IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A 488/2016

In the matter between:

JOSEPH SASS NO	Appellant
and	
NENUS INVESTMENTS CORPORATION	First Respondent
JIREH STEEL TRADING	Second Respondent
W NAIDOO	Third Respondent
ERNA ROSENSTRAUCH	Fourth Respondent
ELMARI DOS SANTOS	Fifth Respondent
MALCOLM LEE MOUTON	Sixth Respondent
JERMAIN ALCASTER	Seventh Respondent
STEVEN NUNES	Eight Respondent
M J VERMEULEN	Ninth Respondent
DAVID BUYS	Tenth Respondent
CARLOS DOS SANTOS	Eleventh Respondent
ADRIANO DOS SANTOS	Twelfth Respondent
EUSEBIO DOS SANTOS	Thirteenth Respondent
MAGISTRATE JJ VAN REENEN, BELLVILLE MAGISTRATE'S COURT	Fourteenth Respondent
THE MASTER OF THE HIGH COURT	Fifteenth Respondent

JUDGMENT: 15 August 2017

DAVIS J

Introduction

[1] This appeal concerns the implications of a finding that payments from a corporation to third parties were made contrary to s 341 (2) of the Companies Act 61 of 1973 ('the Act').

[2] This question is triggered by the following facts: CEMA Roller Shutter Doors CC ('CC') was finally liquidated on 18 December 2012. Initially, Messrs Daniel Terblanche and Leonard Mart were appointed as liquidators by the Master of the High Court on 29 November 2012. Appellant was then appointed as a third liquidator on 12 April 2013. On 27 March 2014, the Master authorised a holding of a commission of enquiry into the affairs of the CC in terms of s 417 of the Act. On 10 May 2015 the initial two liquidators were removed from office by the Master and the appellant was appointed as the sole liquidator of the CC.

[3] From the records of the CC, it transpired that a range of dispositions were made after the commencement of the liquidation proceedings against the CC which were not repaid. I shall examine the details thereof presently.

[4] However, to return to the chronology: on 11 December 2014 a settlement and sale agreement ('the settlement agreement') was entered into in respect of the sale of business and assets of the CC. The parties to this agreement were the three liquidators acting on behalf of the CC, including the appellant, a new company AA Roller Shutter Doors (Pty) Ltd ('AA') being the purchaser and the eleventh, twelfth and thirteenth respondents who were former members of the CC and were described in the agreement as the settling parties.

[5] The agreement provided for a total settlement amount of R 848 259, 00 to be paid to the liquidators which was made up of the sale to AA of the CC's assets for a R 150 000, 00 the sale of vehicles for R 341 623, 34, payment of the liquidators

realisation costs in the amount of R 55 050, 83 and R 28 279,60 and payment of the sum of R 273 305,24 which was the sum remaining in the CC's bank account as at 30 October 2012. The latter payment was made in terms of clause 4 of the settlement agreement which, inter alia read, that subject to the provisions of this agreement, the purchaser and the settling parties agreed to pay the sellers an amount of R 273 305, 24. Clause 10.1 of the agreement is of particular significance. It reads:

> 'This Agreement constitutes full and final statement of any claims which the Corporation and the Sellers may or may in the future have against the Purchaser and the Settling Parties on condition that all information and representations that it has received from the members of Cema Roller Shutter Doors CC pertaining to the corporation's affairs is accurate and up-to-date.'

[6] Subsequent to the conclusion of this settlement agreement, the appellant applied to the court *a quo* for certain dispositions to be declared void in terms of s 341 (2) of the Act and a further order that these dispositions be repaid by those respondents who had received payment thereof together with interest *a tempore mora* to the date of payment. Appellant also prayed for an order that the eleventh, twelfth and thirteenth respondents, who were the former members of the CC, be declared jointly and severally liable with the other respondents, being the recipients, to the appellant for the indebtedness so claimed.

[7] For the purposes of this appeal the two key payments were an amount of R 250 000.00 made to the first respondent on 5 November 2012 and a payment of R 70 000 to the third respondent on 2 November 2012. There were other payments made, which were the subject of the application before Savage J sitting in the court

a quo. Although the application in respect thereof did not prove successful, these claims appeared to have been settled. Accordingly, the issue before this court is an appeal against the following part of the order granted by the court *a quo*:

> '3. The disposition in the amount of R 250 000,00 made by CEMA Roller Shutter Doors CC to the second respondent, Nenus Investments CC (first respondent in this appeal), on 05 November 2012 is declared to be void in terms of the provisions of s 341 (2) of the Companies Act 61 of 1973.
>
> 4. The disposition in the amount of R 70 000,00 made by CEMA Roller Shutter Doors CC to the second respondent, Mrs W Naidoo (third respondent in the appeal), on 2 November 2012 is declared to be void in terms of the provisions of s 341 (2) of the Companies Act 61 of 1973.
>
> 5. No order is made for repayment of the sums set out in paragraphs 3 and 4 above.
>
> 6. The application against the twenty second to twenty fourth respondents (eleven to thirteenth respondent in this appeal) is refused with costs.'

