

SOUTH AFRICA / JUDGMENT

Van Zyl N.O and Another v Cometa Trading (Pty) Ltd (4425/24) [2024] ZAWCHC 368 (14 November 2024) [2024] ZAWCHC 368

COURT

Western Cape High Court, Cape Town

BEFORE

Montzinger

CASE / FILE NUMBER

4425/24

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FLYNOTES:

COMPANY – Winding up – Disposition – Money transferred from Senqu’s bank account to Cometa – After commencement of Senqu’s winding-up – Status of money held in Senqu’s account – Cometa alleging funds belonged to it – Mere belief in ownership, absent any formal arrangement with the bank to transact on Senqu’s account with its own funds – Cannot override the statutory protections afforded to creditors – Cometa ordered to pay R710,763,92 and interest – Companies Act 61 of 1973, s 341(2).

IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN
Case number: 4425/24
In the application

between: THOMAS CHRISTOPHER
VAN ZYL N.O.
First
Applicant
DEIDRE
BASSON N.O.
Second
Applicant
In their capacities as
duly appointed final liquidators
of Senqu Coal Trading
(Pty) Ltd,
Registration
No: 2018/043976/07)
and
COMETA
TRADING (PTY) LTD
Respondent
(Application
seeking disposition in terms of
s 341(2) of the
1973 Companies Act)

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 02 August 2024
Judgment delivered
electronically: 14 November 2024

JUDGMENT

Montzinger AJ

Summary Introduction

1. The applicants, in their capacity as the liquidators of Senqu Coal Trading (Pty) Ltd (“Senqu”), have approached this court seeking an order to recover a disposition in the amount of R710,763.92. After the commencement of Senqu’s winding-up this sum was paid from its bank account to the respondent, Cometa Trading (Pty) Ltd (“Cometa”).
2. Senqu use to operate a coal mine and in July 2018 entered into an agreement with Pindulo VDM Proprietary Limited (“Pindulo”) for the sale of coal. In terms of the agreement, Pindulo was required to make upfront payments for its coal purchases. By October 2018, despite having received payment Senqu allegedly defaulted on its delivery obligations. This alleged default led to a dispute between the parties, culminating on 23 February 2022 when Pindulo instituted winding-up proceedings against Senqu for its failure to repay R6,286,228.90, the balance of the upfront payment. On 1 March 2022 the Sheriff served the winding-up application on Senqu at its registered address.

3. Senqu's provisional winding-up was ordered on 25 March 2022, followed by a final winding-up order on 6 May 2022. On 13 September 2022, the final liquidators were appointed and pursuant to their appointment assumed control of Senqu's assets, including its bank accounts. The liquidators discovered that while Senqu had ceased trading as early as 2019 its bank accounts remained active. They also learned that these bank accounts were apparently used by Cometa and other entities controlled by a Mr. Pritchard as cash holding accounts.
4. It later surfaced that on the same day the sheriff served the winding-up application payment of R710,763.92 was transferred from Senqu's First National Bank account (the "706-account") to Cometa. This transfer was done by a representative of Cometa who had access to Senqu's bank accounts. The liquidators were of the view that since the transfer from Senqu's 706-account to Cometa was after the commencement of the winding-up proceedings it constituted a disposition in an attempt to place Senqu's property beyond the reach of its creditors. It made a demand to Cometa to repay the funds, which was refused.
5. Consequently, the liquidators sought this court's intervention under ss 341(2) of the Companies Act 68 of 1973 (the "1973 Act"). They request an order that Cometa repay to the insolvent estate the amount of R710,763.92, including interest on the aforesaid sum and costs.

The contentions by the liquidators and Cometa

6. The liquidators' case is straightforward. First, they assert that the funds in the 706-account belonged to Senqu. Second, they advance a case that if the court finds that the funds indeed belonged to Senqu, they are entitled to relief under ss 341(2) of the 1973 Act. This is because it is common cause that the winding-up process had already commenced at the time the payment was

made.

