

SOUTH AFRICA / JUDGMENT

Cooper N.O and Others v Blue Label Distributions (2022/5762) [2024] ZAGPJHC 615; [2024] 3 All SA 800 (GJ) (2 July 2024)

[2024] ZAGPJHC 615

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

2022/5762

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FLYNOTES:

COMPANY – Winding up – Disposition – Payments
made by insolvent company to distributor of prepaid e-tokens –
Argued that payments not diminishing insolvent company's
property because of nature of pre-paid products – Such funds
not ring-fenced – Distributor benefitted
from payments and
was not mere conduit – Appropriated payments for own benefit
– Distributor preferred above
other creditors – Having
effect of undermining essence of concursus creditorum –
Respondent ordered to make payment
to joint liquidators of eight
amounts constituting void dispositions – Companies Act 61 of
1973, s 341(2).
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 2022/5762
1.
Reportable: Yes
2. Of
interest to other Judges: Yes
3.
Revised
2 July 2024

In the matter between: CHAVONNES
BADENHORST ST CLAIR COOPER N.O. First
Applicant
TIRHANI
SITOS DE SITOS MATHEBULO N.O.
Second Applicant
CAPE
BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION)
Third Applicant
and
BLUE
LABEL DISTRIBUTION (PTY) LTD
Respondent

JUDGMENT

MAIER-FRAWLEY J:

1. This application concerns the question of whether or not payments made by the third applicant ('CBP' or 'the insolvent company') into the bank account of the respondent ('Blue Label') after CBP's provisional winding-up, constitute dispositions as contemplated in section 341(2) of the Companies Act, 61 of 1973 ('the Act').
2. The first and second applicants are the joint liquidators of the insolvent company, having been so appointed by the Master on 25 September 2020. They contend that eight payments made by the insolvent company after the date of its provisional winding-up constitute void dispositions, as envisaged in s 341(2) of the Act. They therefore seek: (i) an order declaring each of the eight payments (totalling R 347 531.81) made by CBP to Blue Label to be void dispositions in terms of section 341(2) of the Act; (ii) monetary orders for the repayment of the various amounts so paid, together with interest thereon; and (iii) an order for costs.
3. The third applicant is the insolvent company. On 14 February 2020, an application for its winding up was launched by a creditor of CBP, namely, the Concilium Trust ('the Trust') on the basis that CBP was unable to pay its debts. CBP was provisionally liquidated on 2 March 2020 and finally liquidated on 30 June 2020 by order of court. The effective date of the liquidation proceedings is 14 February 2020, being the date of the presentation of the liquidation application by the Trust to court.[1]
4. Blue Label resists the relief sought on the basis that the relevant payments do not constitute 'dispositions' as envisaged in s 341(2) or, if they are considered to be dispositions as contemplated in the Act, that they were not dispositions to Blue Label, rather, they were dispositions to the true beneficiaries of the funds, namely, the end suppliers of the products that were sold to end consumers by CBP.
5. It is common cause that, during the period between 9 March 2020 and 2 June 2020, CBP made the following eight payments to Blue Label, in aggregate totalling R347, 531.81:

- (i) R91,601.72 on 9 March 2020;
- (ii) R100,000.00 on 8 April 2020;
- (iii) R50 000.00 on 17 April 2020;
- (iv) R70,930.09 on 8 May 2020;
- (v) R15,000.00 on 2 June 2020;
- (vi) R8000.00 on 2 June 2020;
- (vii) R6000.00 on 2 June 2020;
- (viii) R6000.00 on 2 June 2020.

6. There is no dispute about the prevailing legal position, namely, that a court has no discretionary power to validate dispositions of its property by a company after the company has been provisionally liquidated.[2]
7. The applicant's pleaded case is to the effect that the payments made to Blue Label constitute dispositions as envisaged in the Act, firstly, because they fall within the wide definition of 'disposition' in terms of s 2 of the Insolvency Act, 24 of 1936; secondly, because the payments were made into the respondent's bank account after CBP's provisional liquidation, therefore the payments fall foul of the operative part of s 341(2), in terms of which dispositions made by a company being wound-up are void; and thirdly, as the payments were made into Blue Label's bank account, which CBP had no access to or control over, the money became the respondent's money and/or money which Blue Label had the sole right to use as it pleased. In other words, Blue Label had the sole power of disposal of the funds standing to the credit of its bank account, which it was able to exercise by virtue of its

banker-customer relationship on the application of ordinary principles of banking law.

8. Blue label's pleaded version is that it concluded a written agreement with CBP on 19 September 2019.[3] Its version about how its business relationship with CBP operated in practice, stands factually uncontroverted. The pleaded facts are the following:

8.1. Blue Label is a distributor of prepaid e-tokens of value. It does not sell its own products. Instead, it facilitates the sale of various third-party suppliers' products. To this end, it concludes agreements with certain retailers, like CBP, which sell the products to end consumers.

8.2. In paragraph 11 of the answering affidavit, the deponent, Mr JJ Van Rensburg avers that:

"For the purposes of this application and the relief sought (which is not based on the agreement), I am advised that, instead of listing the terms and conditions of the agreement, which, respectfully, speak for themselves, it is more useful to explain how the relationship between Blue Label Distribution and CBP worked in practical terms."

8.3. Van Rensburg then goes on to provide a summary of how the working relationship would ordinarily operate.[4] He states as follows:

8.3.1 The agreement allows CBP to sell various products to consumers. These include bill payments, airtime, data, electricity, betting, ticketing ("the products"), all of which are virtual (not physical) products.

8.3.2 All the products are supplied by third-party suppliers. In other words, they are not Blue Label's products. Blue Label just facilitates the sale of the products, in return for which it obtains payment of a commission by the relevant supplier.

8.3.3 In turn, and in return for the sales of the products to consumers, Blue Label pays CBP a commission from the commission that is paid by suppliers to Blue Label.

8.3.4 To sell the products, Blue Label uses certain "Terminal Equipment". Blue Label developed the software installed on the equipment and/or procured the equipment for the prepaid telecommunications market, and it is defined as "vending machine solutions used for the sole purpose of dispensing virtual airtime".

8.3.5 The Terminal Equipment can either be leased or purchased by a retailer like CBP. In either instance, the Terminal Equipment is placed in the retailer's store, under the retailer's supervision and control. In terms of their agreement, CBP leased the Terminal Equipment from Blue Label.

8.3.6 To use the Terminal Equipment, CBP must deposit money into Blue Label's bank account, which is credited on the Terminal Equipment. Because Blue Label does not own the products (and cannot, therefore, transfer ownership to CBP), this is not a payment for the purchase of any of the products. Instead, it is a payment for the ability to sell the products (in return for which CBP earns a commission from Blue Label).

8.3.7 Once CBP has made such a payment into Blue Label's bank account, unless a consumer has purchased a product from CBP, Blue Label does not have a right or an entitlement to use the money that CBP deposited into Blue Label's bank account. All the rights attaching to the money remain with CBP.

8.3.8 Similarly, if a consumer does not purchase a product and the agreement between Blue Label and CBP ends, Blue Label would be obliged to refund the money that CBP paid to Blue Label.

8.3.9 If CBP so wished, it could, at any time prior to the sale of the products by it, withdraw some or all the money that it pre-paid to Blue Label.

8.3.10 It is only when a consumer purchases a product from CBP (and has paid CBP for that product, in full) that Blue Label debits (or is entitled to debit) the credit balance for CBP's account with Blue Label. This all happens electronically.

8.3.11 At the end of each day, at 12pm, Blue Label's system automatically generates an invoice for the products that CBP sold during that day. The invoiced amount (which is the face value of the product purchased) is deducted from the balance of the deposit that CBP paid.

8.3.12 After deducting the money from CBP's deposit, Blue Label pays that money to its supplier.

8.3.13 From the money paid to it, the supplier pays Blue Label an agreed commission.

8.3.14 From the commission that Blue Label is paid, Blue Label pays CBP an agreed commission. Any commission so earned by CPB is credited to CBP's trading balance.

