

## **Ranking order of Creditors during Rescue Business Proceedings**

Chapter 6 of the Companies Act 71 of 2008 (hereinafter referred to as “the Act” deals with Business Rescue proceedings as well as compromise with creditors.

Section 135 of the Act sets out the order in which the claims of creditors rank during business rescue. This section states that post-commencement claims are preferred in the order of preference created by the Act. Rather unusually, the post commencement finance provisions contained in section 135 make specific provision for employee entitlements to be treated also as part of the post commencement finance.

Any unpaid amount of remuneration, reimbursement for expenses or any other amount relating to employment that becomes due and payable by a company to an employee during that companies business rescue proceedings , is regarded as post commencement finance and will be paid in the order of preference as set out in subsection 3)(a) of the Act :

### **Section 135(3) (a) states as follows:**

(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 as above, will be treated equally, but will have preference over – other post commencement finance irrespective of whether or not they are secured financing as well as all unsecured claims against the company.

Section 135(3)(b) does not stipulate whether or not secured post-commencement claims will rank ahead of unsecured post-commencement claims.

Another issue is that is not clear from the Act, where creditors, who are secured prior to the commencement of business rescue, rank in the order of preference as determined by section 135 of the Act.

Section 135(3)(a)(ii) of the Act only states that the post-commencement claims (whether secured or unsecured) will rank ahead of the claims of all "unsecured" creditors.

This has led to the conclusion that the claims of secured creditors, prior to the commencement of business rescue, will rank ahead of the claims of post-commencement financiers.

**In Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd 13/12406 the ranking of claims was set out as follows :**

- 1) The practitioner, for remuneration and expenses and other persons (including legal and other professionals) for costs of business rescue proceedings;
- 2) Employees for any remuneration which became due and payable after business rescue proceedings began;
- 3) Secured lenders or other creditors for any loan or supply made after business rescue proceedings (post commencement finance);
- 4) Unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began (post commencement finance)
- 5) Secured lenders or other creditors for any loan or supply made before business rescue proceedings began;

- 6) Employees for any remuneration which became due and payable before business rescue proceedings began;
- 7) Unsecured lenders or creditors for any loan or supply made before business rescue proceedings began.

The above makes it clear that the claims of secured lenders prior to the commencement of business rescue rank after the claims of both secured and unsecured post-commencement claims.

Post-commencement financiers can thus seek comfort in that the court has, at least for now, settled the much-debated position of the ranking of creditors who hold security for their claims prior to the commencement of business rescue.

There is certain anomalies with the ranking of claims but in our view that until such time as another court pronounces otherwise, that the order of preference during business rescue determined by Kgomo J in the Merchant West case must be applied.

This judgment has (at least for now) settled the position of secured creditors (who were secured prior to the commencement of business rescue) during business rescue proceedings as well as the order in which secured and unsecured post-commencement financiers will rank in business rescue.