Republic of South Africa

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

Case No: 8623/2018

Before: The Hon. Ms Acting Justice Mangcu-Lockwood
Date of hearing: 28 October 2019
Date of judgment: 6 November 2019

In the matter between:

SIVALUCHMEE MOODLIAR N.O. + Other Applicant(s)

and

RALPH FREESE Respondent(s)

JUDGMENT

Mangcu-Lockwood AJ,

1. This is an application for the setting aside of an impeachable disposition in terms of section 26(1) of the Insolvency Act 24 of 1936 (the Insolvency Act), read with section 340 of the Companies Act 61 of 1973 (the old Companies Act). Initially, the applicants relied in the alternative on sections 29, 20, 31 of the Insolvency Act and the common law but they have abandoned the alternative claims.

2. The applicants are the joint provisional liquidators of Trilinear Capital (Pty) Ltd (in liquidation) (hereafter referred to as 'Trilinear Capital'). Trilinear Capital was placed under final winding up by order of this Court on 4 December 2017.

3. Prior to its winding-up, Trilinear Capital (previously named Trilinear Asset Management Pty Ltd) conducted business as a financial services provider and an asset manager. It was a subsidiary company in a group of companies known as the Trilinear Group. The holding company of Trilinear Capital was Trilinear Holdings Pty Ltd (Trilinear Holdings). The group executive chairman and founder of the Trilinear Group was Sibusiso Samuel Buthelezi (Buthelezi). Buthelezi was also the sole director of Trilinear Capital. Buthelezi's own interest in the Trilinear Group was held through the Pasima Investment Trust (Pasima). Pasima was not a shareholder in Trilinear Capital.

4. The applicants seek an order setting aside a payment of R4 500 000 made on 24 January 2008 by Trilinear Capital to the respondent, Mr Ralph Freese as a disposition without value, in terms of section 26(1) of the

Insolvency Act read with section 340 of the old Companies Act. In the event of the disposition being set aside, the applicants also seek an order for the respondent to repay the amount of R4.5 million.

Background context

5. Most of the background facts leading to the payment of R4,5 million are common cause or are not seriously disputed. Nor is the fact that the respondent was paid an amount of R4,5 million on 24 January 2008 from the banking account of Trilinear Capital.

6. The R4,5 million paid by Trilinear Capital to the respondent had been received for purposes of investment from Cape Clothing Industry Provident Fund (CCIPF). The CCIPF was one of five provident funds created for the investment of pension monies of the members of the South African Clothing and Textile Workers Union (SACTWU), and which used the asset management services of the Trilinear Group. The funds invested by the provident funds were to the tune of R463 million. The provident funds invested the money into the Trilinear Empowerment Trust (the Trust), one of the members of the Trilinear Group. In turn, the Trust engaged the services of Trilinear Capital to manage the funds on its behalf. The evidence is that the trustees of the Trust had little knowledge of the manner in which its monies were expended.

7. During 2011, it emerged that there were large-scale irregularities and maladministration in the Trilinear Group, which prompted some investigations and the removal from office of the trustees of the Trust. A

commission of enquiry was established in terms of sections 417 and 418 of the old Companies Act and a report was thereafter delivered to the Master of this Court. It was uncovered during those investigations that Buthelezi and one Richard Daniel Kawie (Kawie) orchestrated a scheme in terms of which provident fund monies invested in the Trust were used for unlawful purposes, including by way of monies disguised as loans to various entities.

8. Some of the provident fund monies invested into the Trust were advanced to Canyon Springs 12 (Pty) Ltd (Canyon Springs), Arrow Creek Investments 162 Pty Ltd (Arrow Creek), which held shares in Grand Parade Investments Limited (GPI), and Pinnacle Point Group Limited. Canyon Springs was at all times under the control of Buthelezi and Kawie. The investigations revealed that, of the total amount of approximately R 463 million invested by the provident funds through the Trust, approximately R100 million was diverted from Trilinear Capital through Canyon Springs as so-called ‘loans’ as from 20 March 2007. There were no agreements in place for these advances, and no terms for repayment or interest rates were agreed. The monies were either stolen or squandered by Buthelezi, Kawie and associates. The investigations revealed that there were further amounts misappropriated from the Trust by Buthelezi, including amounts of R15 million and R12,54 million during May 2007, through Pasima and Trilinear Capital, respectively. Buthelezi’s estate was placed under provisional sequestration on 26 March 2015, and under a final order of sequestration on 10 September 2015.

