IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED. ✓
DATE 3/8/2012 SIGNATURE

CASE NO: 34450/2011

DATE: 3/8/2012 .

IN THE MATTER BETWEEN

COENRAAD LOUWRENS STANDER N.O.	1ST APPLICANT
IGNATIUS CLEMENT MIKATEKO SHIRILELE N.O.	2ND APPLICANT

[In their capacity as liquidators of KIRSTEN LOTTERING SCHEEPERS INC (in liquidation)]

AND

WOUTER RAYMOND BOUWER t/a BOUWER & HEYNS LEGAL COST CONSULTANTS	RESPONDENT

JUDGMENT

PRINSLOO, J

Introduction

[1] The applicants are the joint liquidators of a company in liquidation, Kirsten Lottering Scheepers Inc ("KLS").

[2] The respondent is a creditor of KLS.

[3] The applicants, essentially, claim relief based on the provisions of section 341(2) of the previous Companies Act, Act 61 of 1973 ("the Act").

In the alternative, the applicants claim relief based on the provisions of sections 26, alternatively 29 alternatively 30 of the Insolvency Act, Act 24 of 1936 ("the Insolvency Act").

[4] Section 341(2) of the Act ("section 341(2)"), under the heading "Dispositions and shared transfers after winding-up void" reads as follows:

> "(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."

[5] It is convenient to quote the contents of the amended notice of motion presented by the applicants, after relief initially sought involving the *locus standi* of the applicants as purported provisional liquidators was abandoned and an argument *in limine* advanced by the respondent in this regard was not proceeded with:

"1. That condonation be granted for the late filing of the replying affidavit (my note: this issue was not disputed before me and, inasmuch as it may be necessary, I grant such condonation).

2. That it be declared that the payment of R750 000,00 to the respondent on 28 April 2009 constitutes a void disposition of the property of Kirsten Lottering Scheepers Inc (in liquidation), after commencement of the winding-up in terms of the provisions of section 341(2) of the Companies Act, no 61 of 1973;

In the alternative to prayer 2

3. That the payment of R750 000,00 to the respondent be set aside as an impeachable disposition of the property of the insolvent estate of Kirsten Lottering Scheepers Inc (in liquidation) in terms of the provisions of section 26, alternatively section 29, alternatively section 30 of the Insolvency Act, no 24 of 1936;

4. That judgment be granted against the respondent for the amount of R750 000,00;

5. That the respondent be ordered to pay interest at the rate of 15.5% per annum on the amount of R750 000,00 from 30 April 2009 to date of payment;

6. That the respondent be ordered to pay the costs of the application."

[6] Returning to the wording of section 341(2), I am satisfied, on the evidence before me, that KLS was unable to pay its debts when it was wound up. I am also

satisfied that the payment made by KLS to the respondent on 28 April 2009 was a "disposition of its property" by KLS as intended by the wording of the subsection. Lastly, it is clear, and common cause, that the disposition was made after the commencement of the winding-up: the winding-up is deemed to have commenced, in terms of the provisions of section 348 of the Act, when the liquidation proceedings were instituted on 25 November 2008, which is well before the payment was made on 28 April 2009. I add that the provisional liquidation order was granted about a month after the payment was made, namely on 27 May 2009, and the final liquidation order was granted on 25 August 2009.

[7] The defendant opposes the application and asks for the disposition to be validated, in the sense that I must "otherwise order" in the spirit of section 341(2). Put differently, the respondent asks for my discretion in this regard to be exercised in his favour by validating the payment.

There is authority for the proposition that the *onus* to achieve this result is on the respondent. The author M S Blackman, in an article in *The Law of South Africa* 1st re-issue vol 4 part 3 para 174 says the following:

> "The *onus* is on the person seeking to uphold the transaction to establish circumstances justifying the making of a validating order."

The learned author, in footnote 11 on p270, quotes a series of judgments from foreign jurisdictions to support his contention in this regard. I do not propose

repeating those references. The author Meskin, Henochsberg on *The Companies Act* vol 1, 5th ed says the following on p681 when dealing with the subject of section 341(2):

> "It is submitted that it is incumbent on a party seeking the validation of the disposition to establish the facts upon which he relies for such purpose."

Brief remarks about the background of the case

[8] Before its liquidation, KLS carried on the business of a company of practising attorneys. One of the directors of KLS, Cornelus Kirsten ("Kirsten") was also a shareholder of a company Malokiba Trading 19 (Pty) Ltd ("Malokiba").

