

SOUTH AFRICA / JUDGMENT

Hill N.O and Another v Liberty Group Limited and Others (M 653/2022)

[2024] ZANWHC 316 (11 October 2024)

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COURT

North West High Court, Mafikeng

BEFORE

Morgan

CASE / FILE NUMBER

M653/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHWEST

DIVISION, MAHIKENG

CASE

NO: M653/2022

Reportable: NO

Circulate to Judges:

YES

Circulate to

Magistrates: NO

Circulate to Regional

Magistrates: NO

DATE: 11 October 2024

SIGNATURE:

In

the matter between:

TRACY
HILL N.O
FIRST
APPLICANT
CLIFFORD
THABANG MAREDI N.O
SECOND
APPLICANT

In
their capacity as joint liquidators of Aurita Boerdery CC (in
liquidation) with registration number 2011/097995/23
and

LIBERTY GROUP
LIMITED
FIRST RESPONDENT
GIDEON DE BEER
MAKELAARS CC
SECOND RESPONDENT
GIDEON DE BEER
MAKELAARS CC
THIRD RESPONDENT

Neutral

Citation: Tracy
Hill N.O and Another v Liberty Group Ltd and 3 Others
ZANWHC (11 October 2024)

Heard:

16 July 2024

Delivered:

11 October 2024

Summary:

Liquidation proceedings - Opposed
application brought by joint liquidators in terms of section
341(2) of the old Companies Act 61 of 1973 against a person alleged
to have been the sole member of closed corporation for
a declarator
against certain payments to be declared void and refundable to the
liquidated entities insolvent estate.
This
judgment was circulated electronically to the parties'
representatives by email. The date and time of hand-down are deemed
to be 10h00 on Friday, 11 October 2024.

JUDGMENT

MORGAN AJ

INTRODUCTION

[1] This is an opposed application in terms of section 341(2) of the Companies Act 61 of 1973, the old Companies Act. This section, in relevant parts, provides that

“341. Dispositions and share transfers after winding-up void.—

(1) ...

(2) 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.”

[2] The applicants are the joint liquidators of Aurita Boerdery CC - in liquidation, namely Ms Tracy Hill and Mr Clifford Maredi, who will be referred to collectively as the liquidators.

[3] The relief sought in this application is primarily against the second respondent, Gideon de Beer Makelaars CC, a closed corporation duly registered and incorporated as such in the Republic of South Africa, which is situated within this Court’s

jurisdiction and conducting the business of and insurance and financial services intermediary and/or broker

[4] The first respondent is Liberty Group Limited, a public company incorporated within the Republic of South Africa. The third respondent is Ginger Investments Thirty CC, a closed corporation duly incorporated and registered in a foreign country, namely the Republic of Namibia. Both entities are cited because the liquidators believe that they are interested in the outcome of the matter. However, no relief is sought against them directly.

[5] The liquidators contend that the payments made from Aurita CC’s bank account—sought to be declared void in this application and refunded by Makelaars CC—were initiated by Mr Aubrey Reynecke ("Reynecke"), a natural person alleged to be a South African citizen and the sole member of the third respondent. It is further asserted that Reynecke loaded and submitted the bank instructions for the impugned payment. However, he is not cited as a party in the present application.[1]

[6] At the commencement of the hearing, counsel for the liquidators submitted that the relief initially sought in the notice of motion was to be amended and limited to prayers 1 and 4 only. This amendment was necessitated by the fact that a substantial portion of

the amount originally claimed—approximately R6 000 000.00 (six million rands)—had already been recovered by the liquidators from the first respondent.

[7] In summary, the only relief sought before me is a declaration that the payment of R375,000 (three hundred and seventy-five thousand

rand) made from Aurita CC's bank account, on the instruction of Reynecke, into the bank account of a certain Mr de Beers for professional services rendered ("the impugned payment"), should be declared void and refunded to the liquidators by the second respondent, Makelaars CC.

