REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/34587

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

10/10/2017
DATE

SIGNATURE

In the matter between:

ENGEN PETROLEUM LTD Applicant

and

GOUDIS CARRIERS (PTY) LTD (IN LIQUIDATION) Respondent

JUDGMENT

SUTHERLAND J:

Introduction

[1] This application is about the proper interpretation of section 341(2) of the Companies Act 61 of 1973. It reads:

> "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 'commencement' of a winding up is, in terms of section 348, the date the application was filed or presented to court. The parties agree that a disposition made by the company between that date and the date upon which the final winding up order is made is subject to the section. The controversy is about whether a disposition made by the company after the date upon which the final winding up order was made is subject to the section.

[3] The need to decide this question springs from these facts:

3.1. The applicant supplied fuel to the respondent since October 2002. The respondent had a credit account.

3.2. On 14 September 2012 a creditor of the respondent filed a winding up application. The applicant was ignorant of this occurrence.

3.3. On 23 October 2012 a final winding up order was granted, establishing concursus creditorum on 14 September. The applicant was ignorant of this occurrence.

3.4. The applicant continued to supply fuel up to 30 November 2012.

3.5. The applicant learnt of the order on 10 December 2012.

3.6. The proof of the appointment of a liquidator was given to the applicant on 12 December 2012.

3.7. The respondent had made several payments to the applicant:

3.7.1. One payment on 11 September 2014, 4 days before the winding up application was filed.

3.7.2. Between the 14 September and 23 October no payments were made.

3.7.3. Between 23 October and 10 December payments were made on 31 October, and 16 November.

3.7.4. After 10 December 2012, payments were made on 14 December, 7 January 2013, 10 January 2013 and 14 January 2013.

3.7.5. At stake is the liability to repay to the respondent the sums paid after 23 October 2012.

The decision in Excellent Petroleum v Brent Oil

[4] The decision by Prinsloo J in *Excellent Petroleum (Pty) Ltd (In liquidation) v Brent Oil (Pty) Ltd 2012 (5) SA 407 (GNP)* is direct authority for the proposition that dispositions occurring after the final winding up order are not contemplated by section 341(2). I am invited to find that this decision is clearly wrong and not to follow it.

[5] The relevant passages in the judgment read thus:

> "[62] In the result, I have concluded that the payments made by the plaintiff to the defendant, barring those made after 31 May 2006 when the provisional liquidation order was granted and the *concursus creditorum* established, ought to be validated.
>
> The dispositions made after 31 May 2006 when the provisional liquidation order was granted up to 8 June 2006 when the defendant ceased trading with the plaintiff.

[63] It is common cause that the aggregate value of these payments made to the defendant in this period is R422 432.

[64] In *Blackman*, supra, the following is said at 14-55:

> 'It would seem that the position is as follows. A company is being wound-up on the grant of a provisional order of liquidation. *[My note: for this proposition the authors rely on what was said in Secretary for Customs and Excise v Millman NO 1975 (3) SA 544 (A) at 551 – 552. In that judgment reference is also made to Walker v Syfret NO 1911 AD 141 where it was held at 160 that: the effect of a winding-up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors; and at 166 Innes JA said: The sequestration order crystalises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.*] Once that stage is reached, the court (although it can ratify a disposition made before the winding-up order) no longer has the power in terms of s 341(2) to authorise a company to make a disposition of its property. . . . After a winding-up order (whether provisional or final) has been made, the court cannot grant an order for specific performance; for, on the making of the winding-up order, a *concursus creditorum* is established and the creditor loses his right to specific performance (the provisions of s 359 are therefore not relevant). . . . The court has no power to permit a company being wound-up to make dispositions of its assets. After a winding-up order has been granted the court may validate dispositions made before the provisional winding-up order was granted, but cannot validate dispositions made after that order.'

[65] I was not referred to any decided cases exactly on this point. In International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another 1983 (1) SA 79 (C) the question seems to have been left open, although in a different context, at 86 – 87.

[66] Dealing with International Shipping, *Henochsberg* at 677 says the following:

> 'The court refused to permit the creditor to do so on the basis, broadly speaking, that no good reason existed for putting it in a better position in the winding-up than other unsecured creditors. The court found it unnecessary to decide whether the discretion exercised by it was under s 341(2) or the general law; it is respectfully submitted, indeed, that as a provisional winding-up order already existed the court had no discretion at all to allow the creditor to take possession of the property as upon the grant of such order a *concursus creditorum* was instituted.'

[67] I am alive to the fact that in the text of s 341(2) no distinction is made, for purposes of validation, between payments made before the granting of the liquidation order, and those made thereafter.

[68] I have also pointed out what was said in Lane at 387B and in Herrigel at 680 on this particular subject, dealing with the state of affairs once the *concursus creditorum* has been established.

[69] In my respectful view the situation is well summarised, and placed beyond doubt, by what was stated by Innes JA in Walker v Syfret NO supra at 166.

[70] It was against this background that it was argued before me on behalf of the plaintiff that these particular payments post-31 May 2006 cannot be validated.

[71] In my view these submissions are correct, and ought to be upheld." (underlined emphasis supplied)

[6] The gravamen of the criticism directed at the *Excellent Case* is that Prinsloo J, so it is implied, relied uncritically on the academic writers' opinions

and the judgments they cited and, as a result, he did not perform an original analysis of the proposition. It is correct that the opinions of Blackman and Henochsberg are the foundations of the view taken by Prinsloo J, who did not independently interrogate the propositions advanced by them. Prinsloo J, as the cited passage shows, was alive to the fact that not all the authorities cited by the writers were dead on point. If the *Excellent* case has been wrongly decided, then it can only be because the reasoning advanced by these writers must be wrong. That then, is the locale of further examination.

[7] In these works appear the following passages:

Henochsberg on the Companies Act at 677:

'The language of s 341(2) is materially different from that of s 227 of the 1948 English Act (and of s 127 of the 1986 English Insolvency Act). Section 227 referred *inter alia* to 'any disposition of the property of the company ... made after the commencement of the winding-up...'. It did not refer to a disposition by the company *being wound up.* ... Thus, in the International case *supra* (disregarding the procedural complications which there existed), essentially an unsecured creditor, notwithstanding the presentation of an application to wind up the company, pursuant to its rights under a notarial general covering bond, sought to take possession of the company's property in order to convert its claim into a secured one. The court refused to permit the creditor to do so on the basis, broadly speaking, that no good reason existed for putting it in a better position in the winding-up than other unsecured creditors. The court found it unnecessary to decide whether the discretion exercised by it was under section 341(2) or the general law; it is respectfully submitted, indeed, that as a provisional winding-up order already existed, the court had no discretion at all to allow the creditor to take possession of the property as upon the grant of such order a *concursus creditorum* was instituted;...'

Blackman on the Companies Act, 14-54 (in addition to the passage cited by Prinsloo J supra)

'Although in the case of a winding-up by the court the power of the court to validate dispositions made between the commencement of winding-up and the order for winding-up persists after the winding-up order has been made, the only dispositions within the avoiding and validating provisions of section 341(2) are those provisions made between the lodgment date of the application and the order of winding-up. After the order has been made, control of the company's property vests in the master until a provisional liquidator is appointed; and hence those who could have disposed of the company's property before the winding-up order are impotent to make any dispositions of its property after the making of the order. Furthermore, and perhaps of more fundamental importance, is the fact that after the order for winding-up has been granted, dispositions of the company's property can be made only in connection with the winding-up under the statutory winding-up regime.'

[8] What explains why these writers contend for this view? In my view, Blackman articulates his rationale admirably in the cited passage; ie, first, the impotence of the company's office bearers after the final winding up order and the passing of control into the hands of the master and liquidator, and secondly and consequently, the subjugation of the company being wound up to the statutory purposes of the insolvency regime. Henochsberg, true enough, does not, in the cited passage, offer a rationale save to invoke the concursus, and it may fairly be understood that he thought the point self-evident that after concursus the court could have no further role because of the effect of concursus.

[9] True enough however, neither writer attempts to deconstruct the text of section 341(2).

[10] Mr Butler's researches have revealed the lineage of the idea encapsulated in section 341(2) through six generations of statutes. It begins with section 153 of the English Companies Act ,1862, which begat Section 205(2) of the English Companies (Consolidation) Act 1908, which begat section 173 Of the English Companies Act, 1929, which begat section 227 of the English Companies Act 1948, which begat Section 127 of the Insolvency Act, 1986. The text of section 227 of the English Companies Act, 1948 reads, which contains the phrase 'after the commencement of the winding up' as distinct from section 341(2) which contains the phrase ' company being wound up' reads thus:

> ' In a winding up by the court any disposition of the property of the company including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up shall, unless the court orders otherwise, be void.'

(This section is the counterpart of section 341(2) of the South African statute; see Sackstein N.O. v Proudfoot (SA) (Pty) 2003 (4) SA 348 (SCA) at [24])

[11] As in South African statute there is no express statement that the close of the period of applicability is the date of the final winding up order. However, decisions in the English courts say that the section indeed does imply that the

date of final winding up order is the close of the period of applicability of the court's power. The decisions in In Re Wiltshire Iron Co (1868) LR Ch 443 at 446 and Re Grays' Inn Construction Co Ltd [1980] 1 All ER 814 (CA) at 819G – J, both offer a rationale for a limitation of the courts power to the interval between concursus and the date of a final winding up order. The thesis relied upon is that during this period it is possible for a company to trade in good faith, and, because the looming insolvency is only a prospect and not a certainty, a premature paralysis of the business ought to be avoided. Moreover, under the shadow of a potential order, the company might rescue itself by the sale of an asset and thereby satisfy the demands of impatient creditors. *Ex post facto*, a court may examine these dispositions in order to audit any potential skulduggery; if there is none, subject to the interests of creditors, a discretionary re-validation may be ordered.

The interpretation of the Text of Section 341(2)

[12] The proper approach to the interpretation of a statute has been articulated by the SCA in Bothma-Batho Transport v S.Bothma & Seun Transport 2014 (2) SA 494 (SCA) at [10]:

> "[10] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18] the current state of our law in regard to the interpretation of documents was summarised as follows:

"....The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[13] On behalf of the applicant, Mr Gautschi argued that, in section 341(2), the key phrase to construe is "being wound up". He submitted that this phrase must be understood to mean a company subject to the process of winding up. He distinguished that condition from a situation where a company could be said to be subject a 'pending application for winding up'. On the construction advanced, it is argued that the 'process' begins with the concursus and ends upon final dissolution as evidenced by deregistration. The contention which is advanced rests upon the supposition that the section specifies only a beginning of a period and no end of the period is unspecified, therefore, logically, the process must

have an end, and the literal last gasp-moment possible ought to be selected to supply that moment, ie the dissolution of the company. In my view, the phrase 'being wound up' at the literal level, is indeed capable of bearing this meaning. However, in my view, that phrase is not the sole portion of the text of section 341(2) that warrants interpretative scrutiny.

[14] The construction, favoured by the applicant, overlooks the implications latent in the whole of the section. The section addresses not only a process with a certain beginning; it also addresses a species of action. These actions are performed by the company, ie dispositions.

[15] The effect of section 348 is a retrospectively effective date for concursus creditorum. The effect is to convert what were valid and binding dispositions into a void dispositions. What a court is empowered to do is exorcise the malignity of such voidness and restore the validity and effectiveness of the disposition. The section 341(2) order is effective and binding on creditors, the company being wound up and on the recipient of the payment, which payment, but for the winding up would have been uncontroversial. However, the court is not empowered to convert an unlawful, invalid or unauthorised transaction into a valid one; the disposition had to enjoy the attributes of validity at the moment it occurred. This original status of validity is critical to the function performed by the section.

[16] The significance of these observations is that section 341(2) applies only to dispositions that a company could validly effect. After the final winding up order a company cannot effect valid transactions precisely because of the concursus, from which moment, the control of the company is removed from its office bearers. (See: *Secretary for Customs and Excise v Millman NO 1975(3) 544 (AD) at 552 H.)* The Master and the liquidator alone can effect a valid disposition after the concursus. Any purported disposition after the final winding up by an office bearer of the company cannot be valid *ab intio*. These observations in my view resonate with the views of Blackman (supra) and which were endorsed by Prinsloo J.

[17] Therefore it can be understood that the purpose of section 341(2) is to address the anomaly resulting from the retrospectivity of the concursus, which ensnares what were valid and binding transactions, willy nilly, and subjects them to a judicial discretion whether or not to *restore that status*. The section cannot apply beyond the final winding up order because there cannot be a valid and binding disposition *by the company* from that date. The contention to the contrary which is predicated on the liquidator being but the hand in a glove which glove is the company, and ergo, it is the company, as such, who makes dispositions after the winding-up order, is a semantic fancy.

[18] It was contended by Mr Butler for the respondent liquidator, that upon the happening of a concursus a 'sea change' in the company occurs. This must be

correct. Henceforth, the business of the company is shackled to the interests of the creditors and run or run down to serve them; there is no room for business as usual. Any transaction not aimed at the new purpose is illegitimate. The liquidator's role is to give effect to that aim.

[19] Moreover, there is no need to provide for judicial supervision over dispositions that occur after the Master and then the liquidator, take control and inn my view section 341(2) cannot be construed to have that reach. It is, of course, a practical possibility that a liquidator may, after the final winding up order, cause the company to make dispositions which are objectionable. Other remedies exist to address a liquidator's delinquency. An illustration of that is the decision in *Commissioner,SARS v Stand 290 Wynberg (Pty) Ltd & Others 2005 (5) SA 583 (SCA)* in which the impropriety of a debtor of the estate agreeing with the liquidator to pay a selected creditor and thus prefer one of the creditors was disallowed as irregular because such an act was a betrayal of the liquidators' duties towards the whole body of creditors. Such a controversy will always have as its point of departure the effect of the concursus, as expressed in *Walker v Syfret NO 1911 AD 141* at 160 by de Villiers JA and at 166 by Innes JA and as indicated above, relied upon by Prinsloo J in the *Excellent case.*

[20] If due deference is paid to the dimension of context in the interpretation process, the question must be asked what work section 341(2) is expected to do in the process of insolvency. Self-evidently, the laws of insolvency; ie both the

common law and the statutory law, establish a system. It is within that system that the powers of liquidators are exercised and also the powers of courts. The exercise of that power, and indeed the conferral of authority to do so, can only be properly understood by an appreciation of the functioning of the system. The system has an inherent logic and hierarchy of functions. The primary function is the protection of the welfare of creditors. Any conferral of authority to diminish the amassing of resources to fulfil that mission must be understood to be subordinated to the overall system and its primary purpose. Mr Butler has argued that the cornerstone of insolvency law is the sanctity of concursus creditorum. I agree. Thus the judicial discretion to *re-validate* a disposition, voided *ex lege* by the concursus, is a compromise of the concursus itself, and falls to be justified only because it would be equitable to do so. The authority to intervene, to achieve an equitable outcome, in these circumstances, ought to be narrowly construed, lest the process of insolvency and its hierarchy of values is rendered incoherent.

[21] The notion that a trawl through the statute (ie sections 353(1), 360(1), 362(2) and 362A) to examine the use of the phrase 'being wound up' might fortify the interpretation advanced on behalf of the applicant is misdirected. In my view, the phrase itself is innocuous and descriptive rather than normative, and takes its normative meanings, if any, from the texts of the sections of which it is a component. The examples cited do not lend substantiation to the proposition that the phrase has in every section a normative role. Moreover, as addressed

above, the critically operative element in section 341(2) is an action which the company has competence to lawfully effect.

[22] Mr Gautschi pressed the argument that the purpose of section 341(2) included the provision of equitable relief for a snookered bona fide creditor of an insolvent company. I am of the view that it indeed serves, among other interests, that objective. I am however unpersuaded that it ought to follow that this perspective contributes to an interpretation that the courts power of intervention can be applied to dispositions after concursus. Rather, it is simply a rationale to address the consequences of retrospective invalidation of bona fide dispositions. The limitation does not yield a commercially inappropriate outcome; indeed, clinical fidelity to the principle of concursus serves precisely that aspiration. In my view the opinion expressed by Blackman (supra) captures exactly this idea.

[23] The practical implications of lapses of time between presentment of an application for winding–up and the court order, which may range from a few days to years was advanced as a reason why the court's powers of intervention ought to be applicable throughout the entire process of winding up, from the date of presentment until de-registration. The outcome of such an interpretation, it was argued, would guarantee an absence of any injustices. In my view the sentiment lodged in this contention is appealing but is not supported by the legislation. Moreover, a quintessential dimension of the system of insolvency is that from the moment of concursus the control of the process is in the hands of the master, the

liquidator and the will of the creditors in general meeting, not a court. To limit judicial intervention to those dispositions which occurred in a period before the final order, which solely because of its retrospective effect, ensnared ordinary transactions seems to be a wholly appropriate policy choice to facilitate an efficient and effective insolvency regime.

[24] The upshot is that it is incorrect to perceive the power conferred on a court by section 341(2) as an appropriate remedy for the bona fide creditor of an insolvent company who gets paid after a final winding up order is granted. The scope for the discretion is itself a clue to the limitation; it is exercised in favour of that ensnared creditor only if, by so doing, the general body of creditors is not disadvantaged by a diminution of assets to divvy-up among them. The summary of guidelines for the exercise of the discretion compiled by Pincus AJ in *Lane NO v. Olivier Transport 1997 (1) SA 383 (C) at 386D – 387 B* illustrates the scope of the discretion:

> 'I set out hereunder a summary of the guidelines for the exercise of the discretion, namely:
>
> (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 applicant as well as 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 3 Ch App 443 at 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's case supra at 447.

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for 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.

(l) Generally a Court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors. See *Herrigel's* case *supra* at 680.'

[25] Accordingly:

25.1. The primary purpose of section 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid.

25.2. Section 341(2) confers a power on a court to intervene in respect of dispositions which a company may lawfully make during the period between the date upon which the application for a winding-up has been presented and the date upon which the final winding-up order is granted.

25.3. Section 341(2) has no application in respect of dispositions purportedly made by a company after the date upon which a final winding --up order is granted because such dispositions cannot be *ab intio* valid as the office bearers of the company have no lawfully authority to make such dispostions.

25.4. The decision in the Excellent Case is not clearly wrong, and in my view correctly held that the court has no power in terms of

section 341(2) over dispositions which occur after the winding–up order.

The Respondents Counterclaim

[26] It was agreed between the parties that if it was held that section 341(2) is not applicable to a disposition after the date of the final winding-up order, the counter claim must succeed.

The Order

[27] The applicant is ordered to pay to the respondent the following amounts together with interest at 15.5 % pa from the dates listed until date of payment.

[28] The amounts and the dates from which interest shall be computed are:

28.1. R702310.52 – 31 October 2012.

28.2. R300,000 – 16 November 2013

28.3. R772501.85 – 22 November 2012

28.4. R200,000 – 14 December 2012

28.5. R200,000 – 7 January 2013

28.6. R200,000 – 10 January 2013 (i)

28.7. R200,000 – 10 January 2013 (ii)

28.8. R35,861.51 – 14 January 2013

[29] The applicant shall pay the respondents costs.

ROLAND SUTHERLAND

Judge of the High Court,

Gauteng Local Division

Rts/b26/p54

Hearing: 5 August 2014
Judgment Delivered: 20 October 2014

For the appellant:
Adv A Gautschi SC,
with him Adv C Van der Spuy
Instructed by Lanham-Love
Ref: C Hunter

For the Respondent:
Adv J Butler SC
Instructed by
Reitz Attorneys
Ref: JDK Reitz