The payment

9. On 8 January 2008 the CCIPF deposited an amount of R 120 million with the Trust for investment purposes. In turn, the Trust placed these funds with Trilinear Capital.

10. A forensic accountant, Mr Christopher Sinclair ('Sinclair'), conducted a forensic investigation into the solvency position of Trilinear Capital and prepared a forensic report which was included in the Court papers. According to the forensic report, when Trilinear Capital received the deposit of R120 million from the CCIPF, its bank balance was nil.

11. On 10 January 2008, the amount of R120 million was paid into Trilinear Capital's call account for investment purposes. Immediately after that transfer, Trilinear Capital's bank statement reflected a negative balance of -R15,90.

12. On 23 January 2008 Arrow Creek and the respondent concluded a written share sale and purchase agreement, in terms of which Arrow Creek purchased 1 003 076 shares in GPI. The purchase consideration for the GPI shares recorded in the agreement was R29,50 per share, which amounted to a total purchase consideration of R29 590 742,00.

13. On 24 January 2008, the amount of R4.5 million was transferred from Trilinear Capital's call account back to its current account. On that same day, the amount of R4.5 million was transferred from Trilinear Capital's

current account to the respondent's bank account. By 22 February 2008, the balance on the call account of Trilinear Capital was nil.

14. A year later, on 28 March 2009 Arrow Creek and the respondent concluded a variation to the share sale agreement in which they effected an amendment to the purchase price of the shares, reducing it by R4.5 million, thus reflecting an amended purchase price of R25 090 742.

15. The respondent's explanation for the circumstances of the payment of R4,500,000 is as follows. On 12 April 2007 Buthelezi and Pasima entered into a loan agreement with the respondent, in terms of which the latter paid a capital aggregate amount of R4.2 million into various bank accounts nominated by the former. In terms of the loan agreement, the capital amount was to be repaid on 30 April 2007. Failure to repay the amount by 30 April 2007 would attract interest calculated from 30 April 2007 to date of payment at the prime Nedbank rate plus 2% per year for the first month, and then escalating. Various payments were made by the respondent in terms of the loan agreement, as follows: R500,000 to Eclipse Capital on 22 September 2006; R300 000 to Eclipse Capital on 1 November 2006; R400,000 to Eclipse Capital on 5 February 2007; R2 million to United African Mineral and Energy Consultants on 5 March 2007; and R1 million to United African Mineral and Energy Consultants on 13 April 2007. The borrowers failed to repay any of the amount due by 30 April 2007. During negotiation of the sale of shares held by the respondent in GPI, Buthelezi informed the respondent that the loan would be repaid, and the parties agreed on the interest amount of R300,000. As proof of the negotiation

agreement, the respondent produced a copy of a written acknowledgement of payment which he says he signed in respect of the repayment of the loan, interest and fees. It states as follows:

> *"I, Ralph Freese, a private person, ID number [….], having my address at [….] declare that today the 23rd January 2008, Sibusiso Samuel Buthelezi, a private person, ID number [….], having his address at [….], Cape Town, and Pasima Investment Trust (IT 2856/ 2000) has paid off all of his outstanding debt, including any accrued interest and fees to me. The principal amount being R4 000 000.00 (South African Rand Four million).*
>
> *Signed at this date 23rd of January 2008 by*
>
> *Ralph Freese*
>
> *In the presence of*
>
> *Evert J. Ter Burg*
>
> *Mpho Komeni"*

16. On 24 January 2008, an amount of R4.5 million was paid into the respondent's bank account. On 30 January 2008, the amount of R25 090 742 was paid into the respondent's bank account in respect of the sale of shares.

