

# LEGAL ALERT

## The Ranking of Creditors



The Court of Civil Appeal (“**Court**”) has on 06 February 2024 delivered a landmark judgment in the case of *Heeralall N. V The Director-General, The Mauritius Revenue Authority* [2024 SCJ 56]. The issue to be determined what ranked in priority: a charge inscribed by a banking institution or a *privilege* inscribed by the Mauritius Revenue Authority. While case law and other authorities cited by counsel of both parties were relevant, one cannot deny the country’s present state of law and the absence of adequate regulations. It can be said that the Learned Judges had an arduous task reconciling different sections of our *code civil* (“**Code Civil**”), the Mauritius Revenue Authority Act 2004 (“**MRA Act**”), and the Insolvency Act 2009 (“**Insolvency Act**”) to achieve a coherent interpretation of the legislative landscape in such matters.

### Heeralall N. V The Director-General, The Mauritius Revenue Authority

Best Flour & Co. Ltd (the “**Company**”) granted a fixed and floating charge (the “**Charge**”) on two immoveable properties which formed part of its assets in favour of the Mauritius Commercial Bank (the “**Bank**”). The Bank caused the Charge to be inscribed on 17 March 2016 and on 07 November 2017, the Bank appointed a receiver and manager (the “**Appellant**”) pursuant to the Charge. On 12 October 2017, the Mauritius Revenue Authority (the “**Third Party**”) caused a *privilege* (the “**Privilege**”) in the amount of Rs 1,771,906, in respect of tax due and payable by the Company, to be inscribed on the same immoveable properties belonging to the Company.

Upon an application made by the Appellant (then applicant) to the Supreme Court of Mauritius, the Court had to determine whether the Privilege of the Third Party ranked in priority to the Bank's Charge. The Learned Judge, ruling in favour of the Third Party, held that the Privilege of the Third Party ranks in priority to the Bank's Charge. The Appellant thereafter made an appeal to the Court. The Company's immoveable properties having been sold, the issue to be determined by the Court was how the proceeds of sale would be distributed between the Company's two preferential creditors, namely the Bank and the Third Party.

### Rationale

This case has brought about a very interesting argument on which takes precedence – the Charge inscribed pursuant to article 2202 of the Code Civil or the Privilege inscribed in accordance with section 21L of the MRA Act.

The Court held that, on the basis that the Company was in receivership, section 204 of the Insolvency Act automatically applied. This section states that the persons entitled to payment out of the property of a company in receivership will be in such rank of priority as may be prescribed. It is rather unfortunate that our legislator has not yet made any regulations in respect of this section. The Learned Judges made a comparison to section 328 of, and the fourth schedule to the Insolvency Act which sets out the order and mandatory priority of payment of preferential and secured claims in case of liquidation of a company.

Since the issue *in lite* concerned the distribution of the proceeds of sale between creditors, the Court further considered and relied on the following articles of the Civil Code– (a) article 2202-53 of the Civil Code which provides that the ranking of a fixed and floating charge is determined as per its inscription date; (b) article 2143 which states that a *privilege* ranks over the other creditors, (c) articles 2148 and 2152 which provide that any tax due ranks third as the Third Party is a privileged creditor exempted from the need to inscribe the privilege; (d) pursuant to article 2202-55, the *privileges* under articles 2148 and 2152 take precedence over the inscription date of a fixed and floating charge and (e) in accordance with

article 2149, any tax due is privileged in respect of tax payable for a maximum period of one year.

Of particular note, the Learned Judges, in granting the appeal, concluded that section 21L(1) of the MRA Act allows the Third Party to recoup the full amount due to it by a debtor whereas section 21M of the MRA Act and articles 2148 and 2152 of the Code Civil provides for the amount of a tax the Third Party is entitled to recover from a debtor without having to inscribe its *privilege*.

### Analysis

In the absence of regulations relating to the ranking of claims of preferential and secured creditors entitled to payment out of the assets of a company in receivership under section 204 of the Insolvency Act, the Learned Judges have sought to harmonise the different legislative provisions on the matter to conclude that, while the Third Party will be able to recover twelve months' of tax payable pursuant to section 21M of the MRA Act and articles 2149 and 2152 of the Civil Code, in respect of the remaining amount of tax that may be due, the Third Party will rank after the Bank on the basis that the Third Party had inscribed its privilege after the Bank.

The authors consider the manner in which the Court was able to reconcile the various (and seemingly conflicting) provisions of different acts.

The current state of law is such that the position and intention of the legislator is not known in relation to section 204 of the Insolvency Act. It is left to our own determination whether the judgement would have been different had the legislator passed the relevant regulations. A question stemming from this judgment is where does a fixed and floating charge which has been duly inscribed stand? It undoubtedly provides less protection for a chargee since the Third Party can cause a privilege under section 21L of the MRA Act at a later date, with the proceeds first going to the Third Party.

## Concluding Remarks

In order to rectify the situation in relation to the ranking of a fixed and floating charge when a company is in receivership, we hope that the legislator will provide clarifications and most importantly issue the regulations under section 204 of the Insolvency Act, as recommended by the Learned Judges.

## Authors



### JOHANNE HAGUE

Managing Director

E: [jhague@prismchambers.com](mailto:jhague@prismchambers.com)

T: +230 403 0901



### ASHWIN MUDHOO

Head - Transactions

E: [amudhoo@prismchambers.com](mailto:amudhoo@prismchambers.com)

T: +230 403 0903



### MANESHA MOTEE

Associate

E: [mmotee@prismchambers.com](mailto:mmotee@prismchambers.com)

T: +230 403 0906



### BEATRICE PHANJOO

Associate

E: [bohanjoo@prismchambers.com](mailto:bohanjoo@prismchambers.com)

T: +230 403 0907

## Disclaimer

*The information provided in this legal alert is for general information purposes only. It is not intended to provide legal advice or opinion of any kind. Please refer to your professional advisers for specific advice.*



## About Prism Chambers

Prism Chambers is a full-service business law firm based in Mauritius which specialises in all aspects of revenue law. For more information about our law firm, please visit [www.prismchambers.com](http://www.prismchambers.com)