

SOUTH AFRICA / JUDGMENT

Cooper N.O and Others v VAB Sales and Distribution (Pty) Ltd (1498/22) [2024] ZAWCHC 379; [2025] 1 All SA 178 (WCC) (19 November 2024)

[2024] ZAWCHC 379

COURT

Western Cape High Court, Cape Town

BEFORE

S Mthimunye

CASE / FILE NUMBER

1498/22

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FLYNOTES:

COMPANY – Winding up –
Disposition –
Three payments made after
provisional liquidation order were void – Another and
largest payment to respondent made on
day of order – No
indication of new trading business with respondent – Payment
not in ordinary course of business
– Insolvent company had
knowledge that application for winding-up was enrolled on that
date – Effect was to ensure
that respondent had advantage
over other creditors – Respondent ordered to pay the four
amounts to the liquidators
– Companies Act 61 of 1973, s
341(2).
HIGH
COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION,
CAPE TOWN
Case No.: 1498/22
In the application

between:

CHAVONNES
BADENHORST
First
Applicant
ST
CLAIR COOPER N.O.
TIRHANI
SITOS DE SITOS MATHEBULA N.O.
Second Applicant
CAPE
BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION)
Third Applicant
and
VAB
SALES AND DISTRIBUTION (PTY) LTD
Respondent
(Reg.
No M2002/020993/07)

JUDGMENT

DELIVERED THIS 19TH DAY OF NOVEMBER 2024

INTRODUCTION

- [1] This application concerns the question of whether or not payments made by the third applicant Cape Basic Products (Pty) Ltd (in liquidation) (hereinafter referred to as CBP) into the bank account of the respondent VAB Sales and Distribution (Pty) Ltd (VAB Sales) after the deemed date of CBP's compulsory 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 CBP having been so appointed by the Master on 25 September 2020. They contend that three payments made by CBP after the date of its provisional winding up and one payment made on the date CBP was liquidated constitute void dispositions, as envisaged in section 341(2) of the Act. They therefore seek an order declaring each of the four payments, totalling R1 096 958,64 made by CBP to VAB Sales to be void dispositions in terms of section 341(2) of the Act. They further sought an order for the repayment of the various amounts so paid, together with interest thereon, and an order for costs.

- [3] During the proceedings the respondent conceded that they no longer disputing the validity of the provisional liquidation order. Furthermore they are also not disputing that the liquidators acted jointly in this application. The only issue that remained which was raised by the respondent was whether the payments made by the third applicant were dispositions. This submission is premised on the contention that CBP in liquidation and Savers Lane are two different entities.
- [4] On 14 February 2020, an application for the third applicant's winding up was launched in this court by CBP's creditor Consilium Trust (IT 1382/2011) under case no: 3048/20, 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 an order of this court. It is important to note subsequent to the application for winding-up being launched in court, the directors of CBP, Mr Humm and Mr Conradie continued to trade under their trading name Savers Lane and made payments to the detriment of creditors. The respondent being one of such creditors.
- [5] VAB Sales resists the relief sought on the basis that the relevant payments do not constitute 'dispositions' as envisaged in section 341(2), alternatively if the court were to consider these dispositions as contemplated in the Act, the court must find that the 'first payment' of R773 650,89 was made before the provisional order of liquidation was granted and therefore in exercising its discretion find in favour the respondent and validate the payment in terms of section 341(2) of the Act. Furthermore, the respondent disputes that any of the payments received, constitute dispositions from the third applicant on the basis that they contend it was effectively payments from Savers Lane Holdings (Pty) Ltd (third applicant's trading name) to respondent for services already rendered.
- [6] It is common cause that during the period of 2 March 2020 and 9 June 2020, CBP made the following four payments to respondent, in aggregate totalling R1 096 958,64:
- (i) R773 650,89 on 2 March 2020
 - (ii) R773 307,65 on 30 April 2020
 - (iii) R200 000,00 on 15 May 2020
 - (iv) R50 000,00 on 9 June 2020
- [7] The parties agree that the prevailing legal position, as confirmed in *Pride Milling Company (Pty) Ltd v Bekker NO and Another* 2022(2) SA 410 (SCA) ("Pride Milling"), is that a court has no discretionary power to validate dispositions of its property by a company after the company has been previously liquidated.
- [8] The applicant's pleaded case is to effect that the payments made to VAB Sales constitute dispositions as envisaged in the Act, firstly because payments were made in the respondents bank account after CBP's provisional liquidation, therefore the payments fall foul of the operative part of section 341(2) in terms of which dispositions made by the company being wound up are void. Secondly that payments were made into VAB Sales bank account,

reflecting a single payment bearing a particular batch reference number on the third applicant's bank statement.