[8] In its opposing affidavit, Makelaars CC provides a detailed explanation of the nature and purpose of the impugned payment, annexing an invoice in support thereof. It disputes the liquidators' allegation that the payment was made as fees for Mr de Beers' alleged

assistance in successfully lodging a disability insurance claim with Discovery Life Limited on behalf of Reynecke in his personal

capacity. Instead, Makelaars CC contends that the funds from which the impugned payment was made did not belong to Aurita CC and, by extension, were not part of its insolvent estate. It further asserts that the initial receipt of these funds was the result of an erroneous payment into Makelaars CC's bank account. According to Makelaars CC, Reynecke merely redirected the funds to the correct beneficiary once they had cleared. In essence, Makelaars CC argues that both factually and legally, the funds deposited into Aurita CC's bank account—and from which the impugned payment was made—did not belong to Aurita CC, as the initial deposit was made in error.

[9] In my view, the questions of whether the initial funds received in Aurita CC's bank account were deposited in error, or whether those funds belonged to Aurita CC upon receipt and before the impugned payment was made, are not matters for determination in the present application. Rather, the issue before me is whether the liquidators have established a case to prove that the impugned payment of R375,000, made by Reynecke from Aurita CC's bank account to Mr de Beers, is void in terms of section 341(2) of the old Companies Act, and if so, the legal consequences of such a declaration.

[10] As stated above, section 341 provides that any disposition of a company's property (including rights of action) made after the commencement of its winding-up, when the company is unable to pay its debts, shall be void unless the Court orders otherwise.

[11] In my view, a court can only void a disposition of property that legally belonged to the insolvent entity. In other words, the court must be satisfied that the property so disposed belonged to the insolvent entity, or the insolvent entity had full rights of ownership over it (unencumbered) at the date of disposal in proper and unambiguous terms. As such the liquidators should be able to prove or attest to the source of the funds i.e. Match the invoices and payment thereof to the funds in then account this can be easily ascertained through the production of invoices and payment schedules or bank statements and flow of funds schedules, read together with the annual financial statements. These averments and evidence must be set out and produced in the founding affidavit.

- [12] In determining whether the impugned payment falls within the scope of section 341(2) of the Companies Act 61 of 1973 in casu, it is necessary to consider the principles of commixtio (mixing of funds) and mistaken payments as established in South African law.
- [13] The doctrine of commixtio arises where interchangeable or fungible goods, such as money, are mixed in a manner that renders them indistinguishable from one another. Once funds are deposited into a bank account, ownership of the specific money deposited is lost. The account holder does not retain ownership of the money itself but acquires a personal right against the bank for the balance standing to its credit. This principle was confirmed by the Supreme Court of Appeal (SCA), wherein the court held that once money is mixed with other funds in an account, its identity is lost, and ownership vests in the bank. The account holder merely holds a claim against the bank and not ownership of the deposited funds.[2]
- [14] The principle governing mistaken payments is equally well established. Where money is transferred into an account due to an error, the recipient is not entitled to retain it, and restitution may be claimed by the rightful owner.
- [15] In Nissan, the SCA made it clear that where a party mistakenly transfers funds into another's bank account, the recipient has no lawful claim to those funds and must return them.[3] Even earlier, in another matter the SCA, held that money mistakenly credited to an account does not confer a right of retention upon the account holder.[4]
- [16] The liquidators have failed to refute or contradict Makelaars CC's pleaded version that the funds from which the impugned transaction was made did not, either factually or legally, belong to Aurita CC. As such, Aurita CC had no legal right of ownership or claim over those funds. Furthermore, Makelaars CC contends that the erroneous receipt of the initial funds did not result in any mixing or commixtio of funds that could have conferred ownership upon Aurita CC by virtue of such mixing. In Nissan the SCA confirmed that when funds are mistakenly deposited into an account, ownership does not transfer to the account holder merely by virtue of possession, nor does the account holder acquire enforceable rights over the funds.[5] Without a legal basis, valid claim, or legitimate reason for receiving the funds, Aurita CC could not have assumed ownership.
- [17] In simple terms, Aurita CC merely held or possessed the funds but did not own them. Consequently, it had no legal right to utilise or dispose of them at will, nor did it acquire enforceable real rights over the funds that could be asserted against third parties. This is consistent with the principle that where money is received in error it does not automatically become part of the recipient's estate unless there is a valid legal claim to the funds.[6]
- [18] Moreover, if Reynecke's bank instruction was indeed unlawful, he ought to have been joined or cited in these proceedings in his personal and/or professional capacity. Notably, the founding affidavit contains no averment as to the basis on which Reynecke had the authority to access Aurita CC's bank account and issue payment instructions to its beneficiaries. This remains unexplained and unclear. In Nissan the SCA opined that where funds are transferred to a third party, restitution must be sought directly from the party that ultimately

retained the benefit.[7] If de Beer was the true recipient of the impugned payment, it follows that the relief sought against Makelaars CC alone may not achieve the intended purpose and effect. The failure to join necessary parties therefore fundamentally affects the enforceability of any order.

