




# A Critical Re-Examination of the Remuneration of Business Rescue Practitioners after Failed Business Rescue Proceedings

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## Summary

The first half of the 2010s marked the dawn of a new corporate rescue mechanism in South Africa. In May 2011, business rescue replaced a remarkably unsuccessful rescue procedure in the form of judicial management in a bid to improve the rescue of financially ill companies. The *Diener v Minister of Justice and Correctional Services 2019 4 SA 374 (Diener)* case was not a striking exception to the assumed promissory import and apt interpretation of business rescue provisions. The reality of the current rescue mechanism is that it has not only benefited significantly from judicial pronouncements but sparked lively debate about its obscure and poorly drafted provisions. In *Diener*, the Constitutional Court had to provide clarity on the status of unsettled remuneration and expenses of a business rescue practitioner (practitioner) after business rescue proceedings were converted into liquidation proceedings. The Constitutional Court held that a practitioner has no super-preferential claim to their unpaid remuneration and expenses against the insolvent estate. The finding of the Constitutional Court also means that a practitioner must prove a claim for unpaid remuneration and expenses against the insolvent estate. However, this current order of preference is not

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barren of criticism based on policy considerations and stakeholder relations under business rescue. This note argues that the current ranking of the practitioner's unpaid claim undermines the integrity and effectiveness of business rescue and proposes a legislative amendment to restructure the current order of the practitioner's post-rescue ranking. This note further investigates the possibility of exempting a practitioner from proving a claim against the insolvent estate. By extension, this note extrapolates arguments relating to the oversight of a practitioner's fees to justify the exemption of proving a claim against the insolvent estate. Ultimately, this note proposes policy-based recommendations to restructure and streamline the practitioner's post-rescue remuneration framework.

**Keywords:** Business rescue; Practitioner's remuneration; Post-rescue standing; Free residue; Super-preference.

## 1. Introduction

Business rescue is a corporate mechanism used to rehabilitate a financially distressed company under the temporary supervision and control of a practitioner. A financially troubled company must have a reasonable prospect of being rescued before the initiation of business rescue.<sup>1</sup> A reasonable prospect denotes an expectation of the uncertain eventual rescue of a company or better return for creditors or shareholders based on an objectively reasonable ground.<sup>2</sup> To rescue such company, a practitioner must develop a plan to restructure a company's affairs in a way that maximises the likelihood of it continuing to exist on a solvent basis; or if that is not possible, results in a better return for a company's stakeholders than they would receive from immediate liquidation.<sup>3</sup> This means that the successful rescue of a faltering company is premised on the realisation of the primary goal of return to solvency and/or secondary

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1 s 131(4)(a) of the Act.

2 *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd* case no 12/45437 (GSJ) (unreported) par 14; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 LTD* 2013 1 SA 542 (FB) par 12.

3 s 128(1)(b)(iii) of the Companies Act 71 of 2008 (the Act).

goal of a better return.<sup>4</sup> A practitioner must have the integrity to discontinue business rescue if a reasonable prospect to achieve a contemplated goal no longer exists.

A practitioner is *entitled* to basic remuneration and expenses incurred during business rescue in accordance with the tariffs prescribed by the minister.<sup>5</sup> These remuneration tariffs range from a minimum amount per hour to a maximum fee per day, depending on the size of the company.<sup>6</sup> In addition to basic remuneration, a practitioner may claim expenses for disbursements made for actual expenses incurred if they are reasonably necessary to carry out a practitioner's functions and facilitate rescue.<sup>7</sup> A practitioner may also conclude a contingency fee agreement with the company and/or success fee agreement with a third party for further remuneration.<sup>8</sup> During business rescue, the claim for a practitioner's remuneration and expenses (and business rescue costs) rank above every other post-commencement claim.<sup>9</sup> However, once business rescue is discontinued in favour of liquidation, the ranking of the practitioner's claim for unpaid fees is controversial and ambiguous. On one hand, section 135(4) stipulates that the remuneration preference created during business rescue does not change, subject to the costs of liquidation. On the other hand, section 143(5) places the practitioner's claim for outstanding remuneration ahead of all secured and unsecured claims. However, as the discussion below will demonstrate, the apparent disjuncture between these sections has been clarified in *Diener v Minister of Justice and Correctional Services (Diener)*.<sup>10</sup>

It is noteworthy that *Diener's* interpretative analysis of the impugned sections has been a subject of adverse academic criticism. However, this note welcomes the *Diener* judgment and mounts

4 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 26.