17. The issues arising for determination are the following:

    a. Whether Trilinear Capital was insolvent as at 24 January 2008;

b. Whether Trilinear Capital made a disposition as contemplated in section 2 of the Insolvency Act;

c. If so, whether the disposition was not for value within the meaning of section 26 of the Insolvency Act;

d. Whether the claim should be limited in terms of section 26 of the Insolvency Act;

e. Whether section 33(1) of the Insolvency Act applies.

18. Section 26(1) of the Insolvency Act provides as follows:

> '26. Disposition without value.
>
> (1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-
>
> (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
>
> (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:
>
> Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.'

19. In order to succeed in terms of section 26(1), the applicants must establish that a disposition was made by an insolvent estate which was not for value.[1] If the disposition was made more than two years before the

[1] *LAWSA* para 270 ; Mars *The Law of Insolvency in South Africa* (10th ed.) para 13.2.1.

liquidation, it must be shown that immediately after the disposition was made the liabilities of the insolvent estate exceeded its assets. If it is proved that the liabilities of the insolvent exceeded its assets by less than the value of the property disposed of, it may be set aside only to the extent of the excess.

Insolvency

20. According to the forensic report, at 24 January 2008 the date of the payment of R4,5 million, Trilinear Capital was factually and commercially insolvent. No proper books of account were kept. Nil returns were submitted with SARS in respect of the period 2004 to 2008, indicating that the company had no taxable income during these years. As at 24 January 2008, the expenses of Trilinear Capital were greater than its income, and it had a negative equity of R810 120. It furthermore appeared to hold no assets, since it conducted business solely as an asset management company. In those circumstances, the forensic report concludes that the deposit of R120 million did not constitute an asset of Trilinear Capital but a liability to the CCIPF.

21. It was argued on behalf of the respondent that there is no proof that Trilinear Capital was insolvent on 24 January 2008, the date of the disposition. Furthermore, the respondent argues that there are no facts provided to support the conclusion that there were no assets at the time of the disposition, adding that the forensic accountant should have

undertaken further investigations regarding the Deutsche Bank receipts which, according to the forensic report, were received by Trilinear Capital during the period in question.

22. In this regard I have no reason to reject Sinclair's forensic report. It is reported in that report that nil returns were filed for the periods 2004 to 2008, an indication that there was no income for that entire period. There were furthermore, according to the forensic report, no assets attributable to Trilinear Capital. The funds that came into its accounts were funds from investors, and could not be considered its assets. This includes funds which would have been received from Deutsche Bank. This also includes the call account of Trilinear Capital which the evidence established was an account used solely for investment purposes. Lastly, within a month of the disposition, Trilinear Capital's bank balance had returned to nil as a result of a number of payments. This evidence could not be disputed by the respondent. It must also be borne in mind that there were no books of account kept by Trilinear Capital for the relevant period.

23. I am satisfied that Trilinear Capital was, on a balance of probabilities, insolvent at the time of the payment of R4,5 million, and immediately thereafter.

A disposition

24. Section 2 of the Insolvency Act defines a disposition as 'any transfer or abandonment of rights to property and includes a sale, lease, mortgage,

pledge, delivery, payment, release, compromise, donation for any contract therefor, but does not include a disposition in compliance with an order of the court; and '**dispose**' has a corresponding meaning.'

25. A disposition of property includes every act by which an insolvent parts with an asset in his estate, whether such asset is a *corpus*, a sum of money or a right of action.[2]

26. It is not in dispute that the payment of R4,5 million was made from the bank account of Trilinear Capital. However, the respondent argues that the payment of R4,5 million could not have been a disposition of property by Trilinear Capital within the contemplation of section 2 of the Insolvency Act because Trilinear Capital did not have any rights over the funds. This is because the funds belonged to the CCIPF, and Trilinear Capital was merely a conduit, acting as a mere agent. In support of this argument, the respondent referred to the case of *Gainsford NNO v Gulliver's Travel (Bruma) (Pty) Ltd* (07/ 5121) [2009] ZAGPJHC 20 (7 April 2009) in which it was held that the transfer of money could not be regarded as a disposition by the company. In the case of *Gainsford,* there had been a falsification of documents both in relation to the establishment of the company, and the opening and operation of a bank account. The bank account was therefore a phantom account which did not belong to the company. That case is distinguishable from the facts of this case because the bank account from