IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICAN)

CASE NO: 13614/2009

DATE:30/05/2012

REPORTABLE

IN THE MATTER BETWEEN:

EXCELLENT PETROLEUM (PTY) LTD PLAINTIFF

(IN LIQUIDATION)

AND

BRENT OIL (PTY) LTD DEFENDANT

JUDGMENT

PRINSLOO. J

[1] This is an action based on the provisions of section 341(2) of the Previous Companies Act, Act 61 of 1973, as amended ("the Previous Companies Act").

For present purposes, this provision of the Previous Companies Act is applicable, inasmuch

as it involves the consequences of the winding-up of the liquidated plaintiff company ("the plaintiff), despite the enactment of the New Companies Act, Act 71 of 2008.

[2] Before me, Mr Muller SC, assisted by Mr Heystek, appeared for the plaintiff and Mr Vorster SC for the defendant.

Introduction and background

[3] Section 341 of the Previous Companies Act reads as follows:

"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."

[4] The plaintiff was finally wound-up by the Western Cape High Court on 18 July 2006. The date of the provisional winding-up order was 31 May 2006.

[5] The winding-up application was presented to the court, as intended by the provisions of section 348 of the Previous Companies Act, on 3 April 2006, so that the winding-up is deemed to have commenced on that day.

[6] In terms of a "list of common cause facts" handed up during the trial as exhibit "B", by agreement between the parties, it is common cause that as at 3 April 2006 the plaintiff was insolvent in that its liabilities exceeded its assets.

[7] The liquidators, Messrs Glaum and Carolus, were duly appointed by the Master of the High Court on 18 September 2006.

[8] In terms of exhibit "B", it is also common cause that at the time of its liquidation the plaintiff conducted the business of purchasing diesel and other petroleum products for the sale to clients at a profit.

[9] During the period 3 April 2006 to 8 June 2006 the plaintiff made payments to the defendant in the aggregate sum of R4 091 974,66, which payments constitute post winding-up payments. This is also common cause.

[10] The post winding-up payments made by the plaintiff to the defendant related to the sale of diesel and illuminated paraffin by the defendant to the plaintiff pursuant to the provisions of an agreement, annexure "C" to the plea ("annexure 'C'").

Annexure "C" is a letter written on the defendant's letterhead on 12 September 2005 by the then sole director of the defendant company, Mr Brent Watts ("Watts") to one Mr Koos Valentyn ("Valentyn") who was at all relevant times a "proprietor" of the plaintiff, although not a director, because of his status as an unrehabilitated insolvent.

In annexure "C", Watts refers to an earlier meeting he had had with Valentyn, where the possibility was mooted that the defendant would supply the plaintiff with petroleum products. In annexure "C" Watts offers Valentyn certain rebates in cents per litre below the list price, in respect of diesel, petrol and illuminated paraffin ("IP") which would be applicable in the event

of the offer being accepted by Valentyn on behalf of the plaintiff. It is stipulated in annexure "C" that all orders would be "cash before collection". The relevant banking details of the defendant are supplied in annexure "C".

[11] It is also common cause, in terms of exhibit "B", that all the consignments of diesel and IP to which the payments, supra, relate, were duly delivered by the defendant.

[12] It is common cause that in the period 3 April 2006 to 8 June 2006 the plaintiff was unable to pay its debts as contemplated in section 341(2) of the Previous Companies Act ["section 341(2)").

[13] In terms of exhibit "B", it is also common cause that "the defendant bears the onus of establishing the facts upon which it relies for the purpose of persuading the court to order that the payments made by the company (ie the plaintiff) to the defendant after the commencement of the company's winding-up are not void".

[14] As appears from the brief analysis of the pleadings, hereunder, the plaintiff (obviously through the initiative of the liquidators suing in the name of the liquidated plaintiff) claims a refund from the defendant of the payments of R4 091 974,66 paid to the defendant in return for the deliveries of diesel and IP (no petrol was involved in these transactions).

A brief analysis of the pleadings

[15] It is convenient to quote the last few paragraphs of the particulars of claim and the prayers for illustrative purposes:

"6. During the period 3 April 2006 to 8 June 2006, the company made payments to the

defendant in the aggregate sum of R4 091 974,66 ('the post winding-up payments'). A schedule reflecting the date and amount of each payment is annexed hereto marked 'B'. (My note: details of these payments are common cause;)

7. The post winding-up payments each constitute a disposition by the company of its property as contemplated in section 341(2) of the Companies Act.

8. In the premises, each of the post winding-up payments is void.

9. Accordingly, the defendant is liable to repay to the plaintiff an amount equivalent to each of the post winding-up payments.

Wherefore the plaintiff claims:

(a) An order declaring that each of the post winding-up payments reflected in a schedule annexed hereto marked 'B' is void in terms of section 341(2) of the Companies Act;

(b) an order directing the defendant to pay to the plaintiff the sum of R4 091 974,66; alternatively, to pay to the plaintiff an amount equal to the aggregate of the post winding-up payments which are declared to be void in terms of prayer (a) here above;

(c) interest in the sum referred to in prayer (b) here above at the rate of 15,5% per annum a tempore morae;

(d) further and/or alternative relief;

(e) costs of suit"

[16] The particulars of claim are dated 30 November 2008.

[17] As to the plea, it is convenient, for illustrative purposes, to quote paragraph 5 thereof:

"5.1 By reason of the following facts and circumstances the defendant pleads that any payments made to it are valid.

5.2 The plaintiff, up to the time of its liquidation, conducted the business of buying diesel and other petroleum products and selling it at a profit to its clients.

5.3 On or about 12 September 2005 and at Johannesburg, alternatively Cape Town, the defendant, being a registered wholesaler of petroleum products and the plaintiff, represented by its managing director, duly authorised, entered into an agreement (in terms whereof the defendant undertook to sell diesel and petrol to the plaintiff at listed prices, less rebates, from time to time, as ordered by the plaintiff on a strictly cash sale basis. The purchase price of a given order was required to be paid into a banking account of the defendant, either at Absa Bank, Standard Bank, Nedbank or FNB. No product would be delivered to the plaintiff by the defendant before payment of the purchase price had been cleared by the respective bank. The aforesaid terms arid conditions are reflected in the defendant's letter of 12 September 2005 to the plaintiff, a copy of which is annexed hereto as annexure 'C'.

5.4 Subsequent to 12 September 2005 the defendant sold and supplied petrol and diesel (my note: it is common cause that this should read 'paraffin and diesel') to the plaintiff on many separate occasions in the normal course of business on the terms and conditions contained in annexure 'C'.

5.5 Payments made by the plaintiff to the defendant relate to the sale of diesel only [no petrol having been sold to the plaintiff], which occurred in the normal course of business and strictly in terms of the terms and conditions contained in annexure 'C' (My note: the facts show that a very small percentage of IP was also sold. Nothing turns on this.)

5.6 During the period from 3 April 2006 to 8 June 2006 the defendant bore no knowledge of the fact that an application had been made in the High Court, Cape of Good Hope Provincial Division, for the winding-up of the plaintiff, and that such application was pending.

5.7 In selling and supplying diesel to the plaintiff as aforesaid, the defendant at all times did so in the normal course of business and in the bona fide belief that the plaintiff was

conducting business in solvent circumstances.

5.8 To the best of the defendant's knowledge and belief the plaintiff retailed petrol and diesel in the open market and required the quantities of diesel supplied to it by the defendant to continue to operate its business for profit.

5.9 The plaintiff utilised the proceeds of the sale of the diesel supplied to it by the defendant during the period 3 April 2006 to 18 July 2006 (my note: this date was later corrected in further particulars for trial and should read 8 June 2006) to finance further purchases from the defendant during the said period.

5.10 By reason of the aforegoing the defendant respectfully prays that the honourable court make an order in terms of section 341(2) of the Companies Act validating the sales of diesel and the purchase prices paid by the plaintiff in respect thereof to the defendant."

[18] The defendant also prays for "an order validating the sale of diesel and the purchase prices paid by the plaintiff to the defendant in respect thereof as reflected in annexure 'B'" and for,the plaintiffs claims to be dismissed with costs.

The evidence

[19] The only witness who testified before me was Mr Dennis Graham Shepherd ("Shepherd"). He was called by the onus bearing defendant. The plaintiff called no witnesses.

[20] Shepherd is the managing director of the retail division of the defendant. During the relevant period, 2006 to 2007, he was the managing director of the Cape division of the defendant. He started his association with the defendant during or about September 2005.

[21] At an earlier stage, Shepherd and his fellow director, Watts, were attached to the

company Afgri. They prepared a business plan involving the distribution of fuels by Afgri. Afgri did not accept the proposals and Watts left the company. On the advice of Shepherd, he started the fuel distribution business on his own. This happened in 2003 with the assistance of Shepherd. In 2005, Shepherd's contract with Afgri came to an end, and he joined Watts in the defendant business.

[22] Shepherd testified about annexure "C". He gave evidence about the contents thereof.

[23] It is common .cause that Valentyn, at a certain stage which is not relevant for present purposes, but well after September 2005 when annexure "C" was written, accepted the proposal therein contained, and the contract came into existence between the plaintiff and the defendant.

[24] The plaintiff placed the first order with the defendant in January 2006.

[25] Shepherd gave detailed evidence about the procedure that was followed to supply the petroleum products to the plaintiff. They worked on a strictly cash basis. The cash had to be deposited in one of the defendant's banking accounts before the delivery would be made. The plaintiff also collected the deliveries from the refinery on a "coc" or "customer own collection" basis.

[26] The defendant also had customers who received products from the defendant on credit. This was about 20% of the defendant's clients. In those cases, credit applications were completed, and the credit worthiness of the customers was investigated. This normally involved some of the bigger role-players.

[27] In the case of cash clients, such as the plaintiff, it was not necessary to investigate the credit details of such a customer. The reason was that payments had to be made in advance before deliveries would take place.

[28] During the period January to June 2006, when the parties did business with each other, Shepherd had very little contact with Valentyn. Contact was not necessary. The delivery and payment procedure was an effective one.

[29] The first time that Shepherd heard that the plaintiff had financial problems was on 8 June 2006 when he received a phone call from one Ms Moodlia from the office of the liquidators. She telephoned him and asked him whether he knew that the plaintiff had been placed in liquidation (this was of course shortly after the provisional liquidation date but well before the final liquidation date). Shepherd said he did not know. Ms Moodlia was very considerate and suggested that Shepherd should take legal advice because he was not allowed to trade with an insolvent company.

[30] Shepherd immediately telephoned his attorney, who advised him to stop deliveries immediately. This was done.

[31] Shepherd testified that he had no prior knowledge of financial problems on the part of the plaintiff. The defendant had a number of other "cash customers". The plaintiff was the only cash customer that picked up its own deliveries ("customer own collection") from the refineries. This meant that the defendant had even less contact with the plaintiff.

[32] It turns out that Valentyn and his wife also floated another company, Excellent Fuels (Pty) Ltd, during or about the time of the winding-up of the plaintiff. Shepherd knew nothing about this. He only started doing business, through the defendant, with Excellent Fuels months later, in December 2006 on the same cash basis, and only learnt about its existence at that time. Before starting doing business with Excellent Fuels, Shepherd also took legal advice, given the history of the plaintiffs winding-up, and was told that he could go ahead, but had to find out whether Excellent Fuels had financial problems. He enquired from the insurance company, Coface, and was advised that there was nothing on record about financial difficulties experienced by Excellent Fuels. Nevertheless, the defendant and Excellent Fuels only did business for a very short period, a month or two, whereafter it was decided to terminate the arrangement.

[33] Shepherd was subjected to intensive cross-examination.

[34] The proposals contained in annexure "C", in September 2005, were only accepted by Valentyn in January 2006 after Shepherd followed up the September 2005 proposals with him.

[35] The witness did ask Valentyn why he was changing from one supplier to another and the answer was that he could get better rebates from the defendant. He was never told that the plaintiff owed the previous supplier any money.

[36] The deliveries started in January 2006. That is also when Valentyn accepted the terms and conditions and the "order procedures". Watts did not have any contact with Valentyn at the time. Watts left it to Shepherd to conclude the arrangement.

[37] It was put to Shepherd that if he was satisfied with the plaintiffs credit worthiness, he would have allowed deliveries to be made on credit. Shepherd answered that if he had been asked for credit it may well have been given but it was not asked for.

[38] The document bundle, exhibit "A", contains extracts of Shepherd's evidence before an insolvency enquiry that was held after the winding-up. This is exhibits "A24" to "A52". Shepherd was cross-examined about the contents of his evidence on that occasion. As I understand inscriptions at the bottom of each of the transcribed pages, the evidence was given on 2 October 2007, more than four years before Shepherd testified before me. Shepherd was examined about a few discrepancies between his evidence before me and what he told the enquiry. In my view, generally speaking, these discrepancies were not of a material nature, and adequately explained by Shepherd. I do not consider it necessary to dwell on the details.

[39] One of the central themes of the cross-examination involved the change or purported change of the plaintiffs VAT number on the invoices. There was an indication that the VAT number of the plaintiff may have been changed to the VAT number of another company in the *Excellent group, Excellent Fuel Carriers (Pty) Ltd* which is a company used to transport fuel. The defendant also did business with this company on a limited basis. The VAT numbers were not considered to be of great importance, because fuel is "zero rated" and does not attract VAT. Shepherd made enquiries about the use of VAT numbers from his auditor and was told that the VAT numbers should be reflected, despite the "zero rating". Any confusion between the VAT numbers was ascribed by Shepherd to an administrative oversight There was also some confusion about the registration number of the plaintiff company.

[40] At one stage Valentyn asked Shepherd to change the company registration number on the documentation. He referred the query to his financial department. He assumed that Valentyn had given the wrong company number from the outset and now wanted to rectify matters. He did not suspect that Valentyn wanted to replace the one company with another one, but nevertheless requested the financial department to investigate. The result of the investigation was that the numbers initially used were correct On the advice of his financial manager, it was decided and accepted that the registration and VAT numbers initially used were correct and should be persisted with. He took this up with Valentyn who said that a lady in his office had made a mistake and that the existing particulars should be retained. In the end, Shepherd was satisfied that the status quo could remain. He did not suspect that anything sinister was in the offing. The defendant's employees on the ground also had no information that anything untoward was going on. He said "Ons mense het ook niks in die veld opgetel dat iets snaaks aan die gang is nie. Gewoonlik vind ons gou uit as iets snaaks aangaan, ons het nie so iets opgetel nie."

[41] In cross-examination, it was put to Shepherd that a notarial bond over the property of the plaintiff was already passed in favour of a previous supplier, Total, in January 2006, at the time when the defendant started doing business with the plaintiff. Shepherd was unaware of this. He was similarly unaware of the fact that the plaintiff had already ceded its book debts to Total in September 2005. In this regard, I add that there is no indication before me that Total, for example, ever took the trouble to notify the defendant, or other creditors, of the existence of this cession.

[42] The witness never enquired where the funds came from that the plaintiff used to pay for the deliveries of fuel received from the defendant. "Ek vra nooit so iets nie, ek het aanvaar dat

die geld wat hulle aanbied is goed."

[43] Shepherd was asked whether he knew if the profits generated by the plaintiff from selling the products delivered by the defendant to the plaintiff to the larter's customers were used to supplement the coffers of the plaintiff or perhaps to spend for the benefit of the other company, Executive Fuels. Shepherd said that he had no idea and did not even know about the existence of Executive Fuels before December 2006.

[44] I did not get the impression that Shepherd was in any way discredited during this intensive cross-examination. He struck me as an honest and reliable witness. I find nothing in his evidence which flies in the face of what was pleaded in paragraph 5 of the plea, supra.

Brief remarks about the legal position

[45] I have already quoted the provisions of section 341(2) to the effect that "every disposition ... made after the commencement of the winding-up, shall be void unless the court otherwise orders".

[46] It is clear that the court has a discretion to "otherwise order".

[47] In *Meskin, Henochsberg on the Companies Act* the provisions and effect of section 341(2) are comprehensively dealt with from p676 to p681.

As to the court's discretion to "otherwise order" the following is said by the learned author at p680:

"The Court's discretion 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 ... 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 ... but the Court ordinarily will refuse to validate a disposition when 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..."

[48] The learned authors Blackman et al, in their work Commentary on the Companies Act deal with the subject at pp 14-46 to 14-61.

As to the court's discretion to "order otherwise", the learned authors say the following at 14-56:

"The Court's discretion to validate a disposition is absolute and is controlled only by the general principles which apply to every kind of judicial discretion. It is free to act according to the judge's opinion of what is just and fair in each case. In assessing what is just and fair the Court must of necessity strike some balance upon looking at what is fair vis-a-vis the applicant as well as what is fair vis-a-vis the creditors. Each case is dealt with on its own facts and particular circumstances, special regard being had to the question of the good faith and honest intention of the persons concerned.

All the cases in this area indicate useful guidelines but they are no more than that, for the Courts have had to consider the use of the validating power in a very wide variety of circumstances and will no doubt in future have to consider further and different combinations

of the possibilities inherent in commercial situations involving insolvent companies. The different factual combinations are, as a matter of possibility, so varied that any attempt to state binding rules would be highly likely to find the Courts concerned with factual situations for which the rules were inappropriate."

In both *Blackman and Henochsberg*, one finds detailed discussions on these "useful guidelines" and there are copious references to both South African judgments and judgments in other jurisdictions.

I shall later briefly revert to some of these guidelines.

In *Herrigei NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 4 SA 669 (SWA) the void disposition which the plaintiff liquidator sought to recover from the recipient was made the day after the provisional liquidation order was granted.

In his very comprehensive judgment, repeatedly quoted in later judgments, the learned judge, at 679, weighed up certain factors in favour of the first defendant, seeking to have the disposition validated, and considerations against such validation. It was only a single disposition amounting to some R12 000,00.

The learned judge found that there was no evidence of *mala fides* on the part of the recipient. It also appeared that the payment was made in the course of a business transaction between the liquidated company and the recipient.

As to the factors weighing against validation, the learned judge said the following at679F-H:

"On the other hand there are weighty considerations affecting the exercise of the discretion in favour of the plaintiff. The disposition was not made by Quickbeton in order to keep it afloat, as it were; in other words, this case is not one of the so-called 'salvage cases'... (my note: these 'salvage cases' are generally those in which the disposition had the effect of keeping the company afloat, or where the company's coffers had been swollen as a result of the disposition. In those cases, the courts generally appear to favour validation.) Furthermore, the disposition in this case clearly diminished the amount of money standing to the credit of Quickbeton at the time of its liquidation. Creditors are, therefore, clearly prejudiced by this (void) disposition."

[50] The learned judge then goes on to make the following remarks, at 679H-680D which, in my view, is of particular relevance for present purposes:

"Furthermore, there is the following tact to be considered, namely that first defendant admits that on 26 June 1978, when it could still have presented the cheque for R12 518,70 for payment before Quickbeton was provisionally liquidated later that day, and also subsequent to this date, Quickbeton was already unable to pay its debts. By virtue of the provisional liquidation order having been issued on that date, the said *concursus creditorum* was established, and thereafter the claim of each creditor had to be dealt with as it existed at the time the provisional liquidation order was issued: see Walker1 case supra at 160 and 166: Administrator. *Natal v Masill Grant and Nell (Ptv) Ltd* fin liquidation) 1969 1 SA 660 (A) at 671G-H. First defendant, having received payment in full of the debt owing to it by Quickbeton after Quickbeton was provisionally liquidated, was clearly preferred above other creditors because the amount available for distribution by the liquidator (plaintiff) amongst the general body of concurrent creditors - including first defendant - must have been quite appreciably reduced and first defendant was, in effect converted from an ordinary concurrent creditor to a

preferent creditor. The fact that first defendant received the payment in question after liquidation supervened, that this payment was a disposition which was, and is, void and (most importantly) that it had, and has, the effect of clearly preferring first defendant above the general body of creditors must, in my opinion, outweigh such considerations of fairness and equity as exist in first defendant's favour. To validate such preferential payment simply because first defendant did not know that it was being preferred when the payment was made to it, would, in my judgment, defeat the whole purpose of section 341 of the Companies Act." (Emphasis added.)

[51] It is clear, from the aforegoing, that the learned judge declined to "order otherwise" and to validate the disposition. He ordered the first defendant to refund the disposition with interest a tempore morae and costs.

[52] In *Rousseau en Andere v Malan en 'n Ander* 1989 2 SA 451 (CPD) the recipients were also ordered to repay the void disposition.

The plaintiffs, in their capacity as liquidators of the insolvent K company, instituted two claims against the defendants for repayment of certain monies. The first claim related to a sum of money which was paid to the defendants, in their capacities as agents for the K company, as commission and repayment was claimed on the grounds that it was made after the K company had already been placed in liquidation and that it was therefore void in terms of section 341(2).

The second claim concerned a disposition for value in terms of section 26 of the Insolvency Act, 24 of 1936. I will only refer to the first claim. It was common cause that the insolvent company's scheme, with the recipients of the disposition as its agents, was an illegal one. It

was aimed at the distribution of a product known as "milk culture" .and entailed the sale to members of the public of so-called "activators". It appears to have been a type of pyramid scheme and it was also conducted in contravention of the Gambling Act 51 of 1965. The court found that the recipients as agents of the company participated in the illegal scheme.

[53] At 459A-F, the following is said:
"Die situasie word getoets nie alleen vanuit die oogpunt van die ontvanger nie maar ook vanuit die oogpunt van die maatskappy wat die vervreemding gedoen het. Die volgende blyk uit die uitsprake:
(a) Die vervreemding moes minstens bona fide en vanuit 'n sake oogpunt redelik gewees het. In die gewone loop van sake sal dit by meebring dat die ontvanger 'n teenprestasie gelewer het vir die vervreemding - (then follows a reference to an English case).
(b) Bostaande elemente alleen is egter nog nie genoeg nie want die Howe moet nie te maklik die basiese konsep van 'n concursus creditorum versteur deur toe te laat dat een skuldeiser langs daardie weg bevoordeel word bo ander skuldeisers nie — (here follows a few references including one to *Herrigel, supra*).

Dit is gevolglik van kardinale belang om daarop te let of die vervreemding redelikerwys daarop gemik was om die maatskappy se bates te versterk, wat tot voordeel van al sy skuldeisers sal strek.

In die huidige saak is daar na my mening geen basis vir die uitoefening van die hof se diskresie nie, vir die volgende redes: wat ook al die *bona fides* van die ontvangers (dit wil se die eisers) kon die maatskappy nie bona fides gewees het nie. Die maatskappy was in Oktober 1984 in extremis en sy binnekring het geweet daar is geen werklike eindproduk of

vooruitsig op solvensie nie. Die hele onderneming was onwettig en geen vervreemding deur die maatskappy om die onwettigheid langer te laat voortduur (en nog meer mense te ooreed om aktiveerders te koop) kan deur die hof gebillik word nie."

[54] Of course, in the present case, there is no question of an illegal scheme. The plaintiff and the defendant started doing business in the ordinary course already in January 2006. Petroleum products were sold by the defendant to the plaintiff to the value of millions of rand. All the orders were duly delivered and paid for in advance. In the relevant two month period alone, ie between 3 April 2006 and 8 June 2006, between the dates when the liquidation proceedings were deemed to commence in terms of section 348 of the Previous Companies Act, and when the . defendant immediately stopped further deliveries upon being told for the first time that a provisional liquidation order had been granted against the plaintiff, business in excess of R4 million was concluded in the normal course between the two parties. The undisputed evidence of Shepherd is that the defendant had no inkling whatsoever of the plaintiffs financial difficulties or, for that matter, of the liquidation proceedings having been launched and a provisional order having been granted a few days before the information was conveyed to the defendant on 8 June 2006.

Having listened to the impressive evidence of Shepherd, even when he was subjected to intensive cross-examination, I am satisfied that the *bona fides* of the defendant are beyond question, at least on the probabilities.

The plaintiff offered no evidence whatsoever. Indeed, I find myself unable, on the probabilities, to conclude that this is not a so-called "salvage" case in which the dispositions over a number of months had the effect of keeping the plaintiff afloat, or where the company's

coffers had been swollen as a result of the disposition, in the words of the learned judge in *Herrigel* at 680D-F.

[55] It is difficult to see how it can be argued that the monies now being reclaimed were paid to the defendant to the detriment of other creditors: the monies were paid in the normal course of trade in exchange for corresponding quantities of diesel and IP. By all accounts, even before he entered into the arrangement with the defendant in January 2006, Valentyn had been trading on this basis for a considerable period of time. One of the common cause facts listed in exhibit "B", provides that "at the time of its liquidation the company conducted the business of purchasing diesel and other petroleum products for the sale to clients at a profit" (emphasis added). There was no evidence presented to me to show that this normal commercial activity was not aimed at "keeping the plaintiff afloat and swelling its coffers", even if it turned out that by April 2006 the plaintiff was commercially insolvent with its liabilities exceeding its assets. Many struggling companies keep on trading in the hope of "staying afloat". In many instances, like the present, their trading partners are not aware of their financial distress. It also does not seem to me that this particular trading activity between the plaintiff and the defendant flew in the face of the alleged cession by the plaintiff of its book debts to Total at an earlier stage. There were no "book debts" incurred as far as the defendant was concerned: the purchase price for the petroleum products had to be paid before the products were delivered for the plaintiff to sell it to its clients at a profit In any event, the defendant was unaware of the alleged cession of book debts.

[56] Against this background, it is convenient to quote passages from an article written by Prof Blackman, whose Commentary on the Companies Act I have already referred to, in LAWSA First Reissue vol 4 part 3. The relevant passages are to be found in para 174:

"The central issue is whether the payments were made so as to allow the company to carry on business for the ultimate benefit of the creditors. The element of benefit to the company will usually be satisfied if the transaction relates to the need to continue business and earn income or save loss during the pendency of the application.

This will usually involve a counter-performance from the recipient (my note: see Rousseau, supra, at 459B-C) after the date of the commencement of the liquidation. Thus, usually, if the payment is made honestly and in the ordinary course of business for the benefit of the company for goods or services supplied to the company after the commencement of the liquidation, a validation order will generally be made on the grounds that the delivery of goods or performance of the services increased the assets of the company .... Even if no benefit actually accrued in the sense that the company's undertaking or assets were built up by the attacked transaction, the payments may still be validated if they were made in good faith for the benefit of the company. In the case where some form of commercial assessment is required, this will not involve an examination of minute detail such as the necessity or otherwise to make particular telephone calls; nor will it involve any element of reasoning by hindsight in an endeavour to determine whether the transactions provided actual benefit to the creditors. But at the very least the court should consider whether:

(a) the company was carrying on business;

(b) the continuation of the business might be considered to be in the best interests of the creditors; and

(c) the provision of the services by the appellant (in this case the recipient of the payments) appeared, at the time of the transactions, to be necessary or desirable for the continuation of business operations. 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 is not fatal to the success of an application for validation of a transaction otherwise rendered void by the section ..."
These remarks are made by the learned author with reference to the relevant authorities, appearing in the footnotes from p267 onwards.

[57] Inasmuch as the *bona fides,* or lack thereof, of the plaintiff (presumably as represented by Valentyn and/or his wife) may be relevant to this enquiry, there is no evidence before me to show, at least on the probabilities, that they did not attempt to keep the plaintiff "afloat" while trading with the defendant or, in the process, to "swell its coffers". Shepherd was the only witness. In the circumstances, I consider this issue to be a neutral one for present purposes.

[58] In Lane NO v Olivier Transport 1997 1 SA 383 (CPD) a single payment was made to the relevant recipient a day or two before the close corporation was provisionally liquidated. The learned judge decided not to exercise his discretion in favour of validating the payment. It appears from the judgment, at 387B, that the defendant (recipient) did not plead any facts or factors for the exercise of the discretion and its plea amounted to a bare denial.

[59] Of relevance, is the efforts,made by the learned judge to list at 386C-387B, a series of guidelines applicable when it comes to the exercise of this particular discretion. I will deal with them briefly, without quoting the authorities relied upon by the learned judge barring to state that he also referred to *Herrigel* and *Rousseau*:
(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. I have already referred to this topic.
(b) Each case must be dealt with on its own facts and particular circumstances. This I have mentioned.

(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned. This has been dealt with.

(d) The court must be free to act according to what it considers would be just and fair in each case.

(e)The court, in assessing the matter, must attempt to strike some balance between what is fair vis-a-vis the applicant as well as what is fair vis-a-vis the creditors of the company in liquidation.

I have also mentioned the question of the alleged cession of book debts to Total. No details about creditors were presented to me in evidence. In fairness I must point out that counsel for the plaintiff, in comprehensive heads of argument, made reference to documentation to be found in the notices bundle (exhibit "Y") showing the extent to which the assets of the plaintiff were eclipsed by its liabilities and suggesting that the plaintiffs financial position deteriorated from December 2005 to April 2006. In the heads of argument reference was also made to the fact that the Valentyns caused Excellent Fuels (Pty) Ltd to be incorporated shortly after the section 345 letter was addressed to the plaintiff. It was submitted in written heads of argument that Valentyn had attempted to get the defendant to "switch" company registration and VAT numbers on its system in an effort to continue trading under a different guise in the face of impending liquidation. No evidence to support these submissions was offered during the trial. I have dealt with the cross-examination of Shepherd on the last-mentioned subject I repeat my earlier observation that I am not persuaded, on the available evidence, that the Valentyns did not, at least on the probabilities, attempt to keep the plaintiff afloat while trading with the defendant-Returning to this requirement to attempt to strike some balance between what is fair vis-d-vis the applicant (here the defendant) as well as what is fair vis-a-vis the creditors of the company in liquidation, I consider it necessary to look at the position of the defendant: although it was not stated before me in so many words, it must be fair to assume, as I do, that

the defendant paid for the petroleum products before selling them to the plaintiff. According to Shepherd's evidence, the defendant's supplier, at the time, was Afric Oil, a subsidiary of Engen. Assuming that the products would have been sold at a profit to the plaintiff, the amount paid by the defendant to its supplier would presumably have been something less than the R4 091 000,00 received by the defendant from the plaintiff for the petroleum sales forming the subject of this dispute. To this extent, the defendant will be out of pocket if the payments were not to be validated by exercising the discretion in its favour. The petroleum products are lost to the defendant, and so will the amount in excess of R4 million be which the defendant received from the plaintiff by way of counter-performance. The monies paid by the defendant to its supplier for these products (presumably something of the order of R4 million or slightly less) will represent a clear commercial loss to the defendant. Added to this, will be legal expenses and interest I consider this to be a substantial loss to an honest and bona fide trader, which complied with its own obligations flowing from this trading exercise, to the letter,

(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. On the available evidence, as I have indicated, it appears, on the probabilities, that the disposition was made in the ordinary course of the plaintiffs affairs.

(g)The court should investigate whether the disposition was made to keep the company afloat or augment its assets. I have, indicated what my finding in this regard is, on the available evidence.

(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 riot have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive.

There is no evidence to persuade me to come to such a conclusion. The possibility of this

having happened must be remote, in my view, in the face of a finding that the payments were made in the normal course of business.

(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. This was clearly the case, given the undisputed evidence of Shepherd.

(j) Little weight should be attached to the hardship which will be suffered by the applicant (here the recipient) if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. I have dealt with the perceived hardship to other creditors which may have been caused by the payments made by the plaintiff to the defendant. I will deal hereunder with the position of the creditors which may have been caused by the payments made by the plaintiff to the defendant. I will deal hereunder with the position of the *concursus creditorum* which was created upon the granting of the provisional liquidation order.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. In this case it was a series of transactions stretching from January 2006.

(1) 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. Here the learned judge refers to *Herrigel* at 680. I have already quoted the passage from *Herrigel* at 679H-680D. I have emphasised certain extracts from that passage of the *Herrigel* judgment It seems to me that what the learned judge in *Herrigel* had in mind concerned payments made after the liquidation order was granted and not payments (like here) made after the winding-up was deemed to commence in April 2006 in terms of the provisions of section 348 of the Previous Companies Act. The passage from *Administrator, Natal,* quoted by the learned judge in *Herrigel* on the

subject, also concerns the situation upon the establishment of the *concursus creditorum*. As already quoted, this relevant passage can be found in Administrator, Natal, supra, at 671G-H where the learned judge also confirmed the trite principle that upon the liquidation of that company the *concursus creditorum* was established.

I will revert, hereunder, to the argument advanced on behalf of the plaintiff that a different approach is required in respect of payments made to the defendant before the provisional liquidation order was granted on 31 May 2006, and those payments made between the period 31 May 2006 and 8 June 2006 when deliveries were stopped.

Should the payments be validated by "ordering otherwise"?

[60] I have dealt with what the learned authors, *Henochsberg* and *Blackman*, have to say about the nature of the discretion to be exercised in this regard. It

"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 and "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 *Henochsberg* at p680.

[61] I have dealt with the applicable guidelines. For the reasons mentioned, it appears that the application of those guidelines would militate, on balance, in favour of a decision to validate the payments. The principles, as I understand them, have been applied to the facts of this case. I will not embark upon unnecessary repetition.

[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 432,00.

[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 & 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 pi60 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 p166 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 section 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 section 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 (Pry) Ltd 1983 1 SA 79 (C) the question seems to have been left open, although in a different context, at 86 to 87.

[66] Dealing with International Shipping, Henochsberg, at p677, 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 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 *coricursus creditorum* was instituted ..."

[67] I am alive to the fact that in the text of section 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, J A, *supra, in Walker v Syfret NO* at p166.

[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. An alternative argument offered on behalf of the defendant

[72] Mr Vorster offered an alternative argument aimed at persuading me to refrain from ordering the defendant to refund the payments even if their validation were to be refused.

[73] Given the view I have taken already on the subject, this alternative argument only remains relevant with regard to the post provisional liquidation order payments.

[74] I do not propose dealing at length with this argument, although I find it attractive in some respects.

[75] The argument, briefly summarised, amounts to the following: it is trite that, as a general proposition, the mere voidness of a disposition or of the *causa* of such disposition does not create a legal obligation on the recipient to restore what was received. Money in the hands of a recipient such as the defendant became its property by *confusio* and cannot be recovered

by a vindicatory action - *Stern and RitskinNO vAppleson* 1951 3 SA 800 (W) at 810H-811H as approved *MacKay v Fey NO & Another* 2006 3 SA 182 (SCA) at 186J-187A.

[76] In Herrigel the following was said at 680H:

"It is true that section 341(2) says nothing about the recovery of the void disposition but merely avoids the disposition itself. The invalidation of the disposition of the company's property and the recovery of the property disposed of are logically two distinct matters; ..."

At 681B-D the following is said in *Herrigel*:
"In my judgment plaintiff is entitled to the repayment of the void disposition, this being the relief claimed by him in this action, and such repayment must be ordered against first defendant. Inasmuch as I have found that the disposition was and is void and have not, in the exercise of my discretion in terms of section 341(2) of the Companies Act 'ordered otherwise', it, in my view, follows as a necessary corollary that the order prayed for in the action for the repayment of the void disposition must be made."

[77] Mr Vorster also relied on the following passage from *Sackstein NO v Proudfoot SA (Pty)* Ltd 2003 4 SA 348 (SCA) at 359F-J;
"There is authority for the view that impeaching a transaction and the subsequent vindication of the property concerned are two distinct steps in the process of recovery of the relevant assets.

In the matter of In re Leslie Engineers Co Ltd (in liquidation) [1976] I WLR 292 Oliver J, in the Chancery Division, had to deal with an application by a liquidator to have declared void two

payments made by the company after the commencement of the winding-up of the company. Section 227 of the English Companies Act of 1948 at the time read as follows:
'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 members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void.'

On behalf of the liquidator it was argued that if the disposition is voided, the liquidator acquires the right to recover the property. Oliver J at 298B-D found this argument too wide: "Now, it must be remembered that the invalidation of the disposition of the company's property and the recovery of the property disposed of, are two logically distinct matters. Section 227 says nothing about recovery; it merely avoids dispositions ... What is the appropriate remedy in respect of the invalidated disposition is a matter not regulated by the statute and that has to be determined by the general law...'"

[78] In *Sackstein*, at 359/-360C, the learned Judge of Appeal then goes on immediately with what was said in *Herrigel* on the subject:

"In *Herrige*l ... Lichtenberg J at 678A-B pointed out that section 227 of the English Companies Act has its counter-part in section 341 of the South African Companies Act. Similar to the English provision, section 341(2) of our Companies- Act gives the court a discretion not to declare a disposition made after the commencement of winding-up proceedings void. On the facts the learned judge refused to exercise his discretion not to invalidate the 'void' disposition (at 680G). The question then arose: can the first defendant who had received the benefit of the void payment by the company in liquidation, be ordered to repay Same to the liquidator? It

is in this connection that the learned judge following Leslie Engineers remarked, at 680H, that section 341(2) of the Companies Act says nothing about the recovery of the void disposition but merely avoids the disposition itself. That is, as I have pointed out, also the position under section 227 of the English Companies Act."

[79] The learned Judge of Appeal, with respect, appears to have overlooked the remarks of the learned Judge in *Herrigel,* at 681C-E, which I have quoted, that "it follows as a necessary corollary that the order prayed for in the action for the repayment of the void disposition must be made".

The learned Judge of Appeal in *Sackstein did* not appear to take this issue any further or make a firm pronouncement thereon. Assuming that he did take note of the fact that the learned judge in *Herrigel* regarded it as a "necessary corollary"
that the void disposition can be ordered to be refunded, it is clear that the learned Judge of Appeal in Sackstein did not criticise that approach.

[80] F add that in Leslie Engineers, supra, evidently relied on with approval by the learned Judge of Appeal in *Sackstein*, the recipient of the void disposition was also ordered to make repayment. The same, of course, happened in *Herrigel*, Rousseau and Lane.

In Blackman et al, supra, at 14-15, the following is said oh the subject:
"The section does not provide for recovery of the property. It merely renders the disposition void, and gives the court a discretionary power to order otherwise, ie to validate the disposition. 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.

Where the disposition has been made by a cheque drawn on the company's bank account, whether in credit or overdrawn, the amount must be recovered from the payee and cannot be recovered from the bank in terms of section 341."

The learned authors rely on Leslie Engineers, supra, in the course of this discussion.
At 14-61, relying on *Herrigel*, they simply say the following:
'Although the court is not expressly empowered to make an order declaring a disposition to be void, it may make such a declaratory order. The court will order a person who has received a void disposition to repay it. The court has the power to order him to pay interest a *temporae morae*. It does not however follow from the invalidation of a disposition of a company's property, such as money standing to its credit at a bank, that the property may be recovered. It may have become inextricably mingled with an innocent recipient's property,"

For this latter proposition, the authors also rely on what was held in Leslie Engineers.

[81] Mr Vorster, in his comprehensive heads of argument, *inter alia*, relied on the following passage in Leslie Engineers, already quoted:
"What is the appropriate remedy in respect of the invalidated disposition is a matter not regulated by the statute and that has to be determined by the general law..."

It was argued by Mr Vorster that the "general law" there referred to, would in' South African parlance be the common law and more specifically the law relating to unjustified enrichment. In the present case, the plaintiff has made no averments in the particulars of claim suggesting either that the defendant was unjustifiably

enriched or that the plaintiff was unjustifiably impoverished by the payments in question. This is not surprising, so the argument goes, as it is clear on the evidence that the plaintiff received full counter-performance for the payments made by it in the form of fuel delivered to it and presumably on sold by it. Consequently, so the argument goes, even if validation were to be refused, the prayer for repayment should similarly be refused.

[82] Although I find this argument of Mr Vorster attractive in some respects, I am not prepared to uphold it in the present case. Firstly, the defence, such as it may be, was not pleaded. Secondly, the approach that repayment must necessarily follow a refusal to validate, adopted by a series of eminent authorities, as I illustrated, and not evidently criticised in *Sackstein* where *Herrigel* was under consideration, has not been shown, in my view, to be so clearly wrong that I ought to deviate therefrom. Thirdly, Mr Vorster's argument about the absence of unjustified enrichment, is in my view not applicable to the question as to whether or not payments made after the liquidation order has been granted should be validated. Unjustified enrichment does not, in my view, enter into the equation at the post liquidation order stage. Such payments simply fly in the face of the principles governing the law of insolvency. In the celebrated words "of INNES, JA, supra, "... 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 ..."

[83] In the result, I am not prepared to uphold Mr Vorster's alternative argument in this particular case, given the conclusions I have arrived at.

The costs

[84] The payments for the period 31 May 2006 until 8 June 2006, which I will decline to validate, for the reasons mentioned, amount to R422 432,00 as I have indicated.

[85] This amount equals only about 10% of the claim of R4 091 974,66, An order directing the defendant to repay the lesser amount, will riot, in my view, amount to substantial success for the plaintiff. Payment of the lesser amount does, however, fall inside the ambit of the claim as formulated and the argument as presented to me. I consider that it will be just and equitable to award only a percentage of the plaintiffs costs in the circumstances.

The application in terms of rule 21(4)

[86] It appears that the plaintiff moved an application in terms of rule 21(4) when admissions as to the details of all the dispositions made could not be secured from the defendant in terms of a request for particulars for trial. When agreement as to the figures was subsequently reached, it was not necessary to pursue the application. It was argued on behalf of the defendant that it was entitled at first to deny details of the dispositions. There was no room for an application to compel in terms of rule 21(4). The payments were later agreed upon.

I was not fully addressed as to all the details relating to this application, such as the chronological sequence of events and whether or not the initial refusal to make the admissions was reasonable in the circumstances. In the result, I am of the view that it would be appropriate to order each party to pay its own costs relating to this application.

[87] As to costs, generally, I am satisfied that the complexity of the case justifies the employment of two counsel.

The mora rate of interest

[88] The parties were in agreement before me that interest should run on the amounts which the defendant may be directed to repay from 20 May 2008 (fourteen days after the date of demand) at the Prescribed Rate of Interest of 15,5% per annum.

The order

[89] I make the following order:

1. In terms of the provisions of section 341(2) of the Previous Companies Act, Act 61 of 1973, the sales of diesel and the purchase prices paid by the plaintiff to the defendant in respect thereof as reflected in annexure "B" to the particulars of claim and prior to 31 May 2006, are validated.

2. The payments made by the plaintiff to the defendant in respect of the purchases mentioned in 1 above between 31 May 2006 and 8 June 2006 are declared to be void in terms of the provisions of section 341(2) of the Companies Act aforementioned.

3. The defendant is directed to forthwith pay to the plaintiff the sum of R422 432,00.

4. The defendant is directed to pay interest on the aforesaid sum at the rate of 15,5% per annum calculated from 20 May 2008 to date of payment.

5. The defendant is ordered to pay 20% of the plaintiffs costs which will include the costs flowing from the employment of two counsel.

6. In respect of the application in terms of rule 21(4), each party is ordered to pay its own costs.

WRC PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

13614-2009

HEARD ON: 29 FEBRUARY 2012 TO 1 MARCH 2012

FOR THE PLAINTIFF: J MULLER SC ASSISTED BY A M HEYSTEK.

INSTRUCTED BY: KAPDITWALA LAW FIRM

FOR THE DEFENDANT: JP VOSTER SC

INSTRUCTED BY: WESSELS & VAN ZYL INC