7. As noted, Cometa does not dispute that the winding-up process had commenced at the time the payment was made from Senqu's 706-account, nor does it dispute that Senqu was insolvent at that time. However, Cometa opposes the application on the basis that the liquidators have failed to satisfy the remaining requirements of ss 341(2). Cometa argued that the disposition was not made by Senqu, as the transfer was executed by a representative of Cometa who had access to the 706-account. Cometa further contends

that, although the funds were held in Senqu's bank account, they did not belong to Senqu but rather to Cometa. Alternatively,

Cometa submits that if the court finds the disposition should be voided, it should exercise its discretion to validate the transaction, as the payment was made in good faith and under the belief that the funds were its own.

8. Cometa further relied on the principle that, in motion proceedings seeking final relief, any material dispute of fact must be resolved in its favour under the Plascon-Evans rule[1]. Cometa also argued that the liquidators cannot rely on evidence obtained during the insolvency inquiry into Senqu's affairs, as such evidence is inadmissible in these proceedings.

The evidence in support of the application

9. It is necessary to outline the nature and scope of the undisputed evidence on which I will decide the application. To that end, I will briefly summarise the roles of key individuals involved in the operations of both Senqu and Cometa.
10. Brett Pritchard ("Pritchard"), who deposed to the answering affidavit, is identified as the sole director and controlling mind behind Senqu and is also a director of Cometa. Then there is Lisa Lourie, also a director of Cometa who played a role in the financial administration of the group of companies. Lourie was the person that transferred the R710,763.92 from the 706-account to Cometa on 1 March 2022. There is also Mariska de Bruyn who served as Senqu's independent bookkeeper.
11. The affidavits filed by both parties disclose several undisputed facts that I consider material for determining the matter. Consequently, I do not believe there are any material issues in dispute that would prevent me from deciding the matter or that would require me to resolve them by applying the Plascon-Evans rule. Furthermore, to determine this application I have not considered evidence obtained during the insolvency inquiry and therefore do not need to address the issue whether such evidence is admissible.
12. The liquidators made the following essential allegations which were confirmed by the affidavits filed on behalf of Cometa:

12.1 Despite the fact that Senqu ceased trading in 2019, its 706-account remained active from March 2021 to March 2022. The Bank statements showed that most payments from the 706-account to Cometa were in rounded sums.

12.2 On 1 March 2022, the same day the liquidation application was served at Senqu's registered address, an unrounded amount of R710,763.92 was transferred from the 706-account to Cometa.

13. Pritchard confirmed the following facts:

13.1 The amount of R710,763.92 was paid from Senqu's 706-account, and the payment was made after the winding-up of Senqu had commenced.

13.2 The 706-account was linked to Cometa's online banking portal and one of many accounts under its control. Following the start of the winding-up process and transfer of the funds, Cometa requested the bank to delink the 706-account from Senqu and transfer

it to Cometa. The bank refused the request.

13.3 Cometa's finance department was generally authorised by Pritchard to make transfers to and from the 706-account.

14. Lisa Lourie confirmed the following facts:

14.1 Senqu was the first company established by Pritchard, and for convenience its enterprise banking profile was used to set up banking profiles for subsequent companies.

14.2 Funds from other companies within the group were deposited into Senqu's 706-account.

14.3 As an executive director of Cometa, she had control over the 706-account. She made the payment on 1 March 2022 from Senqu's 706-account to Cometa.

15. Having regard to these undisputed facts, I will now outline the legal principles applicable to an application to set aside a disposition under ss 341(2) of the 1973 Act.

Setting aside a disposition in terms of ss 341(2) of the 1973 Act

16. Subsection 341(2) is triggered at the commencement of the winding-up proceedings and must be read with s 348 of the 1973 Act that provides that the winding-up is deemed to commence at the time of the presentation of the winding-up application to the court.

17. Once the winding-up has commenced, ss 341(2) of the 1973 Act stipulates as follows:

'Dispositions and share transfers after winding up

(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.'

18. Upon examining this subsection, it is evident that the requirements for establishing a voidable disposition are relatively straightforward. The liquidators must demonstrate that:

(i) a disposition was made; (ii) by the company (iii) of property that belong to the company to be wound-up (iv) and that it was unable to pay its debts after the commencement of the winding-up.