[9] Malokiba conducted the business of providing bridging finance, and for this purpose borrowed money from the general public and other businesses as investors, in terms of written loan agreements, and lent this money to debtors who were in need of bridging finance.

All payments made to Malokiba in terms of the loan agreements, were paid into the trust account of KLS.

A clause in the loan agreement entered into between Malokiba and the investor stipulated clearly that the amount invested will be paid into the trust account of KLS "for the exclusive purpose of financing transfer duties and/or estate agents commission and/or bridging finance in property transactions ..."

[10] It is clear from the undisputed and detailed evidence elaborated upon in a lengthy founding affidavit, that some investors deposited huge amounts into the trust account of KLS. One Maartens paid an amount of R6 million, one Segal an amount of some R3,4 million and Popular Diamond Jewellery Manufacturers (Pty) Ltd an amount of some R3 million.

Between March and July 2005 Malokiba entered into loan agreements with some hundred and fifty four members of the public and businesses and collected investments to the tune of some R188 million.

[11] Later, some satellite companies, also rejoicing in the name of Malokiba, were registered with the view to attracting more investments for the Malokiba stable. All monies paid for shares of these satellites, for such investment purposes, were also paid into the trust account of KLS. Effectively, the trust account of KLS served as the bank account of Malokiba. Later a second trust account was opened by KLS to receive, exclusively, payments involving the activities of Malokiba.

[12] It is clear that the Malokiba operations amounted to nothing less than a pyramid scheme. Eventually, the scheme led to major financial losses of the investors. Kirsten was also a director of another notorious company, Hau Wei Manufacturing. Kirsten channeled monies from the trust account of KLS to other companies of which he was a director. Ultimately, KLS was exposed to the

amount of some R80 million and clearly unable to pay its debts. KLS allowed, as will appear from the aforegoing, its trust funds to be utilised for other purposes than those described in the clause in the loan agreements, to which I have referred. To this extent, KLS attracted liability towards the unsuspecting investors. KLS was also managed recklessly by its directors in that it took part in the illegal scheme of Malokiba. As a result of these unlawful activities, the trust account of KLS also showed substantial debit balances.

[13] In the end, Malokiba and its satellites were also liquidated during or about 2008, and Hau Wei Manufacturing was liquidated in October 2007.

[14] Against this background, it can be said that KLS was disgraced, insolvent and unable to pay its debts.

[15] I turn briefly to the position of the respondent, and his involvement in the case.

During 2005 KLS, together with a number of other firms of attorneys, performed legal work for the Emfuleni local municipality.

The respondent, from time to time, was instructed by KLS to prepare bills of costs relating to services rendered by KLS to this municipality ("Emfuleni").

During the second half of 2005, one H C W Scheepers ("Scheepers") who was a director of KLS and whose name also features in the KLS name, approached the respondent with the news that Emfuleni had requested the attorneys representing them to "freeze" their files for a period and to temporarily "suspend" all proceedings on cases they were working on. They had to submit a list of cases, dealing with the extent of the work done.

The agreement with Emfuleni was that if this instruction to suspend the work were to have the effect that the attorneys could not recover their fees from the debtor, Emfuleni would be liable for the fees of the attorneys including those of KLS on an attorney and own client scale.

Pursuant to this arrangement, Scheepers instructed the respondent to draft the necessary bills of cost and it was agreed that the respondent would be entitled to fees calculated on the basis of 10% of the bill as drafting fees and a further 10% of the bill as taxation fees, namely 20% of the total of fees taxed and allowed. The respondent would share the risk of payment with KLS and would only be paid on the aforesaid basis once KLS received the money from Emfuleni.

On the strength of this arrangement, the respondent went ahead and drafted numerous bills of costs and also attended to the taxation thereof. This happened between the second half of 2005 and the beginning of 2006.

The total amount of fees taxed and allowed and which became due and payable by Emfuleni to KLS, came to some R7,5 million with interest and the respondent's agreed percentage of those fees came to R1 378 179,00. Already on 24 August 2006 the respondent sent an account for this amount to KLS. KLS failed and/or refused to pay.

[16] During April 2009, and only about one month before the provisional liquidation order was granted, Scheepers contacted the respondent and offered to pay him an amount of R750 000,00 in full and final settlement of his claim. Scheepers pointed out that this offer was made due to the fact that Emfuleni had not paid KLS but only offered an amount of R4 million to KLS in settlement of its claim of some R7,5 million. It is obvious that already at this stage Scheepers would have been well aware of the fact that liquidation of KLS was imminent, the application already having been instituted in November 2008.

[17] The respondent accepted the offer and on 28 April 2009 he received the payment of R750 000,00 from KLS.

[18] The respondent alleges in his opposing affidavit that neither he nor any person in his employ was aware, at any relevant time, of the winding-up of KLS. Where this statement is not contested in the replying affidavit, I must accept it to be correct.

[19] In the opposing affidavit, the respondent also alleges that the demands for payment against KLS and the recovery of the amount due to the respondent, including the settlement amount, was done in the normal course of business "of the respondent and the recovery of fees due to it".

The real question, as I understand it, is whether the disposition was made in the normal course of the business of the company which is being wound up. I am not persuaded that this is what happened when Scheepers paid the money to the respondent. As will be pointed out later, KLS, when receiving the R4 million, immediately set about paying certain creditors, including the respondent. This happened when the granting of the provisional liquidation order was around the corner, and when the winding-up had already been commenced with some five months earlier, in November 2008. By the time the payment was made to the respondent in April 2009, the collapse of the Malokiba pyramid scheme would already have been common knowledge. Malokiba and its satellites were already liquidated in the middle of 2008 and Hau Wei Manufacturing was liquidated in October 2007. A judgment was already granted against Kirsten in June 2008 in the sum of some R2,3 million in favour of the liquidators of Hau Wei of which Kirsten was a director.

Under these circumstances, it can hardly be said that the dissipation of the R4 million by making payments to a number of selected creditors, including the respondent and, for example, the wife of Scheepers, shortly before the liquidation

order was granted, represented payments made by KLS in the normal course of its business.

[20] So much for the background of the case. I turn to briefly consider what happened to the R4 million ("the R4 million") once it was received on 28 April 2009 by KLS from Emfuleni.

The destiny of the R4 million

[21] After the provisional liquidation of KLS, the liquidators appointed one Steven Robinson ("Robinson") to take charge of the assets of KLS and to report back. His preliminary auditory report is annexure "DMB14" to the founding affidavit ("DMB14").

[22] It appears from "DMB14" and annexures thereto that the R4 million was initially deposited into the trust account of KLS. An amount of R1,38 million was then disbursed over the next few days to a few selected creditors including the respondent, Adv Leeuwner (counsel representing KLS in the dispute with Emfuleni and who knew about the winding-up proceedings that were pending), De Bruin & Vennote (a firm of attorneys also involved in the litigation which was aware of the pending winding-up proceedings) and two of the companies involved in the pyramid scheme in which Kirsten, amongst others, had an interest.

I add that the present applicants also instituted proceedings in terms of section 341(2) against Leeuwner and De Bruin & Vennote and two of my colleagues in this division upheld both those applications. Adv Leeuwner applied to the Supreme Court of Appeal for leave to appeal and, in an order dated 1 March 2012, the application for leave to appeal was dismissed with the two learned Judges of Appeal making the following order:

> "The application for leave to appeal is dismissed with costs.
>
> Reasons for dismissal of application:
>
> Dismissal of an application for leave to appeal signifies that this court is of the view that the intended appeal has no reasonable prospects of success and that there is no other compelling reason why it should be heard. This court therefore, in general terms, concurs with the reasoning set out in the judgment of the court below."

I realise that this is not a judgment which is binding on me but, nevertheless, it is an order which I cannot ignore. As far as I can make out, De Bruin & Vennote did not prosecute an appeal.

[23] The balance of some R2,64 million was transferred from the KLS trust account to the KLS business account and, according to Robinson, "paid out mainly to connected parties (other than the Absa overdraft of R500 000,00 and an amount to Standard Bank of R261 000,00) ..."

Included amongst the "connected parties" were one of the Malokiba companies in which Kirsten, Lottering and Scheepers were shareholders, another Malokiba company, Scheepers himself, Lottering himself and Ms Scheepers. Most of these recipients were clearly not secured or preferent creditors.

[24] It is clear that all these payments were made with a view to preferring a list of selected creditors (including the respondent) to the detriment of the rest of the body of creditors of KLS.

[25] There was an argument advanced on behalf of the respondent that the disbursements made from the trust account (including the one to the respondent) were not paid from the own funds of KLS but disbursed from the trust account to a number of creditors, including the respondent. The argument, if I understood it correctly, was that this was not a disposition "of its own property" by KLS as intended by the provisions of section 341(2). I cannot agree with this submission. It is clear that the R4 million, when it was paid, became the property of KLS. It was not deposited in the trust account in the normal sense namely on the basis that it belonged to clients of KLS and was only kept in trust for that purpose.

Brief remarks about the legal position

[26] For the sake of brevity, I will deal with extracts from what is stated on this subject of section 341(2) by Meskin, Henochsberg on *The Companies Act* vol 1, 5th ed, *supra*, ("*Henochsberg*") as well as the discussion on the same subject in

Commentary on the Companies Act by M S Blackman and five other authors, vol 3 ("*Blackman et al*").

The remarks made by these learned authors are generally supported by them referring in footnotes to the relevant authorities, including a number of cases reported in foreign jurisdictions. I do not propose repeating those references.

There will also be brief references to three South African judgments often referred to in these applications involving section 341(2) and also relied upon by the authors aforementioned. The cases are the following:
Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Another 1980 4 SA 669 (SWA) ("*Herrigel*")
Rousseau en Andere v Malan en 'n Ander 1989 2 SA 451 (CPD) ("*Rousseau*") and *Lane NO v Olivier Transport* 1997 1 SA 383 (CPD) ("*Lane*").

[27] As far as *Henochsberg* is concerned, the discussion is to be found at pp676-681 of the work by the learned authors. They point out that the court's discretion to validate such a disposition, or to decline to do so,

> "is controlled only by the general principles which apply to every kind of judicial discretion: the court must decide what would be just and fair in the circumstances of the case, bearing in mind the purpose of the subsection."

The purpose of section 341(2) is said "to ensure that the property of a company threatened with winding-up is not improperly dissipated prior to the

commencement of the winding-up ... and is available for satisfaction of the claims of its creditors on a footing of equality of treatment subject only to any security or preference which any of them may enjoy under the Insolvency Act". (*Herrigel* at 678 and *Lane* at 385.)

The learned authors in *Henochsberg* suggest that a disposition valid when effected and only retrospectively invalidated by virtue of the operation of the provisions of section 348 ordinarily will be validated by the court "... if it amounts to no more than the result of the *bona fide* carrying on of the company's operations in the ordinary course". I have already concluded that this was not the case in the present matter and that the payment to the respondent was not made "in the ordinary course" of the business of KLS. The learned authors suggest that the court will ordinarily refuse to validate a disposition where it was made eg with the object of securing 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. In *Herrigel* the court refused to validate the disposition notwithstanding that the recipient thereof was *bona fide* but the result was that such recipient had in fact been preferred above other creditors – see *Herrigel* at 679-680. In the present case, I have come to the conclusion, as illustrated when dealing with the destiny of the R4 million, that those selected creditors (including the respondent) were paid with the object of securing an advantage for them which they otherwise would not have enjoyed and in the process the general body of creditors was prejudiced.

The learned authors also point out that the discretion which a court has to validate or not to validate is to be exercised in the light of certain guidelines crystalised in authorities quoted by these authors: firstly, the basic premise is that in a winding-up all unsecured creditors should be paid *pari passu* (which, for the reasons mentioned, did not happen in the present case). Secondly, it is not normally right to validate a payment, the effect of which is to pay in full a single unsecured creditor, unless the payment formed a necessary part of a transaction which as a whole was beneficial to the general body of unsecured creditors. For the reasons mentioned, this did not happen in the present case. Thirdly, payments made in good faith and at the time when the parties were unaware that (proceedings for winding-up had been instituted) will generally be validated where they relate to the company's need to continue business and earn income (or save loss) during the pendency of such proceedings, but not payments, even though they are made honestly, which were mere reductions of pre-existing debts without any conceivable countervailing benefits to the company. In the present case, the payments were clearly not made honestly by Scheepers. He knew exactly what the position was and there was no longer any question of KLS continuing business in the normal fashion by the time the disposition was made to the respondent. Fourthly relatively little weight should be attached to the hardship which will be suffered by the recipient of the payment if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. In this case, the respondent, regrettably, will suffer a great

deal of hardship if he is ordered to repay the monies honestly earned a number of years ago through hard work but, unfortunately, and for the reasons mentioned, the disposition made to the respondent could not have served "to minimise hardship to the body of creditors generally". There are two other guidelines offered by the learned authors which do not appear to me to be relevant for present purposes.

[28] The discussion by the authors *Blackman et al*, *supra*, is to be found at pp14-46 to 14-61 of the work. Generally, the approach of these learned authors is in harmony with what is to be found in *Henochsberg*. I do not propose embarking upon unnecessary repetition.

At 14-59, the authors state:

> "Knowledge at the time of the transaction by anyone of the parties that an application for the winding-up has been presented and that a winding-up order may be made (my note: of course, in this case at least Scheepers clearly knew what was going on) is not fatal to the success of an application for validation of a transaction otherwise rendered void by the section. However, where, in the case of a creditor's application, there were doubts as to the company's solvency, the court in the exercise of its discretion will not sanction a disposition unless it is satisfied on affirmative evidence that the transaction is or was beneficial to the company. In this situation, the court would regard a fairly heavy *onus* in

relation to evidence as falling on persons seeking to justify a disposition not in the ordinary course of business."

For the reasons mentioned, the respondent, in this case, did not offer any evidence to this effect and did not discharge the *onus* referred to: the disposition was not made in the ordinary course of business, and it also did not redound to the general benefit of the body of creditors. Indeed, it amounted to the respondent being preferred to other concurrent creditors.

In this regard, Mr Davis offered submissions to the effect, if I understood him correctly, that if the debts flowing from the Malokiba pyramid scheme were to be ignored, the disposition did not amount to an unfair advantage over "normal" creditors as Mr Davis put it. I fail to see how the Malokiba creditors looking to KLS for compensation because of the losses they suffered, for the reasons already explained, can be ignored for purposes of assessing the merits of this particular dispute. Moreover, evidence in support of the submission made by Mr Davis is not to be found in the opposing affidavit so that the *onus*, in that regard, has also not been discharged.

[29] Although each case must be treated on its own facts, it ought to be observed that in *Herrigel, Rousseau* and *Lane* the recipient of the disposition was ordered to repay the amount. I make this observation because section 341(2) does not provide for recovery of the property or money. It merely renders the disposition

void, and gives the court a discretionary power to order otherwise, ie to validate the disposition, as pointed out by *Blackman et al* at 14-51. The learned authors go on to state:

> "Thus, the appropriate remedy in respect of the invalidated disposition is a matter not regulated by the section and has to be determined by the general law."

Recognising this, the learned judge in *Herrigel*, at 685B-D, nevertheless came to the conclusion that:

> "An order to repay the amount of a void disposition is a necessary and practical adjunct to a factual finding that such disposition is void."

These remarks may well be debatable, but, for present purposes, I am not prepared to find that the order for repayment is clearly wrong.

Conclusion

[30] In view of the aforegoing, and while recognising the hardship an adverse finding for the respondent will visit upon him, I have come to the conclusion that the application must succeed. Under these circumstances I also consider it unnecessary to deal with the arguments offered in respect of the provisions of sections 26, 29 and 30 of the Insolvency Act.

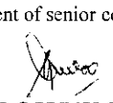
Costs

[31] I was not urged on behalf of the applicant to award the costs of two counsel, although such an order may well be justified. However, it seems to me that the costs flowing from the employment of senior counsel ought to be allowed.

The order

[32] I make the following order:

1. It is declared that the payment of R750 000,00 to the respondent on 28 April 2009 constitutes a void disposition of the property of Kirsten Lottering Scheepers Inc (in liquidation), after commencement of the winding-up as intended by the provisions of section 341(2) of the Companies Act, Act 61 of 1973.
2. Judgment is granted against the respondent for payment of the amount of R750 000,00.
3. The respondent is ordered to pay interest on the aforesaid amount at the rate of 15,5% per annum calculated from 30 April 2009 to date of payment.
4. The respondent is ordered to pay the costs of this application including the costs flowing from the employment of senior counsel.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

34450-2011

HEARD ON: 29 MARCH 2012
FOR THE APPLICANTS: F H TERBLANCHE SC ASSISTED BY H M VERMAAK
INSTRUCTED BY: STRYDOM & BREDENKAMP INC
FOR THE RESPONDENT: N DAVIS SC
INSTRUCTED BY: RIËTTE OOSTHUIZEN ATTORNEYS