[19] It is trite that courts should issue orders that are capable of enforcement and produce a practical effect.[8] In my view, even if this court were to find that the impugned transaction or payment is void, the question remains: against whom

would the consequences lie? If, as the liquidators contend, Makelaars CC was not the intended beneficiary of the impugned payment and the funds were directed to de Beer for professional services rendered, it is unclear how an order against Makelaars CC would be practically enforceable.

[20] The affidavits present conflicting versions, raising a genuine dispute of fact. However, no contradictory version has been presented by the liquidators in reply or by way of a supplementary affidavit that would compel me to view Makelaars CC's version as far-fetched or implausible. This would not justify departing from the well-established principle set out in the frequently cited Plascon-Evans case, which guides our approach to resolving disputes of fact on affidavit in motion proceedings where a final order is sought. In essence, the principle dictates that, in motion proceedings where disputes of fact arise on affidavit, a final order may be granted only if the facts averred by the liquidators in their founding affidavit—facts that have been admitted by Makelaars CC in its opposing affidavit (common cause facts)—are considered in conjunction with the version pleaded by Makelaars CC in its opposing affidavit. Furthermore, those facts must be sufficient to establish a case for the relief sought in the liquidators' notice of motion.

[21] Furthermore, in addition to the liquidators' failure to join Reynecke to these proceedings, they have also failed to join de Beer, the person whom they allege in the founding affidavit is the ultimate beneficiary of the impugned transaction. Joinder and non-joinder are matters of substance rather than form. The common law rules relating to the obligatory joinder of parties remain unchanged. The principal rule in this regard is that anyone with a direct and substantial interest in the matter must be joined.[9]

[22] If a party has a direct and substantial interest[10] in any order, the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings[11] unless the court is satisfied that he has waived his right to be joined.

[23] The mere fact that a party may be interested in the litigation's outcome does not warrant a non-joinder objection.[12] To the contrary, in casu, I find the non-joinder objection as raised by the Makelaar CC warranted and with merit.

- [24] Furthermore, in my view, even if the liquidators were successful in proving that the impugned payment was void, the practical effect would be that de Beer would be required to refund the money unlawfully paid to him by Reynecke. If de Beer is unable to do so, and in addition to declaring the impugned transaction void, the court may find that the amount should be recouped from Reynecke, given that he initiated the unlawful payment instruction. The liquidators could have also explored holding Reynecke personally liable, through the piercing of the corporate veil, if they were of view that his conduct met the requirements of the test by him initiating the erroneous and alleged unlawful payment from Aurita CC's bank account. However, this aspect was not pleaded in the founding affidavit nor included in the relief sought in the notice of motion. Additionally, no replying or supplementary affidavit was filed, despite an indication that one might be delivered during the proceedings. For such relief to be granted, a proper application with the essential averments and pleaded case would have had to be brought, which is not the case here.
- [25] In conclusion, I find that the liquidators have failed to establish a proper case for the relief sought under section 341(2) of the old Companies Act. Firstly, they have not demonstrated that the funds from which the impugned payment was made to Makelaars CC both factually and lawfully belonged to Aurita CC. Secondly, they have failed to file a replying affidavit addressing the averments made by Makelaars CC, which cast doubt on the plausibility of its version regarding the nature and reason for the impugned payment. Lastly, they have failed to join the necessary parties, against whom the declaratory relief and final interdict would be enforceable, thereby rendering any such order without practical effect.
- [26] Moreover, there are auxiliary procedural issues which behave this matter that fortify my cost order against the applicants, over and above the default rule that "costs follow the cause"[13]. The issues are inter alia, the liquidators non-compliance with the this Court's directives as stated in the Division's Practice Manual, i.e. having this matter removed by the presiding judge from the unopposed court roll more than one occasion as a result of the liquidators non-compliance with specific provisions of the Practice Manual and also for having being removed by the presiding judge from the unopposed roll of 5 October 2023 after it has become opposed and costs occasioned with the postponement being reserved; also the non-filing of heads of argument, duly accompanied by a list of authorities and practice note by the liquidators before the matter was finally enrolled on the opposed motion roll before me.
- [27] All these procedural non-compliance issues in my view, could have been avoided by the liquidators as dominus litis if for the latter issues due compliance was had prior to having the matter finally set down before on the opposed motion roll me and in respect of the former issues highlighted, if they had voluntarily removed the matter from the unopposed motion roll at the appropriate time and not during the proceedings in unopposed motion court.
- [28] In the circumstances, I make the following order:

The application is dismissed with costs in the administration of the estate, on party and party scale, including the costs of one counsel where so employed on Scale B.

M MORGAN

Acting Judge of the High Court of South Africa,

North West Division

PARTIES REPRESENTATIVES

FOR THE FIRST AND SECOND APPLICANTS

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FOR THE FIRST AND THIRD RESPONDENTS

No notice to opposition delivered and no appearance at the hearing.

FOR THE SECOND RESPONDENT

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[1] In the founding affidavit the liquidators aver that there are currently questions and uncertainty regarding Reynecke's capacity as a process had commenced to appoint curators for his estate. Nothing more has been said or furnished to this Court to appraise me of any new developments or confirmation of the liquidators' assumptions as per the undertaking in the founding affidavit.

[2] Nissan South Africa (Pty) Ltd. v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd. Intervening) (27/2004)

[2004] ZASCA 98; [2006] 4 All SA 120 (SCA); 2005 (1) SA 441 (SCA) (1 October 2004), ("Nissan").

[3] Supra at fn2.

[4] First National Bank of Southern Africa Ltd v Perry NO and Others (100/99) [2001] ZASCA 37; [2001] 3 All SA 331 (A) (26 March 2001)

[5] Supra at fn 2.

[6] Supra at fn 3.

[7] Supra at fn 2.

- [8] Premier Prvinsie Mpumalanga v Globersdalse Stadsraad 1998 (2) SA 1136 (SCA); Director-General Department of Home Affairs v Mukhamadiva 2014 (3) BCLR 306 (CC) at para 35; and MEC for Education, KwaZulu-Natal v Pillay [2007] ZACC 21; 2008 (1) SA 474 (CC) at para 32.
- [9] United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Others [1972] 4 All SA 493 (C); 1972 (4) SA 409 (C) at 415A; HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme & Others (1213/2016)
- [2017] ZASCA 160 (24 November 2017). However, the refusal of access to forensic reports on the basis of the non-joinder of the third-party authors of report, where no relief, direct or indirect was sought against the report authors, joinder not necessary: Ericsson South Africa (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others [2023] 2 All SA 378 (GJ). Keele v Legal Practice Council and Another [2023] 4 All SA 422 (GP) at [25], referring to ABSA Bank Limited v Naude NO and Others [2015] JOL 33323 (SCA), 2016 (6) SA 540 (SCA) at [10].
- [10] Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388A–I; Umndeni (Clan) of Amantungwa and Others v MEC, Housing and Traditional Affairs, KwaZulu-Natal and Another [2011] 2 All SA 548 (SCA); Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction and Others 2011 (6) SA 331 (GSJ) at [12]; Hlophe v Freedom Under Law and related matters [2022] 1 All SA 721 (GJ).
- [11] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) 659; Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A). Cf President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) par 233; Transvaal Agricultural Union v Minister of Agriculture & Land Affairs 2005 (4) SA 212 (SCA) par 64. City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at [44]; City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at [37]; Mtshali and Others v Masawi and Others 2017 (4) SA 632 (GJ). The courts will not deal with matters where a third party who may have a direct and substantial interest in litigation is not joined, or where no adequate steps could be taken to ensure that a judgment will not prejudicially affect that party's interests: .
- [12] Judicial Service Commission and Another v Cape Bar Council and Another [2013] 1 All SA 40 (SCA), 2013 (1) SA 170 (SCA) at [12].
- [13] Ferreira v Levin NO (2) [1996] ZACC 27; 1996
- (2) SA 621 (CC) at para 3; President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another 2002 (2) SA 64 (CC) at para 15; Neugebauer & Co Ltd v Hermann 1923 AD 564, 575; and Penny v Walker 1936 AD 241, 260.

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