IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

DATE 19-11-2019 SIGNATURE

Case no: 56253/2018

In the matter between: -

JOHANNES ZACHARIAS HUMAN MULLER N.O.	1st Applicant
LARISSA ARENDS N.O.	2nd Applicant

and

SHAROL VIRGINIA RAGOVAN SAMUEL	Respondent

JUDGMENT

N P NKOSI (AJ)

INTRODUCTION AND BACKGROUND

[1] The applicants are joint provisional liquidators of Love and Let's Live (Pty) Ltd ("LLL"), a company in liquidation. They were appointed on the 6th of February 2018, in terms of the provisions of Section 386(1)(a), (b), (c), (e) and 4(f) of the Companies Act 61 of 1973 by the Master of the High Court.

[2] An application to wind-up LLL was presented to Court on the 6th of December 2017 and the provisional winding-up order was granted on the 30th of January 2018. It is common cause that an amount of R250,000.00 was paid to the Respondent on the 19th of December 2017. It was submitted by the applicants that the said amount forms part of the insolvent estate of LLL. The final winding-up order was granted on the 16th of March 2018 by this Court.

[3] The Applicants' *locus standi* was initially challenged on the basis that they did not have the power to institute these proceedings. However, the Respondent subsequently withdrew this defence and conceded that the powers of the liquidators were, indeed, extended by Court, empowering them to institute these proceedings.

[4] The sole director of LLL, Mr. Theron Jnr ("Mr. Theron"), registered LLL in 2015 as an investment company. He successfully marketed his company as an investment company and himself as a Foreign Exchange trader of note. LLL received several millions of rands from many investors who were promised lucrative and extraordinary returns on their investments. He initially promised investors a guaranteed 7%, and later 8% return, per month on their investments.

[5] In July 2017, the Financial Services Board ("FSB") issued a notice that LLL was not registered as a financial service provider. This notification reached Mr. Theron's bank and his bank accounts were frozen. Investors began to be very suspicious of the scheme and demanded their monies without success. Mr. Theron sent a memorandum to all the investors informing them that all the funds are gone and thereafter left the Republic of South Africa out of fear of his life.

[6] A forensic investigation was conducted on LLL by Phandahanu Forensics who acted on instructions from the Applicant's attorney Mr. Krog. The forensic audit report confirmed that LLL was masquerading as a financial investment company, whereas in fact it was a ponzi scheme and that it was conducting its business affairs in contravention of the Banks Act[1] and the Consumer Protection Act[2].

[7] Sometime after LLL's bank account was frozen, Mr. Theron sold Bitcoins which had been acquired with funds from LLL in order to repay the investors. In one of such transactions he submitted the Respondent's bank account as a beneficiary of the proceeds of the sale. An amount of R250 000.00 was deposited on the 19th of December 2017 into the Respondent's bank account. The Respondent was one of many investors who expect repayment of their investment. It is this payment which is the subject matter of this application. The applicants seek an order that it be declared a void disposition in terms of Section 341(2) of the Companies Act 61 of 1973 ("the Act").

DISCUSSION

[8] At the center of this application, is the question whether the amount of R250 000.00 paid to the Respondent constitutes a void disposition. The Respondent conceded that the payment was made after the date of presentation of the winding-up application.

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".*

[1] Act No. 94 of 1990.
[2] Act No. 68 of 2008.

[9] Section 348 of the Companies Act provides that:

> *"A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up".*

It is common cause that the liquidation application was presented to Court on the 6th of December 2017 and that the payment of R 250 000.00 into the Respondent's account was made on the 19th of December 2017.

[10] Section 2 of the Insolvency Act[3] deals with the definition of inter alia a disposition and defines it as follows:

> *"'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of Court; and 'dispose' has a corresponding meaning".*

In my view, the transaction relating to the amount of R250 000.00 fits the definition of a disposition in that LLL through its sole director, transferred or abandoned its right to the Bitcoin through the sale transaction and therefore it is a disposition.

[11] The Court has a discretion to validate a disposition in terms of Section 341 (2). It is correct as submitted by Advocate Louw on behalf of the Applicants that it is incumbent on a party seeking the validation of the disposition to establish the facts upon which he relies for such purpose[4]. Adv. Paige-Green appearing for the Respondent urged the Court to exercise its discretion and validate what is deemed to be an impeachable transaction, and referred to the guidelines enunciated in the decision of ***Excellent Petroleum (Pty) Ltd (in Liquidation) v Brent Oil (Pty) Ltd***[5].

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[3] Insolvency Act 24 of 1936.
[4] Lane No v Olivier Transport 1997 (1) SA 383 (c) at 387 B.
[5] Excellent petroleum (Pty) Ltd (in Liquidation) v Brent Oil(Pty) Ltd 2012(5) SA 407 (GNP).

[12] The Court must exercise its discretion informed by the circumstances of the case. The party seeking the Court's indulgence will therefore have to disclose all the relevant facts favoring him not in an open and honest manner so that the guidelines which were extensively dealt with by Prinsloo J in Excellent Petroleum (supra) case could be tested against such facts.