5 s 143 of the Act.

6 reg 128(1) of the Companies Regulations 2011 issued under the Act.

7 reg 128(3) of the Companies Regulations 2011 issued under the Act.

8 *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 5 SA 35 (SCA); s 143(2) of the Act.

9 s 135(3) of the Act.

10 2019 4 SA 374 (CC).

a direct challenge against the legislative failure to streamline the ranking of a practitioner's unpaid fees after a failed business rescue. The divergent approach between academic literature and judicial interpretation is duly considered. By examining these approaches, this note contextualises the subsequent critical evaluation of the continued viability and potential restructuring of the practitioner's status after unsuccessful rescue. Finally, this note proposes a legislative amendment to reconfigure the practitioner's post-rescue standing.

## 2. Facts and background litigation

In *Diener*, the Constitutional Court had to determine whether a practitioner had the benefit of a "special and novel preference" over unsettled remuneration and expenses once business rescue was converted to liquidation. The applicant, Ludwig Wilhelm Diener (Diener), was appointed as the practitioner for JD Bester Labour Brokers CC (JD Bester), a close corporation with a single immovable asset encumbered to FirstRand Bank, its sole secured creditor.<sup>11</sup> Two months after his appointment, Diener realised that there was no reasonable prospect to rescue JD Bester and took steps to discontinue business rescue in favour of liquidation in terms of section 141(2)(a) of the Act.<sup>12</sup> Diener then submitted a claim to the joint liquidators for his unpaid fees and expenses.<sup>13</sup> He alleged that his claim of unpaid fees enjoys a "special and novel preference" to be paid from the proceeds of secured assets ahead of *all* creditors.<sup>14</sup> Diener relied on the joint reading of sections 135(4) and 143(5) to argue that a practitioner's unpaid claim ranks higher than all secured and unsecured claims after a failed business rescue. The issue was initially referred to the Master for determination and went all the way to the Constitutional Court.<sup>15</sup>

Both the High Court and the Supreme Court of Appeal dismissed Diener's argument. The High Court confirmed the Master's decision

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11 the *Diener* case (n 10 (2019)) par 3, 9.

12 the *Diener* case (n 10 (2019)) par 13.

13 the *Diener* case (n 10 (2019)) par 14.

14 the *Diener* case (n 10 (2019)) par 43.

15 the *Diener* case (n 10 (2019)) par 14.

that a practitioner's unpaid fees and expenses could only be settled from the free residue after defraying liquidation costs.<sup>16</sup> The Supreme Court of Appeal further clarified the relationship between sections 135(4) and 143(5). According to the court, section 135 addresses the ranking of claims relating to post-commencement finance (PCF), whereas section 143 deals with a practitioner's right to remuneration during business rescue.<sup>17</sup> However, section 135(4) also addresses the order of preference beyond business rescue.<sup>18</sup> Section 135(4) confirms the retention of the preferential order created over PCF on liquidation, subject to liquidation costs.<sup>19</sup> Consequently, the Supreme Court of Appeal concluded that the preference in section 143(5) only applies retrospectively to secured and unsecured creditors who provided the company with PCF.<sup>20</sup> Accordingly, that preference is a limited reference to post-commencement creditors to the exclusion of secured pre-business rescue creditors.<sup>21</sup>

### 3. The Constitutional Court ruling

The Constitutional Court (Khampepe J) unanimously dismissed the application for leave to appeal. Khampepe J acknowledged that section 143(5) grants a practitioner a preference over secured creditors when business rescue is in motion.<sup>22</sup> However, the preference does not live beyond business rescue because of the wording of sections 97 (costs of liquidation) and 89 ("costs to which securities are subject") of the Insolvency Act.<sup>23</sup> Generally, liquidation costs are paid from the balance of the free residue and do not outrank secured assets with the exception of liquidation expenses relating to encumbered assets

16 *Diener v Minister of Justice* case no 30123/2015 (GP) (unreported) par 50, 60. The free residue is the "portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention". See s 2 of the Insolvency Act 24 of 1936 (Insolvency Act).

