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Post-Commencement Finance

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Post-Commencement Finance – A Helicopter View

During its BR proceedings a company may "**obtain financing**" in order to assist its business rescue practitioners in managing the company in business rescue out of its financial distress in order

- (1) to return a financially distressed company to solvency on a going concern basis, or
- (2) to achieve a better return for creditors than they would have received in the company's immediate liquidation.

Post-Commencement Finance – A Helicopter View

Section 135(3) of the Companies Act 71 of 2008 ("**Companies Act**") attempts to set out the order in which the claims of creditors rank **during** BR:

1. Payment of the BRP's remuneration and expenses, and the costs of BR (s 135(3))
2. Payment of employees' post-commencement claim for unpaid remuneration, and other employment related claims (s 135(1));
3. Post-commencement "finance" obtained during BR (s 135(2));
4. Unsecured claims;

Section 135(4) of the Companies Act provides that if liquidation intervenes, the preference conferred by section 135 will remain extant.

What does this mean?

Post-Commencement Finance – Trade Creditors

The South African Property Owners Association v Minister of Trade and Industry and Others 2018 (2) SA 523 (GP) (29 November 2016) ("**SAPOA judgment**") -

Claims that arise:

- from a Pre-Commencement Agreements;
- during BR

≠ "finance obtained" in order to assist a company's BRPs in managing the company in BR out of its financial distress in order rescue it;

≠ "post commencement financing" or "costs arising out of the costs of business rescue proceedings"; therefore

= unsecured claim, unless already secured

Post-Commencement Finance - Employees

Section 144(2): Any employee with a claim for:

- any remuneration and/or other claims relating to employment
- that became due **pre-BR**

= preferred unsecured creditor.

Section 135(1): Any employee with a claim for:

- any remuneration and/or other claims relating to employment
- that became due **post-BR**

= post commencement financier

Post-Commencement Finance - BRP

BRP's remuneration and expenses (referred to in section 143) of the Companies Act will be paid, in a BR, **before** payment of the post commencement finance claims contemplated in:

- section 135(1) – employees' post-commencement claims; and
- section 135(2) – post-commencement financiers' claims

Post-Commencement Finance – Secured Creditors

Section 134(3): Encumbered property, or property over which another has title interest, can only be disposed of:

1. with prior consent;
2. if proceeds will fully discharge the secured indebtedness

A secured creditor, **whether as a pre-commencement creditor of post commencement financier**, will enjoy the protection afforded by this section.

Where a **pre-commencement** creditor holds security and that creditors' claim is either:

- compromised in terms of section 154(1) or
- becomes unenforceable under section 154(2),

the security may have to be released unless the BR plan provides otherwise (*Van Zyl v Auto Commodities (Pty) Ltd* [2021] 3 All SA 395 (SCA)).

The claim of a secured **post** commencement financier will likely remain extant following exit from BR

Post-Commencement Finance – Ranking of Section 135 Claims in a Liquidation...

SAPOA judgement + (*Diener N.O. v Minister of Justice and Others* 2018 (2) SA 399 (SCA) + *Diener N.O. v Minister of Justice and Correctional Services and Others* 2019 (2) BCLR 214 (CC) ("**Diener judgments**") = ranking where BR has been converted into liquidation proceedings.

The SCA held that:

"... that section 135(4) and section 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.**" (own emphasis).

The Constitutional Court concluded at paragraph 71 that there is no "...basis on which to interfere with the order of the Supreme Court of Appeal".

Post-Commencement Finance – Ranking of Section 135 Claims in a Liquidation...

Proceeds from the sale of the **Encumbered Assets** –

- Section 89 of the Insolvency Act 24 of 1936 ("**Insolvency Act**") – Costs of Liquidation relevant to security";
- Section 95(1) of the Insolvency Act – Payment of secured creditors.

Post-Commencement Finance – Ranking of Section 135 Claims in a Liquidation...

Proceeds from the sale of the **Unencumbered Assets** (i.e. free residue)–

- Section 97 of the Insolvency Act, read with Diener Judgments – Payment of the costs of liquidation;
- Section 135(3) and (4) of the Companies Act, read with the Diener Judgments:
 1. BRP's remuneration and expenses, and the costs of BR;
 2. Employees' post-commencement claims for remuneration and other post-commencement claims relating to employment (s135(1)); and
 3. Unsecured post commencement financiers (s135(2));
- Section 98 of the Insolvency Act – Payment of the costs of execution;
- Section 98A of the Insolvency Act – Payment of salaries or wages of former employees of the company, subject to the limits described in this section (i.e including claims under s 144(2));
- Section 99 of the Insolvency Act – Payment of statutory obligations, e.g Workmen's Compensation, Taxes, UIF, etc.;

Post-Commencement Finance – Ranking of Section 135 Claims in a Liquidation

- Section 101 of the Insolvency Act – Payment of taxes on persons or the incomes or profits of persons per any Act of Parliament;
- Section 102 of the Insolvency Act – Payment of unperfected General Notarial Bonds; and
- Section 103 of the Insolvency Act, read with the SAPOA judgment – Payment of concurrent creditors, including concurrent (unsecured) creditors with claims that arose after BR commenced under pre-commencement agreements.

Post-Commencement Financiers – creditors?

- Historically, post-commencement financiers have been regarded as creditors of the company in business rescue, which entitled them to vote to adopt or reject the business rescue plan
- This position was called into doubt by a decision of the Johannesburg High Court in *Wescoal Mining (Pty) Ltd & Another v Mkhombo NO & Others* [2023] ZAGPJHC 1097

Wescoal

- In *Wescoal*, the court held that a post-commencement funder is not considered a "creditor" in terms of Chapter 6 of the Companies Act and hence could not vote to adopt or reject a business rescue plan
- Court based its findings on:
 - Contextual interpretation of the Companies Act – creditor is a sub-class affected persons all have in common the fact that they are affected by the *commencement* of business rescue proceedings
 - Post-commencement financiers are rewarded for their risk in other ways – for example section 135(3) of the Act

Wescoal – implications

- Does not deal with the contrary view in *Pruta Securities (Jersey) Ltd v Roger NO*
- Does appreciate that there is no *concursum creditorum* in business rescue or that the voting landscape often changes prior to a meeting convened for the purpose of approving a business rescue plan
- Unsecured post-commencement financiers do not have payment priority as seen in other jurisdictions
- May have a chilling effect on business rescue in SA – PCF is the lifeblood of rescuing financially distressed companies
- On appeal to SCA

Questions

Thank you,
Nastascha Harduth