The judgment of the court *a quo*

[8] The court a quo found that neither the first nor the third respondents were party to the settlement agreement and hence the appellant's claim in respect of these payments had not been settled. The court found that initially loans had been made to former members of the CC by first and third respondents respectively who then lent the monies to the CC. Accordingly, the legal relationship involving the first and third respondents were with the former members, eleven to thirteen respondents. These former members were the true debtors. In a separate legal transaction they used the loaned money in an attempt to refinance the CC.

[9] For this reason, the court *a quo* found that there was no legal obligation which the CC owed pursuant to these loans to either first or third respondents. Thus the repayment by the CC of these loans to first and third respondents respectively in the circumstances meant that the payments fell foul of s 341 (2) of the Companies Act and were void.

[10] However the court went on to say:

> 'On the material before this Court, I am unable to determine whether and to what extent full or part-payment has made by way of the payment made by the former members under the terms of the settlement agreement. It follows that no determination is capable of being made as to amount to be repaid by the second and eleventh respondent o the current papers.'

[11] It is against the order made pursuant to this finding, namely that no order was made to repay the moneys received from the CC that the appellant has approached this court on appeal with the leave of the court *a quo*.

The implications of s 341 (2) of the Act

[12] Section 341 (2) of the Act reads thus:

> '**341 Disposition 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.'

[13] Relying on a passage from Blackman *et al* Commentary on the Companies Act at 14-15, Mr Ferreira who appeared on behalf of first, third and eleventh to

thirteenth respondents, submitted that impeaching a transaction in terms of s 341 (2) of the Act and the subsequent vindication of the property concerned are two distinct steps in the process of recovery of the relevant assets. In this connection Blackman *et al* write:

> '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, i.e. to validate the disposition. Thus, the appropriate remedy in respect of the invalidated disposition is a mater not regulated by the section and has to be determined by the general law.'

[14] Thus Mr Ferreira submitted that the appellant had made no case in his founding affidavit that entitled him to repayment on the basis of a specific cause of action, for example enrichment or another common law ground. Accordingly, appellant was not entitled to claim repayment of the disposition merely because of a declaration of invalidity in terms of s 341 (2).

[15] This argument was sourced in a decision of the Chancery Division in the United Kingdom *In Re Leslie Engineers Co Ltd (in liquidation)* [1976] 1 WLR 292 where Oliver J said of s 227 of the English Companies Act of 1948 (the equivalent of s 341 (2) of the Act) that the section 'says nothing about recovery; it merely avoids dispositions…' at 298

[16] The learned judge went on to say:

> '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. In order to succeed against the respondents, the liquidator does not necessarily have to demonstrate a transaction invalidated by s 227 for there may be claims to recover

moneys paid on other grounds. He does, however, have to show a right of recovery …'

[17] Following upon this decision, in *Herrigel NA v Bond Roads Construction Co (Pty) Ltd and another* 1980 (4) SA 669 (SWA) Lichtenberg J said at 680:

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

[18] Significantly this case dealt with the question of whether a void disposition, where a liquidator sought to recover payment from the recipient, ought to be validated. Thus, the court was required to weigh up factors in favour of the validation of the disposition as well as considerations which dictated to the contrary. Having considered these various factors, the court concluded thus:

'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 s 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. The case of action set out in the particulars of plaintiff's claim, as amended, is that the disposition is void by virtue of the provisions of s 341 (2) of the Companies Act and that, therefore, first defendant, having received the disposition, is liable to repay it to plaintiff. In view of my findings in this judgment plaintiff is, therefore, entitled to such repayment and it must, accordingly, be so ordered.'

[19] In *Sackstein v Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA) the court referred to the *Herrigel* decision, *supra* and noted 'similar to the English provision, s 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'. (at 360)

[20] However, there is a further finding in *Herrigel* which is at 681 B – D which is of particular relevance to the present dispute:

> '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 s 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.'

This finding finds favour in *Excellent Petroleum (Pty) Ltd (in liquidation) v Brent Oil (Pty) Ltd* 2012 (5) SA 407 (GNP) at para s 79 and 82, namely, absent a case for the validation of a transaction which has been declared void in breach of s 341(2) of the Act, a court should order repayment.

Evaluation

[21] In summary, the cases cited by Mr Ferreira deal with the question of whether a court should validate a disposition held to be void in terms of s 341 (2) of the Act. The wording of s 341 (2) of the Act clearly provides for such a discretionary power. It follows that, absent a discretion exercised in favour of validation, a transaction found to be void should hold the consequence that repayment must be made. A 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 purposes of the subsection. See Henochsberg on the Companies Act 71 of 2008 at APPI/24.

[22] In general, a court would ordinarily refuse to validate a disposition where it was made, for example, with the object to securing an advantage to a particular creditor in the winding up which otherwise he or she would not have enjoyed or with the intention of giving a particular creditor a preference. In the present dispute, it is clear that money was lent by the first and third respondents to the eleventh to thirteenth respondents, who then entered into a separate contract of loan with the CC.