17 *Diener NO v Minister of Justice* 2018 2 SA 399 (SCA) par 42-43.

18 the *Diener* case (n 17 (2018)) par 42.

19 the *Diener* case (n 17 (2018)) par 42.

20 the *Diener* case (n 17 (2018)) par 43, 49.

21 the *Diener* case (n 17 (2018)) par 43.

22 the *Diener* case (n 10 (2019)) par 47.

23 the *Diener* case (n 10 (2019)) par 48-49.

under section 89(1) of the Insolvency Act.<sup>24</sup> Therefore, a plain reading of sections 135 and 143 does not expressly create a preference for unpaid remuneration and expenses over secured assets in liquidation, whereas section 89(1) of the Insolvency Act clearly does so in defined circumstances for costs of liquidation.<sup>25</sup>

Furthermore, the contextual and purposive interpretation of a super-preference does not equitably balance the interests of all stakeholders.<sup>26</sup> Khampepe J was at pains to emphasise the absurdity of a practitioner's claim ranking above liquidation costs when there was no free residue to satisfy liquidation costs.<sup>27</sup> A super-preference would further dilute security and impose costs on secured pre-business rescue creditors without consultation even if they did not support the resolution to institute business rescue.<sup>28</sup> Accordingly, the Constitutional Court confirmed that the preferential claim of a practitioner's unpaid claim lies against the free residue, after payment of liquidation costs.<sup>29</sup> Thus, the judicial scrutiny of the dichotomy (or relationship) between sections 135(4) and 143(5) resulted in uniform judicial interpretation. While the legislature had abysmally failed to consider the appropriate ranking after business rescue, the courts managed to streamline and contextualise the ranking of a practitioner's unpaid claim on liquidation. The courts' doctrinal exegesis of the subject-matter illustrates harmonised understanding and synthesis of the applicable statutory provisions and irregularities of a super-preferential claim. Consequently, the courts successfully navigated the practitioner's remuneration framework to attribute purposive and contextual interpretation to conflicting provisions.

Be that as it may, the judicial analysis of the practitioner's post-rescue ranking cannot escape policy-informed criticism in the greater scheme of business rescue. The policy charge lies against the lack of legislative clarity rather than judicial ranking of the unpaid fees and expenses. Suffice to state at this point that the

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24 the *Diener* case (n 10 (2019)) par 48.

25 the *Diener* case (n 10 (2019)) par 49.

26 the *Diener* case (n 10 (2019)) par 55.

27 the *Diener* case (n 10 (2019)) par 56, 63-64.

28 the *Diener* case (n 10 (2019)) par 57.

29 the *Diener* case (n 10 (2019)) par 49-62.

court-sanctioned ranking, albeit in harmony with the normative regulatory framework, has the potential to breed conflict of interest, disincentivise practitioners, erode confidence in business rescue and delay the eventual failure of rescue. Accordingly, it is expedient to reconsider the protection of business rescue's integrity and legitimacy against the relative polarity of stakeholder rights and policy factors.

#### 4. A synopsis of academic commentary

Delpont correctly points out that the purpose of section 143(5) is not necessarily clear.<sup>30</sup> Generally, the poor drafting and efficacy of business rescue provisions has received considerable academic criticism and judicial scrutiny over the years.<sup>31</sup> The courts have devised a framework to assign a sensible, contextual and purposive interpretation to prevent any anomalous consequences of the poor drafting of chapter 6 of the Act.<sup>32</sup> In doing so, section 5 of the Act guides the courts to interpret and apply the Act in a manner that gives effect to section 7 thereof. Section 7(k) states that the purpose of business rescue is to extricate financially troubled companies while balancing the interests of all relevant stakeholders. These provisions seek to ensure that the construction of impugned business rescue provisions align with the purpose of the Act.<sup>33</sup> This is to say that courts are mandated to balance the interests of all relevant stakeholders when interpreting and applying business rescue provisions. Accordingly, the proper order of preference for a practitioner's unpaid fees must be considered against the backdrop of business rescue's purpose.

According to Burdette and Jacobs, the *Diener* case failed to consider the practitioner as a relevant stakeholder who agrees to execute a difficult and complex appointment.<sup>34</sup> They argue that the court-sanctioned ranking contributes to the potential disenfranchisement

<sup>30</sup> Delpont *Henochsberg on the Companies Act 71 of 2008* (2025) 526.