8.3.15 If CBP's trading balance goes to zero, CBP will not be able to sell any of the products to consumers, and it would need to make another deposit.

9. During oral argument presented at the hearing of the matter, the applicants' counsel submitted that the deponent to the answering affidavit,[5] Mz Van Rensburg ('Van Rensburg'), failed to state, in respect of each of the payments in question, whether such monies were in fact paid over by Blue Label to the suppliers, entitling it to earn commission in respect of sales actually effected by CBP. All that Van Rensburg did, so the argument went, was to paint a picture of what the ordinary practice was. All the liquidators knew, therefore, was that the relevant funds were paid into the bank account of the respondent by CBP after its provisional liquidation.

The liquidators did not know where these payments went because the respondent did not say. How trade relations between Blue Label and CBP ordinarily operated on a practical level, did not necessarily mean that the ordinary practice applied in relation to the disputed payments. It was incumbent upon the respondent to testify about what actually happened to the funds in question – whether they were in fact debited to CBP's account and paid over to the supplier, or if not, whether the payments were to be refunded to CBP on account of the fact that no sales to consumers to the value of each payment had occurred. Such facts were absent from the answering affidavit, with evidence put up in substantiation. Counsel for the applicants highlighted this deficiency during oral argument at the hearing of the matter.

10. This led to a request by the respondent, after oral arguments were concluded and judgment was reserved, to present further evidence in a supplementary affidavit. As the oral argument relied on at the hearing had not been foreshadowed in the applicants' affidavits, the respondent was undoubtedly caught by surprise. The respondent's request to file a supplementary affidavit was not opposed or objected to by the applicants. I considered it to be in the interests of justice to permit the filing of supplementary

affidavits (and further heads) by both parties. The respondent's supplementary affidavit dealt with what actually transpired in relation to the disputed 8 payments, and also included additional (albeit limited) evidence concerning Blue Lagoon's contract

with one its suppliers, namely, Multichoice.

11. In its supplementary affidavit, Blue Label clarified what had transpired after the disputed payments were made, as follows:

11.1 CBP transferred R 347 531.81 to Blue Label in eight tranches. Before CBP sold a third-party product to a consumer, CBP had a right to access that money. Blue Label did not have a right or an entitlement to deal with that money. Until CBP sold a third-party product to a consumer, CBP's money was treated as a current liability in Blue Label's books.

11.2 Thereafter, on various dates, and in various transactions, CBP sold R 347 532.69 worth of third-party products to its consumers. To this end, Blue Lagoon attached a copy of an excel spreadsheet

reflecting six categories of products and that CBP sold R347 532.69 worth of third-party products to the public, which it did in 3 370 individual transactions. The majority of the value of the transactions (R 203 319.54) consisted of bill payments, which were

mostly DStv/Multichoice payments, whilst the majority of the transactions (in number) happened in relation to the 'Data'

category. After the consumers paid R 347 532.69 to CBP, it is alleged that Blue Label debited R 347 532.69 from CBP's trading account (thus, restoring its current asset value to what it was before the sales took place and even before the money was paid to Blue Label).

11.3 The full value of R 347 532.69 belonged to the third-party suppliers and was paid over to them (either in full or minus Blue Label's commission).

11.4 For its role in facilitating the sales of products to consumers, Blue Label received commission of R 10 452.98 from the third-party suppliers. In turn, Blue Label paid CBP a commission of R8,688.32

from the commission it received from its suppliers.

11.5 Blue Label denied that the payments constituted dispositions as contemplated by the insolvency legislation because it alleges that CBP's asset value was never diminished at a single point in the transaction, nor did it ever dispose of any right/s to the money. Instead, its asset value was enhanced by the relevant commissions.

11.6 Blue Label disclosed two pages (excluding the cover page) of its agreement with one of its suppliers, namely, Multichoice,[6] containing definitions and clauses 2 and 2.1 to 2.4 thereof. In terms of the agreement, Blue Label was defined as 'BLD', and Multichoice was defined as the 'Third Party'. Clauses 2.1 to 2.4 and 4 of that agreement record, inter alia, that:

11.6.1 Blue Label had implemented a payment collection system and network in South Africa via the networks;

11.6.2 Multichoice wished to appoint Blue Lagoon as its collections agent of payments by customers using the BLD platform and the Networks;

11.6.3 The parties wished to enter into this agreement to record the terms under which Blue Lagoon was appointed to collect payments from customers for Multichoice as from the Effective Date of the agreement;

11.6.4 “The Third Party hereby, and for the term of this Agreement, appoints BLD and authorises BLD to appoint the Networks as payment agents and payment systems operators...”

11.7 Blue Lagoon maintained its view that it was not the true beneficiary of the relevant transactions. Instead, it was merely an agent on behalf of the third-party suppliers.

11.8 The affidavit concludes with the deponent stating that at the time that the answering affidavit was drafted, CBP's credit balance on the Terminal Equipment was zero. However, after the answering affidavit was delivered, he discovered that CBP's current trading balance with Blue Label was R 24 016.00, which amount stemmed from commission payments that were received by Blue Label and which were automatically credited to CBP's trading account/s, and which amount Blue Label tendered to pay to the liquidators.

12. In both written and oral argument presented in court, counsel for Blue Label submitted that the above facts demonstrate that Blue Label is merely a conduit or intermediary for payment of amounts that are due to end suppliers in respect of the sale of their products by retailers such as CBP in the equivalent amount. As such, Blue Label operates on dual levels: as principal in respect of its own bank account, on the application of ordinary banking principles, but as agent of the supplier vis a vis monies paid to Blue Lagoon by CBP, which are used by Blue Lagoon to pay the supplier once sales are effected by CBP to consumers of the supplier's products. As such, the ultimate disponent is the supplier of products sold in respect of monies paid to Blue Label by CBP, as disponent.
13. The applicants' supplementary affidavit mainly included legal argument. Relying on s 341(2) of the Act which provides that 'every payment made by a company being wound-up and unable to pay its debts made after commencement of the winding-up, shall be void unless the court otherwise orders', the applicants contended that all the payments in question are thus automatically void ab initio and need not be declared such.[7] The payments were made into the respondent's bank account which was operated by it and in respect of which funds it enjoyed the sole right of disposal. They further submitted that in terms of s 341(2) of the Act, 'all that is relevant is that the payments were made to the respondent after CBP had already been provisionally liquidated. It is irrelevant what the respondent may have done with the funds thereafter in terms of its own contractual arrangements with third parties'.
14. In addition, reliance was placed by the liquidators on s 361(1) of the Act. The first and second applicants were appointed joint provisional liquidators on 17 June 2020. As such, the payments in question were all made before their appointment by the Master. This means that all CBP's property including monies standing to the credit was in the custody and control of the Master and its directors had ceased to be such functionally, officially and nominally as a result of the provisional winding-up order, in consequence of which (i) the powers and duties of the directors were terminated, depriving directors of control of CBP's

property and (i) all employees' contracts of service had also been automatically suspended in terms of s 38 of the Insolvency Act read with s 339 of the Act. Thus the void payments could not have been made under any contract with Blue Lagoon, but were made sine causa, given that nobody was authorised to perform such transactions or to give effect to or implement any contractual arrangements on CBP's behalf, including the exercise of an alleged right to reclaim those funds. It suffices to note that the liquidators have not pursued an enrichment claim against Blue Lagoon in these proceedings.