[23] Clearly the eleventh to thirteenth respondents owed R 250 000 and R 70 000 to first and third respondents respectively. These obligations could not be discharged on their behalf by the CC. By causing the CC to discharge these obligations, it concluded transactions which were in breach of s 341 (2) of the Act. There is no basis offered by the Court *a quo* to exercise a discretion which would have validated these transactions and accordingly have resulted in an order by which repayment did not have to be made by first and third respondents respectively, nor, on these papers, could such a discretion have been exercised in favour of validation. It is clear that the dispositions to first and third respondent made by the CC were exclusively for the benefit of the former members and thus in palpable breach of s 341 (2) of the Act. No possible basis for validation was or could be offered by first and third respondents.

The settlement with the former members

[24] The second component of the appeal to this Court concerns the relief sought by the appellant as set out in his founding affidavit thus: 'The relief I seek against [the former members] is that they be declared jointly and severally liable to me with the first and third respondents' by virtue of the fact that they cause payment which are here in claim. In his replying affidavit, appellant develops his case:

> 'Respondents act of unlawfully and intentionally alternatively negligently and are liable jointly and severally to repay these monies…'

[25] Central to this claim by the appellant is the nature of the settlement agreement. Respondent claim that appellant was empowered to compromise any claim in terms of s 386 (4) (b) of the Act. By entering into the settlement agreement, a compromise was affected, the agreement was enforceable and any indebtedness which the former member may have had against the CC was waived. As I have noted, clause 10.1 of the settlement agreement provided that 'this agreement constitutes full and final settlement with any claims…' Only in the replying affidavit does the applicant attempt to develop an answer to this problem. He states in respect of clause 10.1:

> 'This term as to full and final nature of the settlement was conditional, it providing further that that it was concluded by the Sellers "on condition that all information and representations that it has received from the members of Cema Roller Shutter Doors CC pertaining to the Corporation's affairs is accurate and up-to-date." The members of Cema Roller Shutter Doors CC are the respondents. On the basis of the facts of this matter, which included the plethora of post liquidation payments made under the control and auspices of the respondents, respondents failed to disclose material information concerning the identity and contact details for many of

> the recipients of these post-liquidation payments. In fact, much of the information received from the members (respondents) was neither accurate, nor complete and up-to-date. Consequently, the condition for the settlement being full and final was clearly not satisfied and accordingly there was no full and final settlement. More particularly, this inaccuracy and incompleteness arose from the respondents' failure to provide me and/or my Johannesburg attorney of record, the said hacker, with information relating to the identity and addresses of the recipients of a large number of payments reflected in Annexure "JS4" to the Founding Affidavit, for inclusion, either in letters of demand or in the Founding Affidavit.'

[26] This averment was clearly developed in response to twelfth respondent's answering affidavit in which he said 'I have been advised … that any liability the former members may have had as a result of the payments made from the corporations banking account has been repaid to the corporation as agreed with the liquidators including the applicant therein.' This was a reference to the amount of R 273 305.24 which was paid by the former members. It is trite that a person in a position of the appellant should make out a case in the founding affidavit. That was hardly done with the respect to this claim against eleventh to thirteenth respondents. But, even if I take account of the passages to which I have made reference in the replying affidavit, there is hardly a basis, on the probabilities, to justify a conclusion that the settlement agreement did not cover these claims.

[27] Furthermore, as noted above, on 27 March 2014 the Master authorised the holding of a commission of enquiry in terms of s 470 of the Act. The appellant in his founding affidavit, states that 'the facts herein disposed by me emerge from an on-going Commission of Enquiry being held in the Corporation pursuant to the provisions of s 418 as read with s 417 of the Companies Act…' It was surely incumbent upon the appellant

to utilise this commission of enquiry to gain information as to the nature and scope of the settlement agreement and hence as to whether payment of R 273 305.24 made pursuant to clause 4 of the settlement agreement covered his claim against eleventh to thirteenth respondents. Without any additional information there is no justification for the court to disturb the finding of the court *a quo* in respect of appellant's claim against these respondents, for it cannot be said on the basis of these papers that, on the probabilities, appellant has shown that the agreement did not settle this claim.

Conclusion

[28] In the result;

1. The appeal against clause 5 of the order of the court *a quo* is set aside and is replaced with the following:

    5.1 Second respondent is to pay the amount of R 250 000 to the applicant together with interest thereon from 05 November 2011, together with costs.

    5.2 The eleventh respondent is to pay the amount of R 70 000 to applicant together with interest thereon from 02 November 2011, together with costs.

2. First and third respondents, jointly and severally, are ordered to pay the appellant's cost of appeal in respect of the appeal against clause 5 of the order of the court *a quo*.

3. The appeal against paragraph 6 of the order of the court *a quo* is dismissed with costs.

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DAVIS J

SALDANHA and STEYN JJ concur