INSOLVENCY LAW UPDATES JANUARY 2022[1]

INDEX

CASE NAMES

AFGRI OPERATIONS LTD v HAMBS FLEET (PTY) LTD 2022 (1) SA 91 (SCA)

Gore N.O and Another v Ward and Another (2977/2021) [2022] ZAWCHC 3 (31 January 2022)

SUBJECT INDEX

Impeachable transactions -**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*- fraud and theft-disposition without value**Gore N.O and Another v Ward and Another (2977/2021) [2022] ZAWCHC 3 (31 January 2022)**

Winding-up — Application for final order of liquidation — Discretion of court — Unpaid creditor having right, ex debito justitiae, for final winding-up order against company which fails to discharge debt — Court's discretion to refuse order very narrow and exercised only in special or unusual circumstances — Existence of counterclaim not in itself reason to refuse liquidation but may be factor — If considered to be one, then counterclaim must be 'genuine'. **AFGRI OPERATIONS LTD v HAMBS FLEET (PTY) LTD 2022 (1) SA 91 (SCA)**

[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

CASES

Gore N.O and Another v Ward and Another (2977/2021) [2022] ZAWCHC 3 (31 January 2022)

Impeachable transactions -**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*- fraud and theft-disposition without value

[1] The applicants, who are the joint liquidators of Brandstock Exchange (Pty) Ltd (in liq.), have 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 payments were made by means of transfers from funds held to the credit of Brandstock's bank account into the respective banking accounts of the respondents. The applicants also seek orders directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of s 26, or on the grounds of their alleged unjust enrichment at the company's expense.

[2] The first respondent is Mr Benjamin Ward of Stellenbosch. The second respondent is Radicle Produce Company (Pty) Ltd, a company also based in Stellenbosch. The first respondent is the sole director of the second respondent.

[3] The application was opposed. The respondents contended that the payments were made not by Brandstock but rather by Mr Bruce Philp, the sole shareholder and director of Brandstock, using funds stolen by Philp from Mr CJ (Neil) Louw. They argue 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 deny that Brandstock made 'dispositions' to them within the meaning of that word in **s 26** of the **Insolvency Act. **; They also deny that they were enriched by the payments.

[4] It was at Louw's instance that Brandstock was placed in liquidation. He is the only creditor to have proved a claim in the winding-up.

[5] Louw averred in his affidavit in support of the application for Brandstock's liquidation that, on or about 20 April 2018, he had concluded an oral agreement with Philp, representing Brandstock, in terms of which he undertook to finance the purchase by Brandstock of 220 heifers in Cathcart in the Eastern Cape for the VAT-inclusive sum of R2 257 200 so that Brandstock could on-sell the cattle to a buyer in KwaZulu-Natal, one Marinus 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.

[6] Subsequently, on 23 April 2018, Philp sent an email to Louw as follows:

> '**From:** Bruce Philp **xxx@vodamail.co.za**
>
> **Date:** 23 April 2018 at 11:41:24 SAST
>
> **To: xxx@icloud.com**
>
> **Subject: Cattle deal**
>
> Hi Neil
>
> Just to confirm our deal:
>
> 220 Heifers are being loaded from Cathcart in the Eastern Cape through and (*sic*) agent Jerry Joubert. His commission is being paid by the seller. I shall confirm the sellers (*sic*) details once I receive the invoice tomorrow when I shall need to pay.
>
> Cost: 220 x R9000 = R1 980 000.00 plus VAT = R2 257 200.00
>
> The cattle are being sold to Marinus van Rensburg and they are being delivered to Tugela. I shall invoice him R11 000.00 each. He is paying the transport directly.
>
> Profit on the deal is R440 000.00 of which 70% is payable to you within 14 days.
>
> Please could you pay the cost value into:

Brandstock Exchange Pty Ltd

Standard Bank

Paarl

////////50

051001

Thank (*sic*) for the support.

Regards

Bruce'

[7] Louw testified in the liquidation application that Philp had telephoned him on 24 April 2018 and told him that the cattle were ready to be trucked to the purchaser but that the seller required immediate payment to release them. He asked Philp to provide him with a delivery note or invoice from the seller and was informed by Philp that the seller would send the delivery note that evening as he (the seller) was not in his office at the time. Louw thereupon transferred the required amount in two tranches from his current account into the account of Brandstock. His subsequent endeavours to obtain a copy of the seller's delivery note or invoice from Philp were fruitless.

[8] Louw expected to receive payment in terms of the agreement on or about 8 May 2018. When it was not forthcoming, he went to see Philp at the latter's home at Easthill Farm, Muldersvlei, on 9 May 2018. He found Philp too inebriated to discuss matters. Philp thereafter successfully evaded Louw's further attempts at engagement until 15 May 2018, when Louw came across him in the bar of the Klapmuts Hotel. According to Louw, Philp then said to him 'Can't you afford to wait 10 days for your money?'. Not wishing to make a scene in the presence of the other people in the bar, Louw let matters rest and proceeded on holiday to Namibia hoping for the best.

[14] Once ownership passes to the bank it immediately incurs the obligation to account to its customer. But a customer does not always acquire an enforceable

personal right to the credit in his account merely by virtue of the deposit. A bank is entitled to reverse a credit in the account-holder's bank account if it transpires that the account had been credited in error, that the customer had acquired the money by fraud or theft, that the drawer's signature on a cheque had been forged, or that the bank notes deposited in the account were forgeries. It is contended on behalf of Dumas that because he was the victim of fraud or theft by Whitehead the bank must reverse the credit in the trustees' account.

[15] Where, as in this case, A causes the transfer of money from his bank account to the account of B, no personal rights are transferred from A to B; what occurs is that A's personal claim to the funds that he held against his bank is extinguished upon the transfer and a new personal right is created between B and his bank. Ownership of the money – insofar as money *in specie* is involved – is transferred from the transferring bank to the collecting bank, which must account to B in accordance with their bank-customer contractual relationship. This is so even where A was induced to enter into an agreement through B's fraudulent misrepresentation. In that case A will have a claim for delictual damages against to compensate him for his loss but will not be able to claim a retransfer of the credit from the bank. And if B is subsequently sequestrated the claim will lie against B's estate because an insolvent's personal right to credit falls into his estate upon sequestration.

...

[22] The reference to "fraud or theft" in *Nissan* must be understood in context: and one must have regard to the approach of Thirion J in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd*, which Streicher JA approved. Here, R defrauded the Commissioner and paid an amount of money into his bank account with the Bank of Lisbon. The circumstances under which R obtained the money – the taking of the moneys having been nothing short of theft – Thirion J held were such as to deprive its delivery of any legal effect. In other words the bank acquired ownership of the money without a corresponding obligation to account to its customer and the customer had no contractual or other right to the funds. And, although he considered it unnecessary to decide whether the Commissioner could invoke an enrichment action against the bank because the matter was referred to the

trial judge for oral evidence to be heard, he accepted that such a claim (the *condictio sine causa*) was competent.

[23] So both *Nissan* and *Bank of Lisbon* were concerned with theft or fraud outside a contractual context. By contrast the investment transaction between Dumas and Whitehead, though tainted by fraud, nevertheless constituted the *causa* for the payment. Dumas intended to pay Whitehead and voluntarily made the payment into Whitehead's account; it is immaterial that the payment was solicited through Whitehead's misrepresentation and fraud.

[24] As I have said, as between the account-holders no personal rights are transferred; the personal right to the credit of the one account-holder is extinguished upon the transfer and a new personal right created immediately for the other. Whitehead, as a customer of Absa, immediately acquired the new right to the money in his account, which was enforceable against the bank when ownership passed to it, despite the absence of valid causa – ie a valid underlying agreement. Absa then had both a duty to account and a corresponding liability to its customer, Whitehead, and on his sequestration two weeks later, to the trustees of the insolvent estate. Absa is therefore not enriched and no enrichment action lies against it. Dumas had only a delictual claim against Whitehead arising from the fraudulent misrepresentation, which induced the transfer of the money, and on the latter's sequestration a claim against the trustees.'**[15]**

[49] The effect of the payments made by Louw to Brandstock in the current case cannot be materially distinguished from that of the payment made by Dumas to Whitehead. The fact that the payment was made to the intended payee in terms of a contract meant that it could not be regarded (to use the language employed by Thirion J in *Bank of Lisbon* supra, at p.208G) as being deprived of any legal effect. That is the critical point of distinction between this case and *Nissan*. Furthermore, in the current case, 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.

[50] The contractual character of the transaction in terms of which the payments to Brandstock were made by Louw also disposes of the contention by the respondents' counsel that, payment generally being regarded as a bilateral transaction,**[16]** it had not been established that Brandstock, as distinct from Philp personally, had intended to receive the payment. If it is recognised, as I have held it has to be, that the dealings between Louw and Philp resulted in a contract between Louw and Brandstock, and that Louw's payments were made in terms of that contract, it can hardly be maintained that Brandstock did not receive them when Louw performed under the contract. Any doubt that could be raised in that regard vanished when Brandstock appropriated the funds to make payments to various third parties. As mentioned, Philp's role, in causing those payments to be made, also involved using his authority to operate on the bank account as Brandstock's agent.**[17]**

[51] The question remains whether the payments made by Brandstock, which fell to be regarded as thefts from Louw,**[18]** were 'dispositions' by the company within the meaning of the term in the **Insolvency Act. The** term is defined in s 2 of the Act 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*'. '*Property*' is similarly very widely defined; see note 14 above.

[52] 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 Act, such as s 26. 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'.**[19]**

[53] 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.

[54] In *Kaplan*, the fact that the attorney had been the beneficiary of the unlawful withdrawals made from his attorney's trust account appears to have weighed decisively in the court's decision to characterise them as dispositions of his property for the purposes of **s 29** of the **Insolvency Act. In** the current matter, however, as indeed stressed by the respondents' counsel, Brandstock did not derive any identified benefit from the payments made to redeem the debts of BRP Livestock and Philp to third parties. I nevertheless consider that the reasoning of the court in *Kaplan* would be applicable in the current case if the effect of exercise of Brandstock's power to direct its bankers to make the payments were to adversely affect Brandstock's ability to reimburse Louw or pay its other creditors. It did, and by parity of reasoning with the approach taken by Van Winsen J in *Kaplan*, therefore falls, in my judgment, to be considered as a disposition of property for the purposes of **s 26** of the **Insolvency Act. Reference** may also usefully be had in this regard to *Herrigal NO v Bon Roads Construction Co (Pty) Ltd* **1980 (4) SA 669** (SWA) at 674-5.

[55] There was, understandably in the circumstances, no suggestion by the respondents that the dispositions were for value. On the contrary, they accepted for

the purposes of their contentions that Brandstock had received no value for the payments.

[56] It follows that the application will be upheld. It is unnecessary in the circumstances to deal with the alternative claim based on unjust enrichment. Suffice it to say, however, that I do not consider that a proper case was made out for relief under the alternative claim. Apart from any other consideration, the respondents were not enriched by the payments. They *pro tanto* extinguished the first respondent's claim against Philp**[20]** and in all probability gave rise to a loan account liability by the second respondent in favour of the first respondent.

[57] The applicants claimed *mora* interest on the amounts that they are entitled to recover from the respondents with effect from 18 July 2019, being the date upon which they demanded payment. It appears to me, however, that, although the liquidators' cause of action to have the dispositions set aside accrued earlier, the incidence of the respondents' obligation to pay the amounts sought to be recovered arises only from the date upon which the court sets the impugned dispositions aside; cf. *Duet and Magnum Financial Services CC (in liquidation) v Koster* **[2010] ZASCA 34** (29 March **2010); 2010 (4) SA 499** (SCA); **[2010] 4 All SA 154** (SCA) at para 10. The respondents will thus be in *mora* only with effect from the date of the court's judgment.

[58] An order will issue in the following terms:

1. The following payments by Brandstock Exchange (Pty) Ltd are set aside in terms of **section 26** of the **Insolvency Act 24 of 1936** as dispositions without value:

    1.1 The payment of R250 000 made to the first respondent on 25 April 2018;

    1.2 The payment of R250 000 made to the second respondent on 26 April 2018.

2. The first respondent is ordered, pursuant to the applicants' entitlement in terms of **s 32(3)** of the **Insolvency Act to** recovery of the amount referred to in

paragraph 1.1, to pay the said amount of R250 000 to the applicants, together with interest thereon *a tempore morae* at the rate applicable in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975 (as amended) from the date of this order to date of payment.

3. The second respondent is ordered, pursuant to the applicants' entitlement in terms of s 32(3) of the Insolvency Act to recovery of the amount referred to in paragraph 1.2, to pay the said amount of R250 000 to the applicants, together with interest thereon *a tempore morae* at the rate applicable in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975 (as amended) from the date of this order to date of payment.

4. The respondents shall be jointly liable for the applicants' costs of suit.

AFGRI OPERATIONS LTD v HAMBS FLEET (PTY) LTD 2022 (1) SA 91 (SCA)

Winding-up — Application for final order of liquidation — Discretion of court — Unpaid creditor having right, ex debito justitiae, for final winding-up order against company which fails to discharge debt — Court's discretion to refuse order very narrow and exercised only in special or unusual circumstances — Existence of counterclaim not in itself reason to refuse liquidation but may be factor — If considered to be one, then counterclaim must be 'genuine'.

Generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a respondent company which has not discharged that debt. The court's discretion to refuse an order is a very narrow one, exercised in special or unusual circumstances only. While the existence of a counterclaim by the company may be a factor, it is not in itself a reason for the court to refuse granting an order. (See [7], [12].) The question of onus is critically relevant: once the company's indebtedness to the creditor has been prima facie established, the onus is on the company to show that the indebtedness is disputed on bona fide and reasonable grounds. If it is accepted that a counterclaim is a factor, then the company would have to show that it is 'genuine'. (See [6], [17].)