Discussion

15. Blue label's argument, namely, the payments by the insolvent company to it (during the course of its continued trade relationship with Blue Label after its liquidation) did not constitute 'dispositions' as contemplated in section 2 of the Insolvency Act, was premised on the notion that payments that were made by the insolvent company into Blue Label's bank account would not (and did not) serve to diminish CBP's property in any way. This is because the products that CBP would sell or did sell had already been pre-paid by it (by means of deposits made into Blue Lagoon's bank account). Thus, when a consumer purchased pre-paid products from CBP and paid the purchase price in full in respect thereof into CBP's bank account, the same amount would then be debited to CBP's trade account with Blue Label, and the same amount would be paid by Blue Label to its supplier/s. In that scenario, once Blue Label debited CBP's trading account, CBP's asset value was restored to what it was before the payment had been made to Blue Label.
16. Section 341(2) of the Act, provides that 'Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'
17. The Act does not define 'disposition'. Both parties relied on the definition of 'disposition' in terms of s 2 of the Insolvency Act. There it is defined as follows:

"disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and "dispose" has a corresponding meaning". (emphasis added).
18. On the face of it, the definition is wide enough to include any payments made by CBP to Blue Lagoon, which payments, it may be noted, were made in disregard of the concursus creditorum, an aspect to which I shall return later in the judgment.
19. In Van Wyk,[8] Gorven JA pointed out that whether a payment amounts to an impeachable disposition under the provisions of the Insolvency Act is a matter of interpretation. As put by Binns-Ward J in Gore N.O and Another v Ward and Another,[9] 'The reported cases show that the defined terms have been very widely construed in a purposive manner to give effect to the evident

legislative intention in the ‘claw back’ provisions in the [Insolvency] Act, such as s 26.’

20. Although both cases were concerned with whether payments constituted voidable dispositions in terms of s 26 of the Insolvency Act, the same interpretative exercise is required when determining what constitutes a disposition in the context of s 341(2) of the Act. Recently, in Symes,[10] this court applied the interpretation of ‘disposition’ espoused in the English and Australian cases referred to in Van Wyk, which interpretation was endorsed by the Supreme Court of Appeal in Van Wyk, with Gorven JA noting that “It will be seen that Mummery LJ and the Australian courts invoked the purposive approach to legislative interpretation in ascribing meaning to the word ‘disposition’.”
21. In the English case of Hollicourt,[11] the liquidators sought to recover payments made by the bank to third parties from the account of Hollicourt. In terms of s 127 of the English Insolvency Act, 1986: ‘In a winding up by the court, any disposition of the company’s property... made after the commencement of the winding up is, unless the court otherwise orders, void.’ The court a quo had held that there was a disposition of the company’s property in favour of the bank when the Bank debited the Company’s account with the sum paid to the creditor and that that disposition was avoided by s 127, so as to render the Bank liable to restore the Company’s account to its pre-disposition condition.
22. Accepting that where a company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company’s property in favour of the creditor falling within s 127, the appeal court (per Mummery LJ) held that ‘In our judgment the policy promoted by s 127 is not aimed at imposing on a bank restitutionary liability to a company in respect of the payments made by cheques in favour of the creditors, in addition to the unquestioned liability of the payees of the cheques.’

Mummery LJ referred with approval to the Australian matter of *Re Mel Bower’s Macquarie Electrical Centre Pty Ltd (in liq)*,[12] where Street CJ said:

“[The] paying by a bank of the company’s cheque, presented by a stranger, does not involve the bank in a disposition of the property of the company so as to disentitle the bank to debit the amount of the cheque to the company’s account. The word “disposition” connotes in my view both a disponent and a disponentee. The section operates to render the disposition void so far as concerns the disponentee. It does not operate to affect the agencies interposing between the company, as disponent, and the recipient of the property, as disponentee...The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by s 227...I consider that the legislative intention...is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponentee that forms the basic legislative purpose of s 227.” (emphasis added)

Mummery LJ also approved a dictum of McPherson J in the matter of *Re Loteka Pty Ltd (in liq)*, [13] namely, that ‘The amount standing to the credit of the customer’s account is simply diminished thus reducing pro tanto the indebtedness of the bank to the customer. It is the payee of the cheque that receives the benefit of the proceeds of the cheque. All that happens between customer and banker is an adjustment of entries in the statement recording the accounts between them...’

(emphasis added)

After considering additional authorities, Mummery LJ concluded that:

“In summary, our conclusion, in the light of these authorities, is that section 127 only invalidates the dispositions by the Company of its property to the payees of the cheques. It enables the Company to recover the amounts disposed of, but only from the payees. It does not enable the Company to recover the amounts from the Bank, which has only acted in accordance with its instructions as the Company’s agent to make payments to the payees out of the Company’s bank account. As to the intermediate steps in the process of payment through the Bank, there is no relevant disposition of the Company’s

property to which the section applies.’ (emphasis added)

23. In determining whether a disposition is made therefore, the enquiry is directed at determining who the true donee is, as a disposition, purposively interpreted, does not include payments to an intermediary or agent that truly fall within that category, i.e. one who acts merely as a conduit for onward transmission of the payment to a named recipient and who therefore does not benefit from the payment. What these authorities illustrate, is that where an insolvent company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company’s property in favour of the creditor. In making payment, the company parts with or disposes of its property. Ultimately, it is only the party who benefits from the proceeds of the cheque – the payee or donee – against whom s 341(2) will operate. It does not allow for liability to attach to one who did not benefit from the payment, for example, an agency interposing between the company, as disponent, and the recipient of the property, as donee. That is why the court in *Hollicourt* found that no disposition had been made in favour of the bank who was merely an intermediary and not the ultimate payee.
24. The respondent relied on the case of *Van Wyk*[14] for its contention that the monies did not constitute dispositions to Blue Label in that Blue Label had merely acted as a conduit or intermediary. Blue Label was not the ultimate payee of CBP’s funds. Therefore, if the deposits constitute dispositions, they were dispositions to the ultimate supplier and it is the supplier from whom they are to be recovered. It should be noted that in *Van Wyk*, the Supreme Court of Appeal had to determine whether deposits made into an attorney’s trust account constituted dispositions without value within the contemplation of section 26(1)(b) of the Insolvency Act 24 of 1936 (‘Insolvency Act’). Reliance was further placed on *Symes*,[15] where the court dealt with the question of whether or not payments made inter alia into an attorney’s trust account constituted dispositions in terms of s 341(2) of the Act.

25. Van Wyk's case concerned three deposits that were made by Brandstock Exchange (Pty) Ltd (Brandstock) into an attorney's trust account, which the liquidators of Brandstock sought to recover on the basis that the deposits constituted dispositions to the attorneys. All three deposits had been made prior to Brandstock's provisional liquidation on 3 July 2018 and its final liquidation on 20 August 2018. With reference to the elements required to set aside a disposition under s 26(1)(b)[16] and approving of what was held in the English case of *Hollicourt*, [17] the Supreme Court of Appeal found that the deposits constituted dispositions to the ultimate payee and not to the attorneys, who did not benefit therefrom, but merely acted merely as a conduit or intermediary in the onward transmission to Utexx and for Utexx's

benefit.

26. The sole director of Brandstock was one Philp. At the time of the deposits, the attorneys acted for Philp and another entity controlled by him, BRP Livestock CC (BRP). The attorneys neither represented, nor even knew of the existence of Brandstock. BRP was provisionally liquidated on 3 November 2017 and finally wound up on 8 March 2018 by an order of court. At the time the three deposits were made, Philp was confronting a sequestration

application. The insolvency proceedings against Philp and BRP were pursued by a creditor, the Utexx Trust (Utexx). The attorneys were involved in negotiations for a person well-disposed to Philp to purchase Utexx's claims against BRP and Philp. The purchase price was R1.25 million. Philp had instructed them to pay the R1.25 million to Utexx as the purchase price under the agreement. Utexx required payment to be made from the trust account of the attorneys. The purchase price was duly deposited into the attorneys' trust account, however, they were unaware of the source of the deposits into their account. The attorneys complied with their mandate. They paid the sum of R1,25

million to Utexx as instructed by their client, Philp. It was common cause that the attorneys did not receive any benefit or retain any portion of the purchase consideration.