<sup>31</sup> Barends *A Critical Analysis of Section 129 of the Companies Act 71 of 2008* ((2017 dissertation UWC); *Panamo Properties (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 1 SA 2022 (SCA) par 1.

<sup>32</sup> the *Panamo* case (n 31) par 27.

<sup>33</sup> *FirstRand Bank Ltd v KJ Foods CC* 2017 5 SA 40 (SCA) par 75.

<sup>34</sup> Burdette and Jacobs "Queue politely! South African business rescue practitioners and their fees in liquidation" 2019 *Wolverhampton Law Journal* 61 67.

of practitioners.<sup>35</sup> To them, the clear intention of section 143(5) is to create first priority for a practitioner's outstanding fees over *all* secured and unsecured creditors.<sup>36</sup> This is the reason that the learned commentators criticise the marriage of the distinct import of section 143(5) with an unrelated claim under PCF in section 135.<sup>37</sup> However, the interpretation of the learned commentators ignores the main charge against a super-preferential claim. In the absence of a free residue, a practitioner's remuneration and expenses would be paid before the costs of liquidation from the proceeds of secured property.<sup>38</sup> While this anomaly casts doubt on the plausible survival of a super-preference beyond business rescue, Setlhako nevertheless maintains that the Act places a practitioner's outstanding remuneration and expenses ahead of secured claims at all times.<sup>39</sup>

Van Der Merwe correctly remarks that the effect of the court-sanctioned ranking on the practitioners' conduct requires further research.<sup>40</sup> This is because of the courts' indifference towards the consequences of recognising the practitioner's claim as concurrent after business rescue.<sup>41</sup> A practitioner's fees only enjoy priority in business rescue as there is still a goal-driven possibility of rescuing the company.<sup>42</sup> However, limiting this priority to business rescue does not account for a practitioner's potential to preserve their own interests during business rescue at the expense of liquidation.<sup>43</sup> This ranking may also undermine the purpose of business rescue and disincentivise practitioners from accepting appointments on the fear of non-payment and liability towards liquidation costs.<sup>44</sup> Conversely,

35 Burdette and Jacobs (n 34) 65–67.

36 Burdette and Jacobs (n 34) 65.

37 Burdette and Jacobs (n 34) 64–65.

38 the *Diener* case (n 10 (2019)) par 56, 63–64.

39 Setlhako *The Status of the Claims for the Remuneration and Expenses of Business Rescue Practitioners after the Conversion of Business Rescue to Liquidation* (2020 dissertation UP) 102.

40 Van Der Merwe *Business Rescue Practitioners' Remuneration after Institution of Liquidation Proceedings* (2021 dissertation UP) 30.

41 Setlhako (n 39) 106.

42 Phungula *The Evolution of an Effective Business Rescue Statutory Regime in South Africa* (2021 thesis UKZN) 176.

43 Burdette and Jacobs (n 34) 68.

44 Setlhako (n 39) 109; the *Diener* case (n 10 (2019)) par 67.

it may push practitioners to act bona fide and avoid appointments lacking any reasonable prospects of rescue.<sup>45</sup> Nevertheless, the current ranking still pays peripheral regard to the likelihood of a practitioner protracting business rescue to evade non-payment.<sup>46</sup> Furthermore, the current ranking is likely to erode confidence in the institution of business rescue.<sup>47</sup> However, it must be borne in mind that a practitioner assumes the role of a director and may be held liable for conduct constituting gross negligence in the exercise of the powers and performance of the functions.<sup>48</sup>

## 5. Discussion

### 5.1 *The practitioner's remuneration after a failed business rescue*

It stands to reason that there is no interpretation of the appropriate ranking for unpaid remuneration without its own problems.<sup>49</sup> The legislature has exceedingly failed to consider the appropriate ranking of a practitioner's unpaid fees after the conversion of business rescue to liquidation. This is a textbook illustration of the failure to line up the statutes governing business rescue after its introduction.<sup>50</sup> It seems that the confusion about the preferred ranking after business rescue hinges on the internal qualifier in section 135(4) and the failure to situate a practitioner's remuneration within a specific ranking. Section 143(5) is explicit in establishing a practitioner's extraordinary ranking above secured and unsecured creditors. However, the wording of section 135(4) relegates the remuneration of a practitioner to the free residue and weakens the textual relevance of section 143(5) beyond business rescue. Yet, the sole reading of section 143(5) does not seem to apply beyond business rescue.