[9] Further on 19 July 2021 the applicants attorney caused a formal demand in terms of section 345 of the Act to be served on the respondent at its registered address by the sheriff calling on the respondent to pay the sum of R1 096 958.64 into their trust account within 21 days. Despite the aforesaid demand the respondent failed to pay any portion of the monies so demanded.

[10] The respondent in rejecting the demand made by the applicant pleaded In their papers that it had concluded a written agreement with Savers Lane Holdings (Pty) Ltd on 29 November 2019 and never had a contract with Third Applicant (CBP). In paragraph 15 and 16 of their answering affidavit, deposed to by Mr FJH van Zyl, the respondent provides a summary of the sequence of events that led up to the amount of R773 650,89 being transferred into VAB Sales bank Account on 2 March 2020 as follows:

"15. During the last quarter of 2019 a certain Mr Hamm came to see us in order to discuss the business arrangement between Savers Lane and the Respondent going forward. He explained that he and one Frederick Conradie were now at the helm of Savers Lane and that their aim was to take it into a new direction. He said that they had resolved to ride the company of the distribution portion of their business, which had become too costly and that they wanted instead for the Respondent to do their distribution at a contracted fee.

16. I informed Hamm however Savers Lane was in arrears with its account in a significant amount for the products which we had already delivered, and which had remained outstanding for a considerable period. He assured us that the outstanding debt would be promptly addressed. Pursuant thereto on 29 November 2019, Savers Lane Holdings, represented by Mr. Hamm, and the Respondent entered into a written credit agreement, as is evidenced by the signed copy which is attached hereto and marked "FJHZ2". In terms thereof they would be granted credit to a maximum of (+-) R1 000 000.00 (one million Rand).

17. Each product deliver by the Responded to Savers Lane was accompanied by an invoice related to the particular consignment of goods. The Respondent keeps detailed client ledger reflecting each particular order, the debit amount related to each order, the credits, being the payments, which have been received from the particular client. . . ."

[11] Van Zyl then goes further in his answering affidavit by confirming that although the amount of R773 650, 89 was received on 2 March 2020, as per the bank statement, it was only captured on their accounting system by himself on 3 March 2020. He further avers that no further invoices were rendered to Savers Lane Holdings with any further products, however that Savers Lane Holdings continued paying the outstanding balance due to respondent until December 2020.

- [12] Van Zyl in addition disputes that respondent have ever dealt with or contracted with CBP and avers that respondent has never delivered any of its products to CBP. In addition he avers that neither Hamm nor Conradie who they dealt with during the trade transactions made the respondent aware that they were the directors of CBP, consequently they only became aware of such after being served with the application.
- [13] Van Zyl goes further in his answering affidavit contending with regard to the payment of R773 650, 89, which he refers to as the “first payment”, that neither the first applicant nor Mr Oliver or Ms Arendse employed by ABSA bank can say when the “first payment” in fact occurred. In amplification of this contention, Van Zyl avers that there is no indication from any of the documents annexed to their affidavits, which event occurred first between the first payment and the granting of the provisional liquidation order. Accordingly, he contends that no basis has been proffered by the

applicants as to why the court would have to assume in their favour that the “first payment” had in fact occurred after the provisional order.