27. Gorven JA, in applying English and Australian authorities quoted in the judgment, stated as follows:.

"Who then benefited from the disposition? During argument, the parties were ad idem that Utexx benefited by the deposit of R1.25 million which was thus hit by the provisions of s 26(1)(b). This must be correct. Utexx received moneys of Brandstock without Brandstock receiving value since it was not party to the transaction.

In turn, Utexx benefited by that amount since its claim for the purchase price under the agreement was satisfied. As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client. In giving effect to their mandate, therefore, the attorneys acted as a conduit in the onward transmission to Utexx and for its benefit. The disposition of Brandstock was one to Utexx. Since the attorneys did not benefit, they did not attract the onus to show the solvency of Brandstock immediately after the deposit was made. The

deposit into their account was not a disposition to the attorneys and was thus not impeachable under s 26(1)(b).”

28. In Van Wyk, Gorven JA referred, inter alia, to cases such as Kaplan,[18] Reynolds,[19] and Zamzar,[20] noting that the findings of Mummery LJ and the Australian court largely accorded with those set out in the said cases.
29. The court in Symes was concerned Inter alia with the question whether payment into an attorney’s trust account by a company in liquidation made after the date of the commencement of the winding-up and the date of the company’s provisional liquidation, amounts to a disposition in terms of section 341(2) of the Companies Act. Having found no case law dealing with the question, the court drew guidance from the Van Wyk decision in the SCA and authorities therein cited.
30. The facts in Symes were the following: the joint liquidators of Manor Squad Services (Pty) Ltd (in liquidation) (‘Manor Squad’) sought an order for payment of various sums by De Vries Attorneys Incorporated (De Vries) and one Mr Khoza (Khoza), a practicing trust account advocate. Mr Marsland had been Manor Squad’s sole director prior to its final liquidation. He was incarcerated at the time that an application for the liquidation of the company was presented to court on 27 August 2021. Marsland was a client of De Vries attorneys who were representing him in a bail application. The attorneys instructed Khoza to appear on behalf of Marsland in the bail proceedings, which culminated in bail being set at R1 million. On 2 September 2021 two payments of R500,000 were made into the trust account of De Vries attorneys on behalf of Marsland. These monies were used to pay Marsland’s bail. Further payments were thereafter made to both Khoza and De Vries. These included payments of R30,000 followed by R200,000 into the trust account of De Vries, which the attorneys had contended were to cover the cost of ‘medical services, service providers and other services’ which they had secured on Marsland’s behalf, with the providers looking to De Vries for payment, as well as a payment of R400,000

made to Khoza, which he contended was ‘utilized as per client instructions’. All the payments were made in the period between the issue of the winding up application and the grant of the provisional order.

31. Engelbrecht AJ held that ‘The same purposive interpretation undertaken by the English and Australian Courts find application in our law, as is evident from the oft-cited judgment of the SCA in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA). Following the English and Australian authority, cited with approval by the SCA in Gore,[21] I must come to the conclusion that the “disposition” contemplated in section 341(2) requires consideration of who the true disponent is, and that it does not include payments to an intermediary or agent that truly fall within that category.”

32. The court considered that the real question arising for determination was whether De Vries and Khoza were mere conduits, or whether they were indeed the ‘benefactors’ of some or all of the funds, within the meaning of the term ‘disposition’, as interpreted by English and Australian courts and endorsed by the SCA in *Van Wyk*. Having concluded that ‘it makes no difference to the legal position that the payments made were for the benefit of Marsland, and that they had no bearing on or relation to Manor Squad,’ and based on what was reflected on the invoices of De Vries, the court found that the R200 000 and R30 000 payments were made in respect of fees charged to Marsland. Having regard to what had been stated by the SCA in *Van Wyk*, namely, that, since the payment was made by the company in liquidation and not the beneficiary of the legal services, the deposits became “dispositions” within the meaning of section 26(1)(b) of the Insolvency Act, the court concluded that the same principle had to apply to the case under consideration under section 341(2). Thus, in relation to the R1 million bail money, accepting that that the amount was deposited for on-payment as bail money, for which purpose it was duly employed, the court held that De Vries had appropriated the monies in their trust account to pay a disbursement incurred on behalf of Marsland, their client, and as such, the payment fell within the definition of ‘disposition’. Regarding the R400 000 paid to Khoza, although there was no evidence that such amount was paid in respect of an invoice for fees, rather, merely Khoza’s word that it was utilized per the client’s instructions, however, without him stating that it had not been utilized for payment of his fees, the court concluded that he had ‘not discharged the onus that he bears to show that the payment was not a disposition’. Ultimately, therefore, the court concluded that all of the monies claimed constituted dispositions within the contemplation of section 341(2) of the Companies Act. The court found that there was no basis for it to exercise its discretion in favour of De Vries and Mr Khoza to validate the payments which it had held were void, consequent upon which repayment had to follow.
33. Another case of interest is *Ward*.^[22] In *Ward*, the joint liquidators of Brandstock Exchange (Pty) Ltd (in liq.) (‘Brandstock’) applied for the setting aside, in terms of s 26 of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973, of payments of R250 000 made to each of the respondents; alternatively, for a declaration that the payments were made sine causa. The respondents contended that the payments were made not by Brandstock but rather by one Philp, the sole shareholder and director of Brandstock, using funds stolen by one Louw. They argued that the funds used to make the payments had not become ‘the property’

of Brandstock, and that Philp merely used Brandstock’s banking account as a conduit for the purpose of fraudulently receiving and disposing of the money that he, and not Brandstock, had obtained from Louw by false pretences. In other words, the respondents denied that Brandstock made ‘dispositions’ to them within the meaning of that word in s 26 of the Insolvency Act. They also denied that they were enriched by the payments.

34. Louw concluded an oral agreement with Philp, representing Brandstock, in terms of which he undertook to finance the purchase by Brandstock of 220 heifers in the Eastern Cape for the sum of R2 257 200 so that Brandstock could on-sell the cattle to a buyer in KwaZulu-Natal, one van Rensburg, at a profit of R440 000. Philp represented to Louw that the purchaser would pay the purchase price 14 days after the delivery of the cattle in KwaZulu-Natal. The agreement was that upon payment by the purchaser, Brandstock would reimburse Louw for his outlay and, in addition, pay him 70% of the profit realised on the transaction. Louw transferred the required amount in two tranches from his current account into the account of Brandstock. Unbeknowns to Louw at the time, he had been duped by Philp to enter into the agreement, based on false representations by Philp amounting to fraud. Binns-Ward J found that Philp had actual authority to represent Brandstock in concluding an agreement with Louw. Louw was led by Philp to understand that he was contracting with the company and not Philp in his personal capacity.

35. Binns-Ward J found as follows:

“In the current case, because Louw intended to pay Brandstock in terms of his contract with the company, Brandstock obtained an effective right against its banker to deal with the resultant amount standing to the credit in its banking account. The bank would not be at liberty to reverse the credit without Brandstock’s concurrence. In that sense the funds became Brandstock’s ‘property’ when it received the payment; certainly within the very wide definition of the term in section 2 of the Insolvency Act. Pursuant to the instructions of Brandstock’s agent, Philp, the credit was applied by way of payments to the respondents, amongst others, in settlement of the payees’ claims against third parties such BRP Livestock and Philp personally... The fact that stolen moneys were used to make them did not detract from the effectiveness of the payments”[23]

... it is clear that by disposing of the funds credited to its account as a consequence of Louw’s payments, Brandstock exercised the personal right it had acquired against its banker in consequence of the payments.[24]

(emphasis added)

36. Binns-Ward J went on to consider whether the payments made by Brandstock, which fell to be regarded as thefts from Louw, were ‘dispositions’ by the company within the meaning of the term in s 2 the Insolvency Act. He concluded as follows:

“An example that seems to me to be apposite on the facts of the current matter is De Villiers NO v Kaplan 1960