45 the *Diener* case (n 10 (2019)) par 68.

46 Burdette and Jacobs (n 34) 67-68.

47 Setlhako (n 39) 109; Boraine, Evans, Roestoff and Steyn "The pro-creditor approach in South African Insolvency Law and the possible impact of the Constitution" 2015 *Nottingham Insolvency Law and Business Law e-Journal* 59 62.

48 s 140(3)(c)(ii) of the Act.

49 the *Diener* case (n 10 (2019)) par 66.

50 Calitz and O'Brien "Must a business rescue practitioner pay costs of liquidation *de bonis propriis*?" 2023 *TSAR* 247 250 citing the Act; the Companies Act 61 of 1973 and Insolvency Act.

These sections invite unnecessary legal uncertainty and lay fertile ground for a variety of interpretations that are all reasonably sound. The sharp divergence of opinion between the unanimous judicial interpretation and academic analysis on the correct reading of the relevant sections is not without merit. The search for a suitable ranking within the current legislative framework invariably results in legislative fragmentation or inadequate consideration of all relevant circumstances.

The South African post-rescue remuneration framework is also out of sync with the post-rescue remuneration arrangements in comparable jurisdictions. The administration procedure in Canada is closely similar to business rescue and the United Kingdom's (UK) system of administration has influenced its structure.<sup>51</sup> In Canada, a court may secure a monitor's fees and expenses and order that the security ranks above any secured claim.<sup>52</sup> The monitor is entitled to receive their fees and expenses even if a company is in the process of liquidation.<sup>53</sup> In the UK (England and Wales), Schedule B1, paragraphs 99(1)-(3) and 70 of the Insolvency Act 1986 state that a former administrator's remuneration and expenses are payable ahead of any security from the property that the administrator had control over before vacating office. This position entails that the company's assets remain charged with the administrator's fees during the winding-up process after unsuccessful administration. Unlike South Africa, an administrator's fees and expenses in the UK and Canada are statutorily regulated in clear terms and enjoy sufficient priority to guarantee payment for work completed and disbursements incurred.

The authors submit that the appropriate ranking for outstanding fees must happen through legislative reform. A practitioner must be paid *pari passu* and rateably with liquidation costs under section 97(2)(c) of the Insolvency Act. However, the legislative drafting must avoid blurring the line between business rescue and liquidation proceedings. To avoid classifying the practitioner's remuneration as liquidation costs and possibly undermining the fabric of liquidation,

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51 Setlhako (n 39) 108.

52 s 11.52 of the Companies Creditor Arrangement Act read with s 136(1) of the Bankruptcy and Insolvency Act (BIA).

53 Setlhako (n 39) 99; s 39 of the BIA.

the legislature must situate the fees in accord with section 97(2)(c) through the redrafting of section 143(5). To that end, section 143(5) may be amended as follows:

“To the extent that the practitioner’s remuneration and expenses are not fully paid after business rescue proceedings are superseded by a liquidation order, the practitioner’s claim for those amounts will rank *parri passu* and in equal proportions if necessary with the costs of sequestration contemplated in section 97 (2) (c) of the Insolvency Act.”

It is advisable to retain the existing PCF order of preference during business rescue proceedings. The preference for a practitioner’s fees during business rescue must not be “underplayed”.<sup>54</sup> However, the extension of section 135(4) to liquidation must retain the PCF order of preference without the practitioner’s claim (as it would rank alongside liquidation costs). It follows that section 135(4) must read as follows:

“Subject to section 143 (5), 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.”

However, there are considerations that militate against the immediate benefits of the proposed ranking and it is not suggested that these are the only interpretational difficulties thereof. A practitioner afforded preferent post-rescue privilege may incur unnecessary fees and disbursements in the covert efforts to rescue a chronically ill company for purposes of self-enrichment.<sup>55</sup> Some experienced practitioners already charge companies more than the prescribed hourly tariffs.<sup>56</sup> The inflation of the practitioner’s fees, in view of the proposed ranking, would have a knock-on effect on liquidation

54 the *Diener* case (n 10 (2019)) par 60.

