n 1. In terms of section 129(3)(b) of the Companies Act, the board must appoint a practitioner who satisfies the requirements set out in section 138 of the Companies Act, and who has consented to the appointment in writing.

[24] Section 129(2)(a) of the Companies Act above n 1.

[39] Second, business rescue proceedings can be commenced through a court order upon application by an affected person.[25] The court may either grant the order[26] or dismiss the application, and in the case of a dismissal, may also grant an order placing the company under liquidation.[27] If liquidation proceedings have already commenced, an application to commence business rescue proceedings by court order will suspend the liquidation proceedings, affording the court an opportunity to establish whether the underlying purpose of business rescue will be met through relevant proceedings.[28]

[40] Once commenced, business rescue proceedings end when a court sets aside the resolution by the board or when a court orders the company to be placed into liquidation.[29]

[41] Chapter 6 of the Companies Act deals with business rescue and is titled "Business rescue and compromise with creditors".[30] The main provision at issue in this appeal is section 143(5) of the Companies Act, which is contained in Part B of Chapter 6 of the Act, and reads:

> "Remuneration of practitioner
>
> . . .
>
> (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."

[42] The "remuneration" referred to in section 143(5) is the amount the practitioner is entitled to be paid in accordance with the prescribed tariff in terms of

[25] Section 131(1) of the Companies Act above n 1.

[26] Section 131(4)(a) of the Companies Act above n 1.

[27] Section 131(4)(b) of the Companies Act above n 1.

[28] Section 131(6) of the Companies Act above n 1.

[29] Section 132(2)(a) of the Companies Act above n 1.

[30] Chapter 6 is divided into 4 parts: Part A "Business rescue proceedings", Part B "Practitioner's functions and terms of appointment". Part C "Rights of affected persons during business rescue proceedings" and Part D "Development and approval of business rescue plan".

regulation 128(1) of the Companies Act.[31] Under regulation 128(3), the term "expenses" means the actual costs of any disbursement or expenses incurred by the practitioner to the extent reasonably necessary to carry out his or her functions and to facilitate the conduct of the company's business rescue proceedings.[32]

[43] The question is whether the preference articulated in section 143(5) applies when business rescue converts to liquidation. Section 135, which is contained in Part A of Chapter 6, reads:

> "Post-commencement finance
>
> (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.

[31] Companies Regulations, 2011 to the Companies Act 71 of 2008.

[32] Id.

> (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*." (Emphasis added.)

[44] Mr Diener argues that when read together, sections 143(5) and 135(4) create a "super preference" for payment of the remuneration and expenses incurred by practitioners once a company converts to liquidation above all creditors, whether secured or unsecured. The opposing respondents maintain that the preference articulated in section 143(5) applies only during business rescue proceedings, ceasing once the process converts to liquidation. On that reading, the words "in terms of this section" in section 135(4) limit the preference created to post-commencement financing.

[45] The opposing respondents also argue that Mr Diener's interpretation of the Companies Act has the effect of diluting the protection given to secured creditors during business rescue. Section 134(3) provides:

> "If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must—
>
> (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
>
> (b) promptly—
>
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
>
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

[46] Overall, a plain reading of the provisions suggests an interpretation in line with the opposing respondents' contentions. The provision simply ranks the practitioner's

remuneration and expenses before post-commencement financing and unsecured assets and subjects the practitioner's payment to liquidation.[33]

[47] However, there is some ambiguity. Read alone, section 135 applies simply to post-commencement financing. However, the Legislature has clearly granted a preference for the claims of a practitioner over secured creditors in terms of section 143. How far does it extend? What keeps the preference articulated in section 143(5) for the payment of remuneration and expenses of a practitioner before all creditors, whether secured or unsecured, from applying during liquidation?

[48] To answer this, one must turn to the provisions of the Insolvency Act. Section 97 of the Insolvency Act provides that costs of liquidation are paid out of "any balance of the free residue which shall be applied in defraying the costs of the sequestration of the estate", with the exception of the costs referred to in section 89(1) of the Insolvency Act.[34] These costs do not rank in preference above secured creditors, whose claims are dealt with in section 95 of the Insolvency Act. Put another way, section 89(1) of the Insolvency Act deals with the costs to which those securities are subject.

[33] This qualification is found in the phrase "except to the extent of any claims arising out of the costs of liquidation" contained in section 135(4) of the Companies Act.

[34] Section 89(1) reads:

> "The cost of maintaining, conserving, and realising any property shall be paid out of the proceeds of that property, if sufficient and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realisation."