(4) SA 476 (C), which was concerned with the application of s 29 of the Insolvency Act on payments made by an attorney using funds misappropriated from his attorneys’ trust account. The legislation in force at the time provided, similarly to s 88 of the currently applicable Legal practice Act 28 of 2014, that the amount standing to the credit of an attorney’s trust account did not form part of the attorney’s assets. The effect of the judgment in that case is described as follows in Bertelsmann et al, Mars, The Law of Insolvency in

South Africa 10th ed. at p.278: ‘An attorney, notary or conveyancer making payment to another from the trust account at a bank, which he is obliged to keep by law, makes a disposition of “his property” as in so doing he exercises a power of disposal enjoyed by him, arising from the

relationship of banker and customer, although the actual funds while in the bank account are not his property’.[25]

“Just as the dishonest attorney did in Kaplan, Brandstock had the power of disposal of the funds standing to the credit of its bank account and it was able to exercise that power by virtue of its banker-customer relationship. Just as in Kaplan, the exercise of that power to cause payment of the funds transferred to its account by Louw to be made to anyone other than Louw would be unlawful. But once having been exercised, and a payment to any party of the funds having been made by the bank pursuant to Brandstock’s

instruction, the power of disposal was exercised and a resultant disposition made, irrespective of whether it acted lawfully or not in making it.”[26]

(emphasis added)

37. The question arising is whether there was a disposition of the insolvent company’s property in favour of Blue Lagoon on the facts of this matter? It is to the facts that I now turn.
38. The essential nature of the agreement in casu was that of goods and network/terminal facilities supplied. Blue Lagoon provided network/terminal facilities and supplied stock to CBP via its terminal, for which CBP was obliged to pay Blue Lagoon in order to procure the ability to on-sell the products so supplied, and thereby earn commission on such sales. Put differently, payments were made by CBP to Blue Lagoon for the ability to sell the products through use of Blue Lagoon’s network and terminal, including the supply of virtual products to the terminal through which end sales were realized. Upon payment by CBP, Blue Lagoon made the products available by releasing them to the terminal for onward sale by CBP to its customers. In terms of their contract, a debtor-creditor relationship thus came into being between Blue Lagoon and CBP. CBP was obliged to pay Blue Lagoon, in return for which Blue Lagoon released the supply of virtual products sourced by it to its terminal for onward sale by CBP to consumers.
39. Nowhere has it been suggested that the contract in place between Blue Lagoon and CBP was executionary in nature. No evidence was either provided to the effect that when a payment was made by CBP into Blue Lagoon’s bank account, such sum was ring-fenced as belonging to the end supplier, nor was the payment deposited into a dedicated account, isolated from all other creditors of Blue lagoon. Put differently, payment by CBP was not made to Blue Lagoon on the basis that it be ring fenced for a specific purpose, namely, to pay Blue Lagoon’s supplier. It was paid into Blue Lagoon’s general bank account and formed part of the amount standing to the credit of the account, being available to be utilised by Blue Lagoon to pay whichever of its own creditors it chose to pay. Ultimately, as is common

cause, Blue Lagoon retained the sole right of disposal over the funds, and not CBP. In the above scenario, in the words of Binns-Ward J, the funds became Blue Lagoon's 'property' when it received the payment; certainly within the very wide definition of the term in section 2 of the Insolvency Act.[27]

40. The above point may be elucidated by means of the following example: Assuming Blue Lagoon went insolvent after payments by CBP were made into its bank account, whereby a concursus creditorum was established, all of Blue Lagoon's creditors would have been entitled to share in such payment in the normal way. The fact that the payment was to be used by Blue Lagoon to pay its supplier, matters not in that scenario unless the CBP's payment had been retained in a special account and had not become mixed with Blue Lagoon's monies in its bank account by virtue of the principle of commixtio.
41. The difference between the present case and cases dealing with the operation of attorneys' trust accounts is that the disputed payments were not made by CBP in favour of Blue Lagoon's supplier, nor when made to Blue Lagoon, were they ring-fenced in Blue Lagoon's bank account for the benefit of the supplier. There was no privity of contract between CBP and the supplier. CBP owed no debt to the supplier. CBP owed and paid Blue Lagoon, who remained its creditor under their contractual scheme. It should be noted that not all salient or relevant terms of Blue Lagoon's contracts with its suppliers were placed before this court in evidence. Only those terms that pointed to a mandate of agency were disclosed, not, for example, the relevant payment terms that governed the relationship between Blue Lagoon and the supplier. It is however likely that Blue Lagoon had to pay its supplier for products that had been supplied to Blue Lagoon for onward sale to end consumers. Blue Lagoon chose to utilize the services of CBP to sell the products for which Blue Lagoon retained the obligation to pay.
42. The next question to be answered is whether Blue Lagoon was truly a mere conduit or intermediary. In order to determine that, it is necessary to consider whether or not Blue Lagoon benefitted from the payment. It says it did not. But is that really correct?
43. On Blue Label's version, once the amount generated from sales of products to CBP's customers was debited to CBP's trade account and thereafter paid over by Blue Label to its supplier/s, this caused both Blue Label and CBP to earn a commission on such sales. Blue Lagoon was paid for its provision of network/terminal facilities and the virtual products supplied by it to CBP, per the terms of their contract.[28] Blue Lagoon was thereby able to improve its position by earning commission on the sales effected by CBP. Without CBP's payment,

after which Blue Lagoon would debit CBP's trade account and pay its supplier, there would be no commission earned. At the end of the day, the payments by CBP enabled Blue Lagoon to receive value in the form of commission on each sale. In so doing, Blue Lagoon improved its position, thereby directly benefitting from the payments made by CBP, in preference to all other creditors of CBP. In so doing, it obtained an unfair advantage over all other creditors of the insolvent

company. And that is exactly the mischief that s 341 was designed to obviate, namely, ‘a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the winding-up of the insolvent company, by, for example, dissipating the assets of the company or, as it happened in *Pride Milling*, by preferring one creditor above another to the prejudice of the *concursum creditorum*.’ [29] (emphasis added)

44. The contention by Blue Lagoon that it benefitted only from commissions paid to it by its suppliers and that it therefore did not receive any benefit from CBP,[30] is to my mind an argument in sophistry or is otherwise contrived. Without CBP’s payment, which Blue Lagoon retained together with all other funds standing to the credit of its bank account and which funds were thereafter used by it to pay one of its creditors/suppliers, there would be no commission earned and no benefit derived. The test is whether Blue Lagoon benefitted from the payment. In my view it did. It did not act as a mere conduit on the facts of this matter. Ultimately, It appropriated CBP’s payments for its own benefit, namely, to pay its suppliers with whom CBP enjoyed no privity of contract and to whom CBP owed not debt.
45. On the supplementary new evidence put up by the respondent, after the 8 payments were made by CBP to Blue Lagoon, further payments were made by CBP to Blue Lagoon during the course of ongoing trade relations between them. Sales continued to be effected by CBP, the amount of which was debited from CBP’s trade account and paid over to by Blue Lagoon to its supplier/s. This caused both Blue Lagoon and CBP to earn a commissions on each transaction. Hence Blue Lagoon’s tender to repay the accumulated commission earned by CBP to the liquidators. What is apparent from this scenario is that Blue Lagoon continued to trade with CBP even after the date of its final liquidation in apparent disregard of the *concursum creditorum*. On what basis it continued to do so, given the provisions of s 261(1) of the Act, is not explained in the papers.[31]
46. What should next be considered is the effect on the *concursum creditorum* as a result of trade relations between CBP and Blue Lagoon.
47. In *Pride Milling*,[32] a case which concerned the proper interpretation of s 341(2) of the Companies Act, read with s 348, the liquidators of the insolvent company sought repayment of four payments (which in total amounted to R295 000) made by the insolvent company to *Pride Milling* in settlement of amounts owing in respect of goods sold and delivered by *Pride Milling* to the company. Certain of the payments were made between the date of the presentation of the winding-up application to court (the effective date of the winding-up in terms of s 348 of the Act) and the date of the provisional winding-up order. Appropos payments made after the effective date, the case presented by the joint liquidators was that the payments in issue were void and were therefore hit by s 341(2), unless validated by court.
48. The Supreme Court of Appeal held, *inter alia*, that:
 - (i) In considering the scenario where payments are made after the date of presentation of the winding-up application to court (the effective

date) and the grant of a provisional order, the court reiterated, that, what s 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This must be read with s 348 of the Act. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render s 341(2) operative;[33]

(ii) The court has no power to permit a company being wound up to make dispositions of its assets. A court may validate a disposition made after the effective date but cannot validate dispositions made after that order. Dispositions made subsequent to the grant of a provisional winding-up order are void and ought not to be allowed to stand;[34]

(iii) Once a court grants a provisional order a concursus creditorum is established. The effect of this is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted. Accordingly, to order otherwise would not only render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound-up are void, but would also have the effect of undermining the essence of the concursus creditorum and indeed the substratum of insolvency law.[35]

(iv) The provisions of s 341(2), in unequivocal terms, decree that every disposition of its property by a company being wound-up is void.

Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred;

(v) The court endorsed what had been held in *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966

(3) SA 344 (W), namely, that “the mischief that the section was designed to obviate was: ‘... a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court’ by, for example, dissipating the assets of the company or, as it happened in this case, preferring one creditor above another to the prejudice of the concursus creditorum.”.[36] (footnote excluded; emphasis added)

49. The intended aim of the concursus, or as it has also been described, the ‘community of creditors’, created immediately upon the liquidation of the insolvent, is to give equal protection to all the creditors without undue preference and to preserve and distribute the estate to the benefit of all of them.[37]

50. As pointed out in *Da Silve*:

“A court has no power to validate any dispositions made after the grant of a provisional or final winding-up order. The reason for this is not difficult to fathom; as Pride Milling explains:

‘...once a court grants a provisional order a concursus creditorum is established. The effect of this is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted. ... Accordingly, to order otherwise would not only render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound-up are void, but would also have the effect of undermining the essence of the concursus creditorum and indeed the substratum of insolvency law’[38] ...

The ‘power of a liquidator to recover dispositions made after the constitution of the consursus of necessity stems from the essence of the consursus itself and what the SCA described in Pride Milling as the ‘substratum of insolvency law’. A liquidator’s cause of action is inherent in these foundational principles[39]...

It is precisely at the post-consursus creditorum stage that the power to recover dispositions prejudicial to the general body of creditors is most critical. As the much-quoted dicta from Walker v Syfret NO lay down, once a court grants a provisional liquidation order, ‘nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors’. This is so because: ‘The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate,

and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.’ ”[40]

(emphasis added)

51. In Da Silve, the court sanctioned recovery of a disposition made in disregard of the concursus creditorum’ on the basis that “The power of a liquidator to recover dispositions made after the constitution of the consursus of necessity stems from the essence of the consursus itself and what the SCA described in Pride Milling as the ‘substratum of insolvency law’. A liquidator’s cause of action is inherent in these foundational principles...The liquidators permissibly pinned their cause of action on the conduct of Pick n Pay [creditor]] in disregarding the concursus creditorum.”[41]

52.The Electoral Commission v Reddy & Others In the context of the facts of the present case, Blue Lagoon is left to enjoy the benefit of its claims being settled in full, whilst the other creditors would have to be content with whatever residue might still be available.

53.The Electoral Commission v Reddy & Others As recently reiterated in Mazars,[42] “Petse AP in Pride Milling could not have said it more explicitly that the ‘predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void.’ If that is the existing position then these payments are rendered invalid ex tunc at the time that they are made.” (emphasis added)

54. The Electoral Commission v Reddy & Others In Eravin,[43] the court had to determine whether a payment made by a company being wound-up (Ditona) to the appellant (Eravin) could be recovered by Ditona's liquidators as a void disposition, as envisaged in s 341(2) of the Act, or whether it may not be recovered by the liquidators because, in terms of s 154(2) of the Companies Act 71 of 2008 (the new Act), it comprised a pre-business rescue debt which may not be enforced. The court concluded that both sections are not concerned with when debts are due and can be claimed, rather, when they are owed. The disputed payment was made a day after the winding-up application was launched, and, being void, the court found that its repayment was immediately owed by Eravin. In this regard, Plasket AJA stated as follows:

"The question to be answered in this case is thus when the debt was owed. That must be answered in the first instance with reference to s 341(2) of the old Act. It states expressly that a disposition in the terms contemplated by it 'shall be void'. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received." (emphasis added)

55. The end result of the trade scenario that operated between Blue Lagoon and CBP is that one creditor (Blue Lagoon) was being preferred above all other creditors of CBP,[44] in circumstances where trade continued, despite CBP's liquidation, without consideration for the rights of the general body of creditors, thereby having, in the words of Petse JA in Pride Milling, the 'effect of undermining the essence of the concursus creditorum and indeed the substratum of insolvency law.'
56. Once a concursus creditorum is established, the law has laid its hand upon the estate and no creditor can improve its position thereafter. The creditor who is paid by an insolvent company after the law has laid its hand on the insolvent estate, and who is ordered to repay the void disposition, is armed with a claim which it can submit in the ordinary course together with other creditors of the insolvent estate.
57. As pointed out in Pride Milling,[45] "It bears mentioning that the words 'any company being wound-up' in s 341(2) of the Companies Act are not without significance. Notably, they are expressed in the continuous tense. Consequently, their import must be that after the commencement of and for as long as the winding-up process is in progress an affected company may not validly dispose of its property." (emphasis added)
58. For all the reasons given, I must conclude that the liquidators have succeeded in establishing an entitlement to repayment of the amounts listed in the Notice of Motion, which, as I have already found, constitute void dispositions.
59. As regards costs, the general rule is that the successful party is entitled to its costs. It should be pointed out that the case argued on behalf of the applicants evolved to the extent that an application to lead further

evidence was brought by the respondent whereafter further affidavits and heads were filed. On the other hand, the respondent (Blue Lagoon) included new evidence in its supplementary papers, evidence that was ostensibly available to it when its answering affidavit was filed. It took the opportunity to file two additional sets of heads thereafter. In these circumstances, I consider it to be fair and just to order that the parties pay their own costs in respect of the supplementary affidavits and supplementary heads filed in the matter.

60. Accordingly, the following order is granted:

1. The respondent is to make payment to the first and second applicants in their capacities as the joint liquidators of the third applicant, of the following amounts constituting void dispositions in terms of s 342(1) of the Companies Act, 1973:

1.1 The sum of R91,601.72;

1.2 Interest on the said sum at the maximum permissible statutory rate from 9 March 2020 to date of final payment;

1.3 The sum of R100,000.00;

1.4 Interest on the said sum at the maximum permissible statutory rate from 8 April 2020 to date of final payment;

1.5 The sum of R50,000.00;

1.6 Interest on the said sum at the maximum permissible statutory rate from 17 April 2020 to date of final payment;

1.7 The sum of R70,930.09;

1.8 Interest on the said sum at the maximum permissible statutory rate from 8 May 2020 to date of final payment;

1.9 The sum of R15,000.00;

1.10 Interest on the said sum at the maximum permissible statutory rate from 2 June 2020 to date of final payment;

1.11 The sum of R8,000.00;

1.12 Interest on the said sum at the maximum permissible statutory rate from 2 June 2020 to date of final payment;

1.13 The sum of R6,000.00;

1.14 Interest on the said sum at the maximum permissible statutory rate from 2 June 2020 to date of final payment;

1.15 The sum of R6,000.00;

1.16 Interest on the said sum at the maximum permissible statutory rate from 2 June 2020 to date of final payment;

2. The parties are to pay their own costs in respect of the supplementary affidavits and supplementary heads filed by them.
3. Save for what is stated in paragraph 2 above, the respondent is to pay the applicants' costs of suit.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:

14 March 2024

Order deferring judgment (pending receipt 28 March 2024
of supplementary affidavits & heads)

Respondent's supplementary affidavit 5 April 2024

Applicants' supplementary affidavit:

10 April 2024

Respondent's supplementary heads: 20 May 2024

Respondents further supplementary heads: 7 June 2024

Applicants' supplementary heads

5 June 2024

Judgment

delivered

2 July 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 2 July 2024.

APPEARANCES:

Counsel for Applicants: Adv A. Newton

Instructed by:

Kobus Boshoff Attorneys

c/o De Jager- Du Plessis Attorneys

Counsel for Second Respondent: Adv J. Brewer

Instructed by:

Barkers Attorneys

- [1] In terms of section 348 of the Act, a winding-up of the company by the court is deemed to commence at the time of the presentation to the court of the winding-up application.
- [2] Pride Milling Company (Pty) Ltd v Bekker NO and Another 2022
- (2) SA 410 (SCA) ("Pride Milling"), par 18.
- [3] A copy of this agreement appears as annexure 'AA1' to the answering affidavit. Salient terms include, amongst others, the following: 5. SUPPLY OF THE PRE - PAID STOCK 5.15.1 The pre-paid stock is supplied by the company [Blue Label] via the following procedure: 5.1.1 The outlet [CBP] shall deposit money into the company's bank account. Credit will only be loaded to the outlet's account once the company has confirmed the details of the deposit. 5.1.1 Once the outlet's account is in credit, the terminal equipment will via electronic means through a host computer system dial the server automatically for an order. 5.1.3 The server will transmit in numbers to the terminal equipment and debit the outlet's account. An invoice will automatically be generated . 5.1.4 Once the minimum stock levels have been reached, the terminal equipment automatically requests another order, and if the outlet's account is in credit, the order will be delivered. 5.2 In the event that the outlet disputes the amount of the pre-paid stock delivered by the company to the terminal equipment, the outlet shall notify the company immediately ...failure to notify the company will result in the outlet accepting the correctness of the amount stated on the invoice rendered... 6. PAYMENT 6.1 The outlet shall effect payment to the company in the following manner: 6.1.1 Upon the presentation of an invoice, for the supply, delivery installation of the terminal equipment: 6.1.2 By means of a bank transfer or deposit into the company's bank account for the pre-paid stock. 6.2 All monthly service charges, if applicable, shall be paid by the outlet monthly in arrears, on or before the 7th day of each month; 6.3 Notwithstanding the above provisions, the company may at any time, on reasonable written notice vary its invoicing and payment procedures and requirements 6.4 The company may allow the outlet, at the company's discretion, a discount... 6.5 Should payment not be made on the due date as provided for hereinabove, the company will be entitled to charge interest at the ruling prime rate + 4% per annum on the outstanding amount which interest will be calculated daily and compounded monthly until date of final payment." (emphasis added)

[3] A copy of this agreement appears as annexure 'AA1' to the answering affidavit. Salient terms include, amongst others, the following:

5. SUPPLY OF THE PRE - PAID STOCK

5.15.1 The pre-paid stock is supplied by the company [Blue Label] via the following procedure:

5.1.1 The outlet [CBP] shall deposit money into the company's bank account. Credit will only be loaded to the outlet's account once the company has confirmed the details of the deposit.

5.1.1 Once the outlet's account is in credit, the terminal equipment will via electronic means through a host computer system dial the server automatically for an order.

5.1.3 The server will transmit in numbers to the terminal equipment and debit the outlet's account. An invoice will automatically be generated .

5.1.4 Once the minimum stock levels have been reached, the terminal equipment automatically requests another order, and if the outlet's account is in credit, the order will be delivered.

5.2 In the event that the outlet disputes the amount of the pre-paid stock delivered by the company to the terminal equipment, the outlet shall notify the company immediately ...failure to notify the company will result in the outlet accepting the correctness of the amount stated on the invoice rendered...

6. PAYMENT

6.1 The outlet shall effect payment to the company in the following manner:

6.1.1 Upon the presentation of an invoice, for the supply, delivery installation of the terminal equipment:

6.1.2 By means of a bank transfer or deposit into the company's bank account for the pre-paid stock.

6.2 All monthly service charges, if applicable, shall be paid by the outlet monthly in arrears, on or before the 7th day of each month;

6.3 Notwithstanding the above provisions, the company may at any time, on reasonable written notice vary its invoicing and payment procedures and requirements

6.4 The company may allow the outlet, at the company's discretion, a discount...

6.5 Should payment not be made on the due date as provided for hereinabove, the company will be entitled to charge interest at the ruling prime rate + 4% per annum on the outstanding amount which interest will be calculated daily and compounded monthly until date of final payment." (emphasis added)

[4] See paras 11.1 to 11.7 of the answering affidavit.

- [5] Mz Jaendri Janse Van Rensburg, who is employed by Blue Label as Shared Services Executive.
- [6] Salient terms of the Multichoice agreement are dealt with in paras 46 & 46.1 to 46.11 of the supplementary affidavit.
- [7] This argument was presumably advanced based on what the Supreme Court of Appeal recently reiterated in *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* 2023
- (1) SA 398 (SCA), par 11, where the following was said: “Petse AP in *Pride Milling* could not have said it more explicitly that the ‘predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void.’ If that is the existing position then these payments are rendered invalid *ex tunc* at the time that they are made.”
- [7] This argument was presumably advanced based on what the Supreme Court of Appeal recently reiterated in *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* 2023
- (1) SA 398 (SCA), par 11, where the following was said:
- “Petse AP in Pride Milling could not have said it more explicitly that the ‘predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void.’ If that is the existing position then these payments are rendered invalid ex tunc at the time that they are made.”*
- [8] *Van Wyk Van Heerden Attorneys v Gore NO and another* [2022] 4 All SA 649 (SCA) at par 30, where the following was said: “The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. It is now trite that, when it comes to interpretation: ‘A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...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.” (footnotes excluded)
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- [9] *Gore N.O and Another v Ward and Another* (2977/2021)
- [2022] ZAWCHC 3; 2022 (4) SA 213 (WCC) (31 January 2022), at par 52. (“Ward”)

- [10] Symes and Another v De Vries Attorneys Incorporated and Another (2022-011114)
- [2024] ZAGPJHC 1764 (22 February 2024) ('Symes')
- [11] Bank of Ireland v Hollicourt (Contracts) Ltd [2001] All ER 289 (CA) (Hollicourt).
- [12] Re Mel Bower's Macquarie Electrical Centre Pty Ltd (in liq) [1974] 1 NSWLR 245.
- [13] Re Loteka Pty Ltd (in liq) (1989) 7 ACLC 998 at 1004..
- [14] Van Wyk Van Heerden Attorneys v Gore NO and another [2022] 4 All SA 649 (SCA)
- [15] Symes, fn 10.
- [16] The elements being: (i) a disposition (ii) by an insolvent (iii) not made for value (iv) within 2 years of liquidation; and (v) the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.
- [17] Bank of Ireland v Hollicourt (Contracts) Ltd [2001] All ER 289 (CA) ('Hollicourt'). There, the liquidators sought to recover payments made by the bank to third parties from the account of Hollicourt. In terms of s 127 of the Insolvency Act, 1986: 'In a winding up by the court, any disposition of the company's property... made after the commencement of the winding up is, unless the court otherwise orders, void.' The appeal court (Per Mummery LJ) found that section 127 only invalidates the dispositions by the Company of its property to the payees of the cheques. It enables the Company to recover the amounts disposed of, but only from the payees. It does not enable the Company to recover the amounts from the Bank, which has only acted in accordance with its instructions as the Company's agent to make payments to the payees out of the Company's bank account. Mummery LJ referred with approval to the Australian matter of Re Mel Bower's Macquarie Electrical Centre Pty Ltd (in liq)
- [1974] 1 NSWLR 245, where Street CJ said: '[The] paying by a bank of the company's cheque, presented by a stranger, does not involve the bank in a disposition of the property of the company so as to disentitle the bank to debit the amount of the cheque to the company's account. The word "disposition" connotes in my view both a disponent and a disponentee. The section operates to render the disposition void so far as concerns the disponentee. It does not operate to affect the agencies interposing between the company, as disponent, and the recipient of the property, as disponent...The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by s 127...I consider that the legislative intention...is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponentee that forms the basic legislative purpose of s. 227.'

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[18] *De Villiers NO v Kaplan* 1960

(4) SA 476 (C) (Kaplan), referenced in *Ward*, as referred to in par 36 of the judgment below.

[19] *Reynolds and Others NNO v Mercantile Bank Ltd* [2004] ZASCA 137; 2004

(5) SA 220 (SCA) (Reynolds). In this case, Mercantile Bank (Mercantile) did not have outlets in certain areas and, for the convenience of its clients, opened bank accounts in those areas with Standard Bank (Standard). As such, it became a client of Standard. Clients of Mercantile in those areas could deposit cheques into accounts of Mercantile with Standard without having to go to a branch of Mercantile. Within two years of being liquidated, Duchini (Pty) Ltd deposited two cheques made out to Mercantile into one of its accounts with Standard. That account with Standard was credited

accordingly. On the instructions of one of the directors of Duchini, the amounts of the deposits were credited by Mercantile to accounts held by that director with Mercantile. This reduced the indebtedness of that director to Mercantile. Duchini was not indebted to Mercantile at the time. The liquidators of Duchini sued Mercantile, seeking to set the payments aside under s 26(1) of the Act. The Court held: “Indeed a disposition without value which is liable to be set aside is one in which the person who benefited by the disposition runs the risk of having such disposition being set aside in certain specified situations. It is manifest that [Mercantile] benefited from the dispositions. First,... it obtained the benefit of a credit to its account with the Standard Bank which it could immediately use. Secondly, it was thereafter able to reduce the debt which was owed to it by [the director in question] Makrides by the amounts of the two deposits making use of the transfer of the credit to its account at the Standard Bank.’ As can be seen, the court highlighted the need for the recipient to benefit from the disposition.”

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[20] Zamzar Trading (Pty) Ltd (in Liquidation) v Standard Bank of SA Ltd 2001

- (2) SA 508 (W) (Zamzar). There the liquidators of Zamzor brought a claim against the bank. The claim was that Zamzar and one Sferopoulos had conspired in a fraudulent scheme. Pursuant to that scheme, Zamzar opened a current account with the bank. VAT repayments were made into the account and, on instruction from Zamzar that it had an obligation to

Sferopoulos, the bank debited the account in favour of Sferopoulos. The liquidation of Zamzar ensued and the liquidators sought to recover these amounts from the bank. There was no suggestion that the bank was in any way aware of the fraudulent dealings... In upholding an exception to the particulars of claim, Goldblatt J held: 'Should plaintiff's cause of action be valid it would mean a commercial bank would in respect of each customer and each transaction have to ascertain where the customer's funds came from and the reason therefore and why such funds were being paid to a named payee. Thus the bank would only be permitted to safely execute its client's mandate if it could be satisfied it was not tainted in any way. The whole scenario envisaged by the plaintiff is, in my view, repugnant to logic and law as it would create a situation where a principal could visit liability on his agent for performing precisely the mandate which it had given to its agent.'

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[21] The reference by Engelbrecht AJ to to 'Gore' is a reference to Van Wyk, fn 14.

[22] Ward, fn 9.

[23] Id, par 42

[24] Id par 49

[25] Id par 52

[26] Id par 53.

[27] In Ward, supra, Binns-Ward J referred to the case of Joint Stock Company Varvarinskoye v Absa Bank Ltd. and Others

[2008] ZASCA 35; 2008

- (4) SA 287 (SCA), which he found was distinguishable on its facts. The facts of Joint Stock Co, which are likewise distinguishable from the facts of the present matter, may be used to illustrate the point I make in par 46 above. The facts were articulated By Binns-Ward in the judgment, as follows: “The facts in Joint Stock Company supra were also very different from those presented in the current matter. In Joint Stock Company an account in the bank’s customer’s name was used, by agreement between the applicant and the customer, to ‘warehouse’

funds payable by the customer to its subcontractors under a mining engineering contract with the applicant. The bank was fully aware that its customer had no right to the warehoused funds, which were paid into the account for the exclusive purpose of satisfying the subcontractors’ claims. A special withdrawal system had been put in place to ensure that the customer could not draw on the account other than to make payments or transfers to the subcontractors. The bank nevertheless purported to set off the

credit balance in the account against the amounts owed to it by its customer on other accounts conducted at the bank by the latter that were overdrawn. The appeal court held that the bank was not entitled to have done so because of its knowledge that the customer had no right to the funds in the special account other than for the designated purpose. An order was therefore made declaring that the rights to the amount standing to the credit of the account before the purported set off vested in the applicant and the bank was ordered to pay the amount, together with mora interest, to the applicant. In Joint Stock Company, the bank’s appropriation, by way of book entries, of the funds standing to its customer’s credit in the special account to settle the customer’s indebtedness to the bank on other overdrawn accounts occurred in a contractual context. On the facts of that case, it was the effect of the peculiar contractual context and the bank’s privity with it that invalidated the bank’s actions.”

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[28] The terms of their contract are outlined in fn 2 above.

[29] Lief NO v Western Credit (Africa) (Pty) Ltd 1966

(3) SA 344 (W) ('Lief') (the case is referred to in par 48(v) below).

[30] Respondent's supplementary heads, par 37.

[31] Sub-sections 361(1) & (2) of the Act, read as follows:

(1) In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. "(2) In any winding-up of any company, at all times while the office of the liquidator is vacant or he is unable to perform his duties, the property of the company shall be deemed to be in the custody and under the control of the Master." The effect of the grant of the provisional liquidation order was that the directors of CBP ceased to be such functionally, officially and nominally, their powers and duties were terminated, and they were deprived of all control of the company's property. See: Secretary for Customs and Excise vs Millman, N.O. 1975 (3) SA 544 (AD) at 552 H. [They lose control of the company's affairs and the power and authority to manage the business]. By the same token,

[31] Sub-sections 361(1) & (2) of the Act, read as follows:

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[32] Pride Milling, cited in fn 2 above.

[33] Id, par 13

[34] Id, paras 18 & 20.

[35] Id, par 19

[36] Id, par 14.

[37] See Da Silve N.O and Another v Pick n Pay Retailers (Pty) Ltd (6367/2022)

[2023] ZAGPJHC 42 (25 January 2023), par 20, where Keightley J quoted from Ellering Bros (Pty) Ltd v McCarthy Ltd 2014

(4) SA 22 (SCA), albeit that this trite position was discussed within the context of principles governing uncompleted executory contracts.

[38] Id par 15

[39] Id par 18

[40] Id, paras 16& 17.

[41] Id, par 18

[42] Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others (2023

(1) SA 398 (SCA), par 11

[43] Eravin Construction CC v Bekker NO (20736/2014) [2016] ZASCA 30 (23 March 2016) at par 21

[44] In their founding papers, the liquidators point out that CBP was wound up on the basis that it was unable to pay its debts and that this continues to be the case. In support thereof, the liquidators provided a copy of the first liquidation and distribution account in respect of CBP's administration in liquidation. It showed that claims totalling R4 050 063.77 were up till then proved against the estate by creditors at statutory meetings of creditors, members and contributories held at the Paarl Magistrates Court during the course of 2020, leaving a shortfall of R3 335 126.62. CBP is thus clearly unable to pay its the debts of its proven

creditors. This was common cause on the papers.

[45] Par

35. See too paras 32-34 where Petse AP discusses the fact that the consequences of visiting dispositions of the kind dealt with in s 341(2) with voidness, will not always be harsh.
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Prepared on 10 October 2026 · Esheria