- [14] In addition, Van Zyl further submitted that it was not apparent that the provisional order was in fact granted on 2 March 2020 or at all. In amplification of this contention he avers that from their investigations of the attorneys of record, it appeared that the order was not granted in open court on 2 March 2020. He avers that the investigations revealed that the matter was called on 2 March 2020, whereafter it stood down and thereafter never called again at all that day. From the papers it appears that Van Zyl is implying, that the provisional liquidation order was granted in chambers, after official court hours.
- [15] Van Zyl avers that due to the fact that the provisional order involving a life changing event was not granted in open court, and affording parties who have an interest in the matter to address the court, resulted in the provisional order being unlawful and void or rescindable by any party having an interest in the matter.
- [16] He further avers that as a result of the order being taken in chambers, it could very well have occurred after the normal court hours or even after business hours. In addition, he avers that his attorney has requested a record of the proceedings of 2 March 2020 to be typed and that it will be filed as soon as it comes to hand.
- [17] Van Zyl further avers that if the court were to find that the payments constitute dispositions of the kind envisioned by section 341 of the Act, the court should in exercising its discretion in favour of the respondent by declaring that the first payment is not void. In amplification of this assertion Van Zyl referred the court to the following considerations at page 140 paragraph 40.1 to 40.7 of his affidavit:

40.1 The fact that all the payments which were received by the Respondent had been received in exchange for value, in the form of delivery of stock products to Savers Lane.

40.2 The fact that the Applicants have sold Savers Lane stock and equipment, which was sold for a substantial amount, to the benefit of the Third Applicant and its creditors.

40.3 That the product delivered by the Respondent and the payments related thereto had evidently occurred in the normal course of the businesses of Savers Lane and the Respondent.

40.4 That the Respondent, like many other businesses, was detrimentally impacted by the COVID-19 pandemic and that any order compelling repayments of the money received would be devastating to the Respondent's business, causing it irretrievable loss.

40.5 The funds, now pursued by the Applicants, were received and disbursed over the last two years in the normal course of the Respondent's business.

40.6 That I personally invested my pension funds in the company and the salaried income and occasional dividend which are declared constitute my primary source of income. In the premises my livelihood and that of my co-shareholders will also be severely affected in the event that the court finds that the repayments sought by the Applicant's must occur.

40.7 The Respondent will be severely prejudiced in the event that it was constrained to pursue legal action against Savers Lane, bearing in mind that Savers Lane's assets appear to have been sold by the Applicants per public auction, to pay the Third Respondent's creditors. There will probably be no assets to attach in the event of the Respondent obtaining judgment against Savers Lane. That much appears from the deed search, a copy of which is attached hereto and marked "FJHZ6(a)" conducted by Chantel Van Zyl, from which it is evident that Savers Lane does not possess any immovable property capable of being attached."

[18] The respondent further denies that they owe the applicant an amount of R1 096 958.64 or that the said sum is payable by them to the applicants. In addition, they also deny the averments by the applicants that a letter of demand was served on 8 Main Road, Villiersdorp, as such they contend that they have never been afforded an opportunity to respond to any letters of demand from the applicant.

[19] In reply to the respondents answering affidavit the applicants contends that the second applicant supports the application as per the confirmatory affidavit filed by him. They further contended that the applicant was indeed provisionally liquidated on 2 March 2020, thus the first payment made to the respondent was made after the provisional liquidation order was granted in court. In amplification of this contention the applicant annexed "RA1", which illustrates an ABSA bank single transaction tracing audit trail, accompanied by a confirmatory affidavit, confirming that a payment of R773 650.89 was made to the respondent on 2 March 2020, captured at 15h59:35 and approved 16h09:41. In addition the applicants aver that it is accordingly overwhelmingly probable that the payment was made after the provisional order had already been granted.

- [20] The applicants further pointed out that Savers Lane is the third applicants trading name and is not a separate entity. Therefore the second applicant held and dealt with the assets of Savers Lane during the course of the administration of the third applicant in liquidation. Thus by the respondent having contracted with and received payment from Savers Lane in fact dealt with and received payments from the third applicant.
- [21] The applicants admits that the respondent had granted the third applicant a R1 million credit facility whilst the third applicant was already in substantial arrears with respondent, and that the respondent thereafter recovered various payments in substantial amounts from the third applicant despite the respondent having ceased its supply of further goods to the third applicant. The first and second applicants reiterates that these payments received by the respondent from the third applicant were preferential payments which would invariably denude the third applicant of its assets in proportion to the value of the payments, to the prejudice of the third applicant's remaining creditors.
- [22] In addition, in reply the applicant contended that they sold Savers Lane's assets because the third applicant and Savers Lane are one and the same entity in liquidation. Thus the payments that were made to the respondent were not made in the ordinary course of the third applicant's business as the payments were made after the third applicant was already in liquidation or deemed to be so. In addition, the first and second applicants contended that it is trite that little weight should be attached to the hardship that the respondent or its members may suffer if the payment is not validated, since the purpose of section 341(2) of the Companies Act 61 of 1973 is to minimise hardship to the general body of creditors.