[49] When these are read together, section 143 of the Companies Act does not allow for the claims of practitioners to usurp the claims of all creditors, whether secured or not, in liquidation. Importantly, the preferences listed in the relevant provisions for secured creditors are tied to the security. The arguments by Mr Diener, IBRASA and Turnaround for a preference for the remuneration and expenses of practitioners are not so limited. Unlike section 89(1) of the Insolvency Act, section 135(4) of the Companies Act makes no reference to using secured assets to pay the practitioner. In contrast to section 135(4), section 89(1), in much clearer terms, creates a preference over secured assets for the costs of liquidation.

[50] The consent that must be sought in terms of section 134(3) of the Companies Act further suggests that the practitioner does not have a preference over secured assets. It is also inconsistent with a reading-in of a similar limitation for practitioners.

[51] Given that some ambiguity arises when sections 135(4) and 143(5) of the Companies Act are read together, it is necessary to interpret the sections having regard to their purpose and context, which I do next.[35]

[35] The correct approach to interpretation was summarised by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18 where it stated:

> "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 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."

Context and purpose

[52] In *KJ Foods*, the Supreme Court of Appeal, in the context of interpreting section 153(1)(a)(ii) and (7) of the Companies Act, stated:

> "In interpreting the provisions of the Act the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*; and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, as was said in *Endumeni*, 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results'. Thus when a problem such as the present arises, the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. Accordingly, in this instance, the proper approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies, *in a manner that balances the rights and interests of all relevant stakeholders*.'"[36] (Footnotes omitted.)

[53] In examining whether there are reasonable prospects that the interpretation by the Supreme Court of Appeal could be overturned by this Court, it is necessary to look at the context and purpose of business rescue, having regard to which interpretation is most sensible in this context and examine any anomalies that arise from the interpretations suggested by the parties.

[54] The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit to stakeholders upon liquidation (if inevitable). It is stated expressly in section 7(k) of the Companies Act that one of the purposes of the Act is to "provide for the efficient

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See also *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18.

[36] *FirstRand Bank Ltd v KJ Foods CC* [2017] ZASCA 50; 2017 (5) SA 40 (SCA) (*KJ Foods*) at para 75.

rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders". It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees, and shareholders.[37] The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders.[38] In addition, a secondary purpose is to achieve a better outcome on liquidation or disinvestment, whereby "[t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth a lot more if preserved, or even sold, as a going concern than if the parts are sold off piecemeal".[39] At the same time, where it is not viable to rescue a company, it should be liquidated and its business sold.[40] Business rescue can only begin where there is a reasonable prospect of saving the company.[41] This was highlighted in *KJ Foods*, where the Supreme Court of Appeal quoted with approval the High Court in *DH Brothers Industries*, which stated that—

> "Chapter [6] as a whole reflects 'a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction' *but only of viable companies, not of all companies placed under business rescue*."[42]

This is in line with the ultimate aim of balancing the rights and interests of all relevant stakeholders.

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[37] Sections 7(k) and 128(1)(h) of the Companies Act above n 1. See also *KJ Foods* id at para 68; *Panamo Properties* above n 21 at para 1; *Cloete Murray N.O. v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) at para 12; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) at para 23.

[38] Cassim "Business Rescue and Compromises" in Cassim *Contemporary Company Law* 2 ed (Juta & Co Ltd, Cape Town 2012) at 862. For a critical reprisal of this rationale, see Loubser "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" (2013) 25 *SA Merc LJ* 437.

[39] McCormack "Super-priority new financing and corporate rescue" (2007) *Journal of Business Law* 701 at 703.

[40] *KJ Foods* above n 36 at para 77, endorsing *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 (1) SA 103 (KZP) (*DH Brothers Industries*); Cassim above n 38 at 863.

[41] Section 129(1)(b) of the Companies Act above n 1.

[42] *DH Brothers Industries* above n 40 at para 10.

[55] The question is which interpretation upholds the purpose of business rescue while balancing the rights of all stakeholders. The "super preference" interpretation put forward by Mr Diener undoubtedly favours practitioners and does not achieve a balance of the rights of all interested parties.

[56] An example of this is where business rescue proceedings are superseded by liquidation proceedings, and there is no free residue in an insolvent estate to meet the costs of liquidation. Here, the "super preference" would mean that as a matter of fact, and in conflict with section 97 of the Insolvency Act and section 135(4) of the Companies Act, the practitioner would be paid his or her remuneration out of realised secured property, while the costs of liquidation would not be. The effect of the "super preference" contended for is that the claim for remuneration of the practitioner would, in fact, rank ahead of the costs of liquidation. The practitioner would then also enjoy this preference over secured creditors even if a court, upon challenge to a director's resolution to institute business rescue proceedings (in terms of section 129(1) of the Companies Act), set aside that resolution and were to grant an order placing the company in liquidation. In this case, it cannot be said that there is any balancing of stakeholder interests.