19. The SCA in *Pride Milling*[2] has provided a helpful exposition of the principles a court should have regard to when considering an application by the liquidators to set aside a disposition that falls foul of ss 341(2). It is thus not necessary for me to reproduce the principles in this judgment.

20. It suffices for me to keep in mind, while considering this matter, that the predominant purpose of ss 341(2) is to decree that all

dispositions made by a company being wound-up are void[3] and the mischief that ss 341(2) seeks to obviate. The mischief is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors[4] as assets should rather be preserved and made available for distribution among a company's creditors on an equal footing[5], which distribution is fundamental to the integrity of the insolvency regime.[6]

The status of money in a bank account

21. An important consideration in this matter though is the status of the money that was held in Senqu's bank account. Especially, in the context of the facts of this matter, as Cometa alleged that the funds in the 706-account was not Senqu's but rather belonged to Cometa.
22. *S v Kearny*[7] confirmed that our law has for long recognised the position that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money, it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer.
23. In *Whitehead*[8] the court held that once money was transferred into a bank account of another person, the transferor's personal right to the credit in the account was terminated. Instead, the money became the property of the bank by the operation of the commixtio rule, regardless of whom made the deposit and the circumstances in which it has been made[9]. This means that the bank becomes accountable to its customer, the holder of the account in which the money was transferred, and not a third party. The transferor therefore had no claim, as a personal right, to the money that had been transferred to the customer. This position was endorsed, during 2021, by the SCA in *South African Reserve Bank v Leathern N.O. and Others*[10]. Also, more recently in *Van Wyk Van Heerden Attorneys v Gore N.O and Another*[11] the SCA once again held that:

"Under the banker-customer relationship, the bank is indebted to the customer. The bank owns the money but is obliged to comply with

instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf."[12]

24. I am bound by the aforementioned authorities. Therefore, once funds are deposited into a bank account, ownership transfers to the bank, who in turn becomes indebted to the account holder. The law is clear that the depositor loses ownership, and any claim to the funds by a third party must be pursued against the account holder, not the bank.
25. There is an exception to the general legal position as foreshadowed. In *Joint Stock Company*[13] the SCA explained that, where to the knowledge of the account holder and the bank, the account holder had limited control of the funds, the right to claim funds standing to the credit of the account did not accrue to the account holder but to the depositor. The court also confirmed that if funds held in an account can be identified as having been reserved for or 'belonging' to another by agreement with the bank, the account holder is not

entitled to deal with those funds[14].

Evaluation

26. As noted earlier, ss 341(2) sets out four requirements that an applicant must establish to void a disposition. Thus far, two of these requirements have been satisfied: (i) a disposition was made, and (ii) it occurred after the commencement of Senqu's winding-up, when Senqu was unable to pay its debts. The remaining issues to be determined are whether the funds in question were the property of Senqu and whether the disposition was in fact made by Senqu.
27. Considering the applicable legal principles governing the status of funds in a bank account, I am satisfied that the liquidators have met the remaining two requirements to void the disposition. It is undisputed that the R710,763.92 was held in a bank account registered in Senqu's name. The fact that Senqu had ceased trading is immaterial. Until the company is wound up or deregistered, it remains a juristic entity capable of owning assets and exercising control over them.
28. Furthermore, there was no agreement with the bank that would allow Cometa to rely on the exception, as per Joint Stock Company, to claim rights against the bank relating to the funds in the 706-account. I endorse the proposition by Mr. Bothma, who appeared for the liquidators, that while Cometa could have treated the 706-account as its own, until such time as the bank had been informed of the position, the obligations owed by the bank, in respect of the funds, accrued to Senqu. In fact, the logic of the legal position is manifested when it is considered that Cometa attempted to engage with the bank after the winding-up process have already commenced to delink the 706-account and transfer it to Cometa. A request the bank denied, as it was entitled to do as its obligation was with Senqu. This finding therefore disposes of the requirement that what was disposed of did not belong to Senqu.
29. Mr. Jonker, appearing for Cometa, argued that even if the court finds that the funds in the 706-account legally belonged to Senqu, the application must still fail because the liquidators have not proven that the disposition was in fact made by Senqu. He argued that the transfer was effected by Lourie, a representative of Cometa, rather than by anyone acting on behalf of Senqu. Consequently, it was submitted that Senqu exercised no control or management over the funds in the 706-account. Therefore, since the