55 *Montic Dairy (Pty) Ltd (in liquidation) v Mazars Recovery and Restructuring ((Pty) Ltd* 2021 3 SA 527 (WCC) par 33–36.

56 Marumoagae and Thambi “Should payment of additional remuneration to business rescue practitioners outside section 143 of the Companies be prohibited” 2024 *SAMLJ* 378 388.

costs and increase the possibility of a contribution towards these costs and simultaneously decrease chances of realising the original claim for unsecured creditors. All the while, a practitioner has the freedom to bargain for payment before the cessation of business rescue,<sup>57</sup> subject to payment before commencement of the winding-up process.<sup>58</sup> However, there is no logical reason to leave unattended a practitioner's wide discretion to wantonly exploit the remuneration arrangement and abuse the process. The legislature must ordain supervisory safeguards for the allocation of fair, reasonable and proportionate remuneration to a practitioner. An oversight entity must have authority to allow, reduce or disavow the practitioner's expenses and disbursements. On the other hand, the uncritical acceptance of a practitioner's prima facie bargaining power is an oversimplification of the professional risk and complex dynamics of business rescue. The *ex post facto* consequences of the current ranking are well-documented in this note. The authors hasten to add that the effect of unsuccessful rescue may, in practice, subject the initiation of business rescue to parameters beyond the legislative framework. This is so that practitioners may (consciously or subconsciously) use the higher threshold of reasonable probability to assess reasonable prospects of rescue in order to circumvent the uncertain rescue of a faltering company. Furthermore, a practitioner might not garner the requisite support to adopt and implement any extra-legal agreement with stakeholders. Therefore, the routine protection of the practitioner's profession is important to the health of business rescue and retention of highly skilled and competent professionals while ordaining adequate oversight over their conduct.

It is not always practically feasible to protect the interests of all affected parties in insolvency proceedings.<sup>59</sup> The notion of self-direction goes against the creation of an efficient and *regulated* rescue procedure.<sup>60</sup> Risk-sharing is also inevitable amid a corporate

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57 the *Diener* case (n 10 (2019)) par 60.

58 *Mazars Recovery & Restructuring (Pty) Ltd v Montic Dairy (Pty) Ltd (in liquidation)* 2023 1 SA 398 (SCA).

59 Mokoena "The philosophy of business rescue law" 2019 *Journal of Corporate and Commercial Law and Practice* 1 4-5.

60 the *Diener* case (n 17 (2018)) par 40.

crisis. However, this should not be understood as a mechanical preference for practitioners and myopic exclusion of creditors. The premise for the proposed ranking is the most favourable protection for the effectiveness of the corporate insolvency regime. It is directed at promoting efficient business rescue practices and balancing the interests of all relevant stakeholders in insolvency proceedings. Similarly, this ranking purports to stifle competition between the interests of creditors and practitioners, thereby protecting the security of assets and avoiding the distortion of normal commercial activity and legitimate rescue initiatives. As a result, the proposed ranking is the optimal path to achieve fairness and equity in insolvency proceedings for affected stakeholders.

## 5.2 *Proving a claim*

Section 44(1) of the Insolvency Act states that a pre-liquidation creditor who wishes to share in the distribution of the assets in an insolvent estate must prove a claim against that estate. The Supreme Court of Appeal held that a practitioner, as a pre-liquidation creditor, must prove a claim for unpaid fees and expenses before it could be recognised and paid in liquidation proceedings.<sup>61</sup> The court differentiated a practitioner (pre-liquidation creditor) from persons who render services relating to the administration of the estate, as the latter persons need not prove a claim.<sup>62</sup> A practitioner is not included in the list of those who render such services because of the distinction between business rescue and liquidation.<sup>63</sup> The main difficulty with the court's finding is that a practitioner will risk non-payment for work actually completed (or expenses incurred) and liability for a contribution towards costs of liquidation if the free residue funds are insufficient.<sup>64</sup> Setlhako notes that this may be an "unintended" consequence of the constitutional court judgment.<sup>65</sup> This issue did not arise before the Constitutional Court as it rejected application for leave to appeal.