[57] Another example of the imbalance introduced by the "super preference" is that pre-business rescue secured creditors can incur costs without consultation – even if they object to placing the company under business rescue. A practitioner must be appointed by a board of directors pursuant to a resolution to place the company in business rescue.[43] A creditor can then object to the resolution to place the company under business rescue.[44] But, unless the creditor does so within five days, this objection takes place after the practitioner is appointed.[45] It is also unlikely that a

[43] Section 129(3)(b) of the Companies Act above n 1.

[44] Section 130(1)(a) of the Companies Act above n 1.

[45] Section 129(3) of the Companies Act above n 1.

court will set aside a resolution unless a practitioner has been appointed.[46] This is because the court is tasked with deciding if the business rescue is worth pursuing. To this end, the court has the power to ask the appointed practitioner to draft a report detailing the financial circumstances of the company.[47]

[58] If the "super preference" approach is taken, and a practitioner has been appointed by the time a section 130 objection to a resolution to place a company in business rescue is made, then even if that resolution is set aside by a court, a secured creditor will have to foot the bill for the practitioner's report out of the encumbered assets. This upsets the balance of interests and the consultative process envisaged in business rescue. Ordinarily, creditors and other stakeholders have a say when it comes to matters that affect their rights. Yet the "super preference" results in a situation where a secured creditors' security is diluted without them being able to do anything.

[59] Significantly, there is nothing in Chapter 6, or anywhere else, which would suggest that the Legislature had intended the rights of secured creditors to be diluted where liquidation of the company supersedes business rescue proceedings through the ranking in preference of the practitioner's remuneration and expenses, above the claims of secured creditors in relation to the property over which they hold security.

[60] Finally, the significance of the practitioner's preference *during* business rescue on the Supreme Court of Appeal's interpretation should not be underplayed. While business rescue is ongoing, the practitioner gets first preference for fees. It is only if business rescue fails, or is followed by liquidation, that the practitioner will incur the risk of not being paid. It also assumes that the practitioner has not agreed with the stakeholders concerned that fees will get paid before business rescue ends. However, there is nothing in the Companies Act preventing the practitioner from bargaining for

[46] Section 130(1)(a) of the Companies Act above n 1.

[47] Section 130(5)(b) of the Companies Act above n 1.

that position, particularly where there is a good case for business rescue and the creditors stand to gain from the process.

[61] It was argued that there are sufficient mechanisms to hold practitioners accountable for incurring fees where there is little chance of the business being rescued. These mechanisms do exist, for example in sections 138 to 141 of the Companies Act. Furthermore, practitioners have the same fiduciary duty to the company as a director.[48] If they do not exercise their duty properly, they can be removed and held liable for fruitless expenses.[49] However, it must be noted that the standard of gross negligence is a high one and in cases where there is good faith the courts have been reluctant to find that practitioners should be held liable for fruitless expenses.[50]

[62] On Mr Diener's interpretation, once business rescue proceedings have been converted to liquidation proceedings, a secured creditor loses security in whole or in part, for the remuneration and expenses of the practitioner. The Supreme Court of Appeal is clearly correct that this is untenable and goes against the proper balancing of interests underpinning the Companies Act.

Anomalies

[63] There is no doubt that anomalies arise in the interpretations put forward by both the Mr Diener and the opposing respondents. In their written submissions, BASA listed a number of anomalies that arise as a result of Mr Diener's interpretation. These included the tautology in section 135(3)(a)(ii) that refers to "all unsecured claims against the company". The most notable anomaly occurs where business rescue proceedings are superseded by liquidation proceedings, but where there is no free residue.

[48] Section 140(3)(b) of the Companies Act above n 1.

[49] Sections 139(2), 140(3)(b) and (c)(ii) of the Companies Act above n 1.

[50] See *Absa Bank Limited v Marotex (Pty) Ltd* 2016 JDR 1987 (GP).

[64] In this case, the practitioner's remuneration and expenses rank above secured creditors and can be paid from the proceeds of a secured asset. Section 135(4) would then have to be read on the basis that even though "claims arising out of the costs of liquidation" ranked before the practitioner's remuneration and expenses, if there is no free residue the practitioner's remuneration and expenses will enjoy preference by being paid out of the "proceeds of a secured asset". This is despite this claim ranking after "claims arising out of the costs of liquidation" and in preference to the claims of a secured creditor. This would be in conflict with section 97 of the Insolvency Act and section 135(4) of the Companies Act. The practitioner would then also enjoy this preference over secured creditors even if a court, upon challenge to a directors' resolution to institute business rescue proceedings in terms of section 129(1) of the Companies Act, sets aside that resolution and grants an order placing the company in liquidation. The anomaly that would exist in the event that there is no free residue upon liquidation, is significant and could not have been intended.