disposition

was not initiated by Senqu, this presents, according to Mr. Jonker, an insurmountable obstacle for the liquidators.

30. However, the legal position appears to support the liquidators' case. As the court established in the Whitehead[15] judgment, the circumstances under which the deposit was made are irrelevant. Factually, Lourie's claim that she transferred the funds in her capacity as a representative of Cometa, without any instruction from Pritchard, seems opportunistic. This

distinction was crucial for Lourie to draw, as Pritchard had admitted that he controlled Senqu. Even setting aside the suspicion that Lourie's claim was a calculated attempt to undermine the liquidators' case, I do not need to reject her assertion for purposes of my ultimate conclusion. Having regard to the applicable legal principles, either Lourie, Pritchard, nor Cometa had present evidence that it acted as an undisclosed agent on Senqu's bank account or had some agreement of which the bank was aware. No evidence of such agreement has been presented.

31. Consequently, the legal position prevails: the funds in the 706-account belonged to Senqu. The fact that the transfer was executed by someone unauthorised to act on Senqu's behalf does not alter this conclusion, as the law attaches no significance to such an action in determining ownership of the funds.
32. I therefore find that the liquidators have made out a case for all the requirements of ss 341(2) and are entitled to an order as per the notice of motion. What remains is a consideration whether I should exercise my discretion and validate the disposition.

Discretion

33. Subsection 341(2) affords a court a discretion to validate a disposition that did not comply with its provisions. The nature of a court's discretion is also set out in *Pride Milling*[16]. This essentially entails that a court's discretion to validate a disposition under ss 341(2) is broad but must be exercised in accordance with general principles of judicial discretion. The overarching consideration is what is just and fair in the specific

circumstances of the case and arriving at that conclusion the court must balance the interests of the party seeking validation against those of the company's creditors, with particular attention to the good faith and honest intention of the parties involved. Also, dispositions made in the ordinary course of the company's bona fide operations are more likely to be validated, while those aimed at preferring certain creditors or conferring undue advantage are typically refused. Ultimately, each case is assessed on its unique facts, and past cases provide guidance rather than fixed rules[17].

34. I also take heed of the warning expressed by the court in *Pride Milling*[18]:

'Suffice it to state that a court confronted with this question is enjoined to keep at the forefront of its mind that the legislature has ordained that all dispositions by a company of its property whilst it is being wound up are void. But at the same time a court must be alive to the fact that in an appropriate case it may order otherwise. And, I daresay, that when sanctioning a departure from the statutorily ordained default position, ie voidness of the disposition, a court must guard against a result that would undermine the underlying purpose of the provision.'

35. Cometa, with reference to the decision of *Land v Olivier Transport*[19], contended that it would be just and fair in the particular circumstances of this case to validate the disposition having regard inter alia:

- (i) that it genuinely believed that all funds held in the 706-account were its own; (ii) it always maintained complete control over the 706-account and conducted transactions solely for its own benefit; (iii) at the time the funds were transferred, Cometa was unaware of the presentation of the winding-up application; and lastly (iv) Cometa had no intention of disposing of Senqu's assets or showing preference to any of Senqu's creditors over others. On the contrary, it operated under the belief that it was dealing with its own funds.
36. While Cometa's grounds for seeking validation of the disposition warrant consideration, they fall short of justifying why I should exercise my discretion and depart from the statutorily ordained default position of rather declaring the disposition void. The starting point is the legislative intent behind the provision: to protect the concursus creditorum and prevent the dissipation of a company's assets once the winding-up process has commenced.
37. Cometa's claim that it genuinely believed the funds in the 706-account were its own may be important in assessing bona fides and good faith, but does not absolve it of liability. As I have found the account was held in Senqu's name and remained active even after Senqu ceased trading. Regardless of Cometa's internal understanding, the legal ownership of the funds remained with Senqu, and the transaction occurred after the winding-up process had commenced. The mere belief in ownership, absent any formal arrangement with the bank to transact on Senqu's account with its own funds, cannot override the statutory protections afforded to creditors.
38. Cometa's argument that it was unaware of the presentation of the winding-up application at the time of the transfer similarly fails to carry sufficient weight. The timing of the disposition, occurring on the very day the application was served together with the fact that an unrounded amount was transferred, raises concerns about the propriety of the transaction. Even if Cometa lacked actual knowledge of the winding-up application at that moment, the proximity of events suggests that the court should rather intervene. I cannot only consider Cometa's state of mind but also the broader implications of the disposition on the insolvent estate.
39. Furthermore, Cometa's assertion that it had no intention to dispose of Senqu's assets or to prefer one creditor over another does not adequately address the critical issue: the effect of the disposition. The transfer of R710,763.92 had the inevitable consequence of prejudicing the concursus creditorum, regardless of Cometa's intentions.
40. In light of these considerations, I am not persuaded that Cometa has demonstrated sufficient grounds for this court to exercise its discretion and validate the disposition.

Conclusion

41. I am therefore satisfied, for the reasons foreshadowed, that the liquidators are entitled to an order as per the notice of motion. In the circumstances I make the following order:
- 1) The respondent to pay to the applicants the sum of R710 763,92.
 - 2) Interest on the aforesaid sum at the prescribed rate from 1 March 2023 to date of final payment.
 - 3) The respondent to pay the applicant's costs on a party and party scale, including the costs of counsel on scale B from 12 April 2024.

A MONTZINGER

Acting Judge of the High Court

Appearances:

Applicant's counsel:

Mr. P S Bothma

Applicant's attorney:

Boshoff Bronn & Smit Inc

Respondent's counsel:

Mr. J W Jonker

Respondent's attorney:

Cliffe Dekker Hofmeyr Inc

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984

(3) SA 623 (A) at 634D-635D

[2] Pride Milling Company (Pty) Ltd v Bekker NO and Another (393/2020)

[2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) ("Pride Milling")

[3] Pride Milling par 13

[4] Pride Milling par 30

[5] Herrigel NO v Bon Road Construction Co (Pty) Ltd and Another 1980

(4) SA 669 (SWA) at 678; See also Lane NO v Oliver Transport 1997

(1) SA 383 [F – G] ("Land v Olivier Transport")

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- [6] Pride Milling par 19
- [7] 1964
- (2) SA 495 (A) at 502H–503A
- [8] Trustees of the Insolvent Estate of Whitehead v Dumas and Another 2013
- (3) SA 331 (SCA) (“Whitehead”)
- [9] Whitehead at para 13
- [10] 2021
- (5) SA 543 (SCA) par 17
- [11] 2022] ZASCA 128; [2022] 4 All SA 649 (SCA)
- [12] at paras 14-16
- [13] Joint Stock Company Varvarinskoye v ABSA Bank Ltd and Others
- [2008] ZASCA 35; 2008
- (4) SA 287 (SCA) (“Joint Stock Company”)
- [14] Joint Stock Company
- [15] Where the court refers to; Louw NO & others v Coetzee & others 2003
- (3) SA 329 (SCA) at 334H-I; Commissioner of Customs and Excise v Bank of Lisbon International & another 1994
- (1) SA 205 (N) at 208I.
- [16] par 26
- [17] With reference to the expositions by the authoris: PM Meskin et al Henochsberg on the Companies Act 61 of 1973 vol 1 5 ed (1994), p 676 – 81 and MS Blackman et al Commentary on the Companies Act vol III (OS, 2002)
- [18] Par 25
- [19] At 386 D – 387B - provides a useful guide of factors a court can consider giving expression to the exercise of its discretion

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