LEGAL PRINCIPLES

- [23] Section 341(2) of the Act, provides:

“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.”

- [24] The Act defines dispositions 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.”
- [25] The object of section 341(2) is to prevent the dissipation of the company's assets while the winding-up application is pending and to ensure that its creditors are paid *pari passu*. Accordingly, the section applies as much to bona fide business transactions as to preferences. In relation to payments made between

the bringing of the winding up application and the grant of the provisional order, the onus is on the person seeking to uphold the transaction to establish circumstances justifying the making of a validating order (*Lane NO v Olivier Transport* 1997 (1) SA 383 (C)). If that onus is not discharged, there is no basis for the exercise of the discretion in section 342(1).

[26] The Supreme Court of Appeal in *Pride Milling Co (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA), reaffirmed the principle that in terms of section 341(2) of the Companies Act 61 of 1973, every disposition of its property 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.

ANALYSIS

[27] The respondent's argument, namely, that the payments by the insolvent company to it, on or after 2 March 2020, did not constitute 'dispositions' as contemplated in section 341 (2) of the Act, was premised on the contention that third applicant, in liquidation and Savers Lane are two different entities. The respondent confirms at page 131, para 15 of his answering affidavit that he had a business arrangement with Mr Hamm who is one of the directors of third applicant;

"15. During the quarter of 2019 a certain Mr Hamm came to see us in order to discuss the business arrangement between Savers Lane and the Respondent going forward."

[28] The confusion of the identities of the two entities is cleared up by Mr Steenkamp in his affidavit attached at page 266 to the applicant's replying affidavit. He confirms that he was the founder and director of CBP (in liquidation) and that CBP (the third applicant) traded under the name and style of Savers Lane. The first and second applicants goes further in their papers to show that the third applicant and Savers Lane are one and the same entity, by stating that the assets of Savers Lane were being held and dealt with by the second applicant during the course of their administration of the third applicant in liquidation. In amplification, the applicant argued that because the respondent having contracted with and received payment from Savers Lane, in fact dealt with and received payments from the third applicant. I am inclined to agree with the applicants, as there can be no doubt that these two entities, the third applicant (in liquidation) and Savers Lane are one and the same and consequently the payments made by the insolvent company is classified as dispositions as defined in the Act.

[29] Having established that the payments made by the third applicant to the respondent are dispositions in terms of the Act, I now turn to consider whether these dispositions are void and if so whether this Court in exercising its judicial discretion may validate them.

[30] It is common cause that the payments on 30 April 2020, 15 May 2020 and 9 June 2020 alleged to have been made were in fact made, and that they were made in the period after the provisional liquidation order was granted. A further undisputed fact is that a first payment of R773 650,89 was made on the same day the third applicant was placed under provisional liquidation, 2 March 2020. I will first turn to deal with the payments made after 2 March 2020.

Payments made after 2 March 2020

- [31] Savers Lane, which has been established through the available documents, is the same entity as CBP (the third applicant). After 2 March 2020, the date the court granted an order for the provisional liquidation against the third applicant, Savers Lane transferred three payments, totalling R323, 307.75, as stated in prayers 1.2, 1.3 and 1.4 of the Notice of Motion. During both written and oral arguments presented in court, the applicants' counsel noted that the respondent appears to accept that this Court has no discretion to validate the three payments made to the respondent after 2 March 2020. The respondent did not dispute this contention from the applicants.
- [32] What should next be considered is whether this court can validate these payments which was made in lieu of a historical debt from trade relations between the third applicant and the respondent.
- [33] The answer to this question is found in *Pride Milling* [supra], where 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 section 348 of the Act) and the date of the provisional winding-up order. Notwithstanding the provisional winding-up order, payments were made after the effective date. Similar as in the current case the joint liquidators pleaded case were that the payments in issue were void and have therefore no force and effect in terms of section 341(2) of the Act, unless validated by court.
- [34] The Companies Act decrees that payments made after the commencement of a winding up is void. Thus this Court does not have to exercise its discretion with regard to these three payments as they are void. This Court in terms of the Act has limited discretion to validate the void payments if made during the period between the launching of the liquidation application (the date on which the registrar stamped the application and gave it a case number), and the date of granting of the provisional liquidation order. In exercising its judicial discretion the Court took into account various factors that the Supreme Court of Appeal has listed in *Pride Milling* [supra] at paragraph 24, as follows:

“[24]

- (a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. (See *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 (Ch) at 25.)
- (b) Each case must be dealt with on its own facts and particular circumstances.
- (c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.
- (d) The Court must be free to act according to what it considers would be just and fair in each case. See *Herrigel's case* supra at 678 and see *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA) at 490 and 492 [1970] 1 All ER 353 AT 356 and 357 - 8).
- (e) The Court in assessing the matter, must attempt to strike some balance between what is fair vis-à-vis the creditors of the company in liquidation.
- (f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation. See *Re Wiltshire Iron Co; Ex parte Pearson* (1868) LR Ch App 443 to 447.
- (g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets. See *Herrigel's case* supra at 679 – 80.
- (h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive. See *Wiltshire case* supra at 447.
- (i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for the winding-up or of the fact that the company was in financial difficulties. See *Re Tellsa*

Furniture (Pty) Ltd (1984 – 85) 9 ACLR 869 (NSW).

- (j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. See *Herrigel's case* supra at 680.
- (k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. See *Herrigel's case* supra at 680.”

[35] The court further in paragraph 30 of the *Pride Milling* judgment confirms in unequivocal terms that every disposition of its property by a company being wound up is void and as such have no effect in the eyes of the law. In addition it confirms in paragraph 31 that ,

“[31] As to the rider to s 341(2), its manifest purpose is to give the court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature..., this discretion is only exercisable in relation to payments made between the date of

lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding up a company unable to pay its debts, the interests of the creditors¹⁴ and those of the beneficiary of the disposition. “

- [36] In light of the aforementioned circumstances and recognizing that both parties are in agreement, that the three payments specified in prayers 1.2, 1.3, and 1.4 of the Notice of Motion totalling R323 307.80 were executed subsequent to the issuance of the provisional liquidation order was granted on March 2, 2020. Accordingly, the Court determines that these payments are void. Furthermore, due to the void nature of these payments, they cannot be ratified by this Court in accordance with the Pride Milling principle referenced earlier in this judgment.

Payment made on 2 March 2020

- [37] The only bone of contention is the first payment, referred to in prayer 1.1 of the applicants Notice of Motion. This payment in the amount of R773 650.89 was made on 2 March 2020, the same date the provisional liquidation order was granted. Although it is not clear what time the provisional order was granted in court, in applying the Pride Milling principle together with common sense, this Court has special regard to the circumstances surrounding the granting of this provisional liquidation order. It is a known fact that court hours are between 10h00 and 16h00. Not only was the insolvent company aware that their matter was on the roll on 2 March 2020, but more importantly that the matter stood down. From the papers and court file it is clear that the insolvent company was unable to pay its debts and as a result entered into a credit agreement with the insolvent company. The fact that the insolvent company had knowledge that the application for the winding-up was enrolled on the 2 March 2020 precluded them from making any payments to creditors in the ordinary course of business.
- [38] Furthermore there is nothing to the contrary except the averments made by the respondent that subsequent to an investigation by their attorney they assumed that the matter was never recalled in open court, but that they assume that the provisional order for the winding-up of third applicant was granted by a judge in chambers possibly after court hours (after 16h00). This contention by the respondent is unsubstantiated and highly improbable and falls to be rejected as it is based on mere speculation. The only evidence before this Court is a copy of the provisional court order signed and granted on 2 March 2020 by a judge. As there is nothing to indicate otherwise this court can reasonably accept that the judge granted this order during court hours (between 10h00 and 16h00). Nonetheless, the argument that the order was granted between 10h00 and 16h00 is inconsequential. A court order is a court order. The judge applied his mind before granting the order unless it is suggested that the order was fraudulent. I find that there is insufficient factual evidence placed before the Court by the respondent to convince this court to find that this order was granted out of court time.