[65] Similarly, the opposing respondents' interpretation results in its own anomalies. For example, it is unclear what independent meaning can be given to section 143(5) of the Companies Act, given the contents of section 135(3). This arises only if one takes "all other secured and unsecured creditors" to be a reference to post-commencement finance creditors. One response to this anomaly provided by counsel for BASA during the hearing was that section 143(5) places the practitioner's claims during business rescue proceedings above those of all unsecured and secured creditors, while section 135(3) merely places the practitioner's claims above those claims for post-commencement finance and does not deal with creditors whose claims were secured before business proceedings started. This is contrary to the findings of the Supreme Court of Appeal, which held that section 143(5) is specifically in relation to post-commencement finance creditors only. We are not, however, required to make any finding on this as no arguments were made in relation to this point other than in response to a question from the bench, and because the point is *obiter* (a remark said

in passing) as it deals with the ranking of the practitioner's claims during business rescue rather than during liquidation proceedings.

[66] In *Panamo Properties* the Supreme Court of Appeal remarked that the "commendable goals are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted".[51] It is clear that neither interpretation is without its faults. Nevertheless, taking into account the Chapter 6 context and the purpose of business rescue and the sections themselves, as well as the anomalies arising from each interpretation, I do not see any way that the interpretation contended for by Mr Diener is tenable.

Consequences

[67] It was argued before this Court that if the Supreme Court of Appeal's interpretation were to stand the institution of business rescue will be undermined. This is because practitioners will be less willing to take appointments, given that they may not recover their costs and fees, and the purposes of Chapter 6 of the Companies Act will therefore not be fulfilled.

[68] This argument is unconvincing. On the contrary, practitioners will take appointments having regard to the purpose of business rescue proceedings and will (rightly) avoid taking appointments where there are no prospects of rescue – as should have been the case in this matter where the business was not operating, had no employees and only one secured asset. This interpretation would guard against appointments in circumstances where business rescue proceedings ought not to have been commenced and where practitioners are reliant on payment of their remuneration and expenses at the expense of secured creditors without reference to those creditors.

[69] In addition, it remains open for practitioners to insist on the payment of a deposit, or to reach an agreement with creditors to ensure payment of their

[51] *Panamo Properties* above n 21 at para 1.

remuneration and expenses. In the context of liquidation, most creditors, including some secured creditors, stand to lose something. Even liquidators do not enjoy preference over secured creditors for their fees.[52] Yet liquidations still occur. Credit – on a secured and unsecured basis – is still given. The mere fact that creditors and liquidators do not enjoy preference over all others does not deter them entirely from transacting. Finally, these contentions are also purely speculative and no evidence was produced to substantiate this argument.

[70] Even if the predictive claim is true, to the extent that fewer practitioners will take on work, this does not mean the purpose of business rescue will necessarily be undermined. The purpose is to rescue those financially distressed companies that are capable of being rescued. Just because a practitioner risks not being paid in the event of liquidation does not mean business rescue will never happen, or even that viable business rescue will happen less. It means only that practitioners, like all creditors, will have to assess the risk of transacting with what may turn out to be a financially distressed company before agreeing to the transaction. This assessment of risk – especially where there is no residue from which to pay a practitioner – might avert the superfluous "business rescue" of a company that should be liquidated.[53] In that sense, the number or proportion of successful business rescues may even increase.

[71] While I accept that there is some difficulty with the wording of sections 135(4) and 143(5), when one considers the purpose of business rescue and the overall context of the relevant sections, I do not see any basis on which to interfere with the order of the Supreme Court of Appeal. It is therefore not in the interests of justice to grant leave to appeal and the application for leave to appeal is dismissed.

[52] The only exception is in section 89(1) of the Insolvency Act above n 6, where the expenses of liquidation relate to the encumbered property.

[53] This is not to say that a company with only encumbered assets cannot be rescued. But this is a determination the company's directors and the practitioner must make before placing the company under business rescue.

Costs

[72] As in the Supreme Court of Appeal there will be no order as to costs.

Order

[73] In the result, the following order is made:

1. The application for leave to file a replying affidavit is dismissed.
2. The application for condonation for the late filing of the third respondent's written submissions is granted.
3. Leave to appeal is refused.
4. There is no order as to costs in this Court.

For the Applicant:	J L Van der Merwe SC, L K Van der Merwe and I M Hlalethoa instructed by Cawood Attorneys
For the Third Respondent:	K W Lüderitz SC and J Vorster instructed by Tintingers Inc
For the Sixth Respondent:	J Gauntlett SC and J E Smit instructed by Werksmans Attorneys
For the Eighth Respondent:	A E Bham instructed by Edward Nathan Sonnenbergs
For the Ninth Respondent:	J Hershensohn and L Maite instructed by Couzyn, Hertzog and Horak Inc
For the Tenth Respondent:	X Stylianou and N Mncube instructed by Hogan Lovells (South Africa) Inc