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61 the *Diener* case (n 17 (2018)) par 62.

62 the *Diener* case (n 17 (2018)) par 61.

63 the *Diener* case (n 17 (2018)) par 61.

64 Calitz and O'Brien (n 50) 267; s 14(3) read with s 106 of the Insolvency Act.

65 Setlhako (n 39) 54 and 102.

On the other hand, this position seems prudent as the Act does not provide for the taxation of a practitioner's fees and expenses.<sup>66</sup> The absence of independent scrutiny over the fee structure seems unwise in light of the practitioner's entitlement to "liberal hourly and maximal daily tariff".<sup>67</sup> To exacerbate absence of independent oversight, courts have no inherent authority to order forfeiture of a practitioner's fees where their conduct warrants censure.<sup>68</sup> It has been noted that ordaining independent oversight over the practitioner's fees and expenses may be for the legislature to consider in contemplation of further amendments to the Act.<sup>69</sup> To avoid the effect of proving a claim, Setlhako submits that a practitioner *must* receive fixed remuneration ahead of secured creditors and liquidation costs after business rescue makes way for liquidation.<sup>70</sup> As the authors propose that the unpaid claim must be payable as *if* it formed part of liquidation costs, the practitioner's exemption from proving a claim must be considered against independent oversight of the proposed ranking.

An argument in Levenstein's seminal thesis noted that it would be "problematic" for a practitioner to contribute towards a shortfall in the free residue.<sup>71</sup> The intended post-rescue position was for a practitioner's unpaid claim to rank as an administrative expense before liquidation costs.<sup>72</sup> This argument ignored the lack of legislative safeguards against practitioners' proximity to abuse of funds and concomitantly low dividends for stakeholders. Setlhako contends that a practitioner's remuneration must be determined by a creditors resolution (or court in the event of compulsory business rescue) and filed with the Master or court for approval.<sup>73</sup> Alternatively, that the

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66 *Murgatroyd v van Den Heever* 2015 2 SA 514 (GSJ) par 4; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 3 SA 273 (GSJ) par 49.

67 Borraine, Burdette and Kunst *Meskin's Insolvency Law and its operation in winding-up* (2025) par 18.14.6.

68 *Cawood NO v Murray NO* case no A127/19 (unreported) (GP).

69 the *Oakdene* case (n 66) par 49.

70 Setlhako (n 39) 112.

71 Levenstein *An Appraisal of the New South African Business Rescue Procedure* (2015 thesis UP) 424.

72 Levenstein (n 71) 424.

73 Setlhako (n 39) 112.

practitioner's remuneration must be fixed on a percentage basis against the company's asset value.<sup>74</sup> However, even if the current tariff-based structure is retained, the authors submit that affected parties must have the legislative licence to challenge a practitioner's claim in court. Courts must have wide powers to make any just and equitable orders, including levying necessary adjustments and interest or penalties on any unjustified remuneration and expenses incurred for purposes of self-enrichment and abuse of process. Alternatively, the legislature may consider the *extension* of the taxing master's jurisdiction to authorise independent supervision over the reasonableness of the practitioner's remuneration and disbursements. The use of the taxing Master's technical expertise is particularly attractive as courts may exercise deference to an oversight entity's decision. By doing so, the practitioner will only qualify for remuneration and expenses reasonably necessary to conduct business rescue and perform related functions.<sup>75</sup>

## 6. Conclusion

It is difficult to fault the judicial limitation of the practitioner's preferential claim to the free residue, subject to the liquidation costs. The applicable statutory mechanisms necessitated a sensible interpretation out of the conundrum of shoddy drafting. However, in the spirit of stifling (or balancing) competition between the interests of all relevant stakeholders and evading the distortion of normal commercial activities, it is hopeful that one day the legislature will give serious consideration to a novel order of preference after failed business rescue. In doing so, the legislature must protect the integrity of the business rescue regime, evade the multiplicity of practical issues against ill-considered rankings and strike an equitable balance between the competing interests of all stakeholders. It is preferable to elect a ranking of a practitioner's unpaid claim which serves as a proactive public interest measure against catastrophic socio-economic implications of a tainted business rescue regime.

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74 Setlhako (n 39) 112.

75 the *Murgatroyd* case (n 66) par 21.