[39] I now turn to deal with the time the payment was made on 2 March

2020. It is clear from the applicants founding papers that they approached ABSA bank for assistance in identifying the recipients of all the payments made by the third applicant from the insolvent companies account after the deemed date of commencement of the third applicant's winding up. In their replying affidavit at page 261 para 10.1 the applicants asserts that in light of fact that the payment of R773 650,89 to the respondent on 2 March 2020 was captured at 15h59:35 and approved at 16h09:41 it is overwhelming probable that the payment was made after the provisional order had already been granted.

[40] I am inclined to agree with the applicants that it is overwhelmingly probable that the provisional liquidation order was granted during court time, as already discussed above, subsequently I find it was made before the payment was approved at 16h09. In other words the first payment was made after the provisional liquidation order was granted. It follows therefore in terms of *Pride Milling* [supra] that I am constrained by the provisions of section 341(2) of the Act not to come to the assistance of the respondent to validate this payment as it is void.

[41] Looking at the ledgers at page 150 we see that the insolvent company on 3 March 2020 had an opening balance of R847 023,03 which is reduced by the payment made to the respondent of R773 650,89, resulting in third applicant ending up with a closing balance of R73 372,11. Thus is exactly the type of mischief that section 341(2) of the Act is designed to prevent, that one person gets paid at the expense of all the others.

[42] More importantly, the third applicant on the respondent's own version, owed the respondent a historic debt as formalised in terms of the credit agreement between the respondent and Savers Lane. It is clear that the payment which was made to the respondent was not made in the ordinary course of the company's affairs, instead it is apparent that third applicant was improperly alienating funds by settling a historical debt owed to the respondent.

[43] The effect of the actions of the insolvent company was to ensure that the respondent had an advantage over other creditors in the winding-up, which the respondent would otherwise not have enjoyed. It is not just and fair that the respondent be paid practically his whole outstanding debt and for the other creditors to stand empty handed at the cost of proving their claims against the insolvent company. The Court has to strike a balance between what is fair to the third applicant and what is fair to the other creditors. It is definitely not fair to the creditors that the respondent gets practically paid his whole historical debt at the detriment of the other creditors.

[44] When the winding-up application was launched there is no indication from the papers that in that week there was any new trading business between the respondent and the insolvent company. It cannot therefore be said that this disposition was made in the ordinary course of the company's affairs.

[45] Lastly I find that because the insolvent company was aware of their winding-up and that they knew they were in financial difficulties. I attach little weight to the argument that the respondent will suffer hardship that will be suffered by declaring this payment to be void. The Court cannot only consider the hardship the respondent would face, but also has to consider the hardships that will be suffered by the other creditors if this payment were to be validated.

[46] For all the reasons given above, I am satisfied that the applicants 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.

[47] As regards to costs, the general rule is that the successful party is entitled to the costs, which in this instance would be the applicants.

ORDER:

The following order is granted:

1. The respondent is ordered to pay the following amounts to the first and second Applicants in their capacities as the joint liquidators of the third applicant:

1.1 The amount of R773 650,89;

1.2 Interest on the sum of R773 650,89 at the maximum permissible statutory rate from 2 March 2020 to date of final payment.

1.3 The amount of R73 307,75;

1.4 Interest on the sum of R73 307, 75 at the maximum permissible statutory rate from 30 April 2020 to date of final payment.

1.5 The amount of R200 000,00;

1.6 Interest on the sum of R200 000,00 at the maximum permissible statutory rate from 15 May 2020 to date of final payment.

1.7 The amount of R50 000,00;

1.8 Interest on the sum of R50 000,00 at the maximum permissible statutory rate from 9 June 2020 to date of final payment.

2. The respondent is ordered to pay the applicant's costs of suit.

S MTHIMUNYE

JUDGE OF THE HIGH COURT

Date of hearing: 15 August 2024

Judgment

delivered: 19 November 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time of hand-down is deemed to have been at 10h00 12 November 2024.

APPEARANCES

Counsel for Applicants: AR Newton

Instructed by Lombard & Kriek Inc per JC Kriek

Counsel for Respondent: M Combrink

Instructed by Van Zyl Attorneys per C van Zyl

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