[13] The Respondent has failed to disclose the identity of the person who made the payment of R250 000.00 into her account. It is obvious that this is a substantial amount and a reasonable person would have been curious and sought to establish its source. She also failed to disclose the reason for such payment. She choose not to disclose these material facts and as submitted by the Applicants, they were solely within her personal knowledge.

[14] On the other hand the Applicants extensively referred the Court to the origins of the transaction, the source of payment, the reasons for such transaction, the identity of the source and the beneficiary in a clear and unambiguous manner. These are circumstances necessary for the Court to be able to exercise its discretion. In ***Wightman t/a JW Construction v Head four (Pty) Ltd*** and another[6] Heher JA said:

> *"The comparison between the two approaches is striking. Whereas the appellant sets out chapter and verse the second respondent deals in generalizations. Each material averment should have been met and answered appropriately not enveloped in a fog which hides or distorts the reality".*

[15] I am not persuaded that Mr. Theron or LLL had good and honest intentions throughout this Bitcoin transaction. LLL was in financial distress and could not meet the investors' demands for a refund. Mr. Theron was stressed by the state of affairs and felt that his life was under threat. The memorandum he circulated to the investors speaks for itself. His actions in this transaction were a desperate measure

[6] Wightman t/a JW Construction v Head four (Pty) Ltd and another at para 16

to alleviate pressure exacted on him by the Respondent who, it would seem from her submissions, was desperate for a refund at all costs.

[16] The disposition was not made to keep LLL afloat. LLL was already sinking and this fact was confirmed by Mr. Theron when he advised the investors that the money was all gone. This was followed by him fleeing the country leaving LLL in limbo.

[17] When the disposition was made, the Respondent already knew that LLL was struggling to refund the investors. In her effort to convince the Court that the intention was not to prefer one creditor over the others, she submitted that:

> *"The Honourable Court can also take into consideration if the dominant motive was not to prefer one creditor over the other, but if it was to avoid criminal prosecution (Gore and others NNO v Shell South Africa(Pty)Ltd 2004(2) SA 521(c) which it appears may be of circumstances here in light of the letter sent by Theron Jr".*

The decision in Gore's case relates to the provisions of Section 20(9) of the Companies Act 71 of 2008 in particular, the piercing of the corporate veil where unconscionable abuse of the juristic personality of the company is discovered. It is therefore of no relevance to the Respondent's case in light of her failure to disclose material facts. In my view it is more probable that the dominant motive was to prefer the Respondent over hundreds of other creditors because Mr. Theron master minded the sale of the Bitcoin and the transfer of the proceeds to the Respondent.

[18] Section 341 (2) of the Act is meant to deal with a disposition prior to the final winding-up order. In this instance the Court is vested with a discretion to consider the nature of the disposition made by the LLL or Mr. Theron before the final winding-up order in order to preserve the asserts of LLL until the coming into being of the *concursus creditorum* and appointment of liquidators by the Master of the High Court. Sutherland J in ***Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd* (in Liquidation)**[7]

[7] Engen Petroleum Ltd v Goudis Carriers (Pty)Ltd (in liquidation) 2015 (6) SA 21 at para 25.2,25.3 and 25.4

taking Excellent Petroleum (supra) further, held that a court does not have a discretion if the disposition took place after final winding-up.

[19] I am therefore not persuaded by the Respondent's submission that:

> *"it is not inconceivable that dire and drastic circumstances will befall the Respondent once again, having already lost so much, to such an extent and so as to deteriorate her financial position so severely that insolvency proceedings may be instituted as a consequence if the Applicants' contentions are upheld".*

This submission loses sight of the fact that the exercise of the discretion should be informed by the entire circumstances of the case and not be limited to the Respondent's plight it should also consider the interests of other creditors in similar position with the Respondent. Otherwise accepting the Respondent's submission would defeat the purpose of section 341(2) of the Act and lead to untenable results.

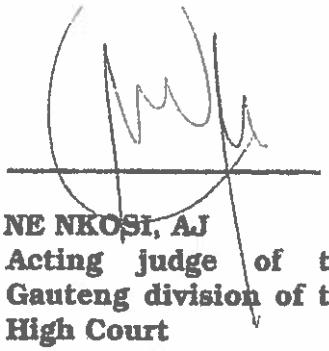
[20] Having regard to the guidelines considered in *Excellent Petroleum (Pty) Ltd* (supra) and *Engen Petroleum Ltd* (supra), I am not persuaded that it would be fair to the other creditors if the Court were to validate the disposition in question. It will only be fair and just if the Respondent's claim is dealt with by the liquidators in tandem with the other creditor's claim. All the guidelines point to the inescapable conclusion that the disposition should not be validated.

[21] I therefore make the following order:

1. The amount of R250,000.00 paid to the Respondent on the 19th of December 2017 is declared void in terms of Section 341(2) of the Companies Act 61 of 1973.

2. The Respondent is ordered to pay the amount of R250,000.00 to the insolvent estate of LLL within 7 days of this order being granted.

3. The Respondent is to pay the costs of this application.



NE NKOSI, AJ
Acting judge of the Gauteng division of the High Court

Date of Hearing	: 16 October 2019
Date of Judgement	: 21 November 2019
For the Applicants	: Advocate M Louw
Instructed by	: Mathys Krog Attorneys
For the Respondent	: Advocate T Paige-Green
Instructed by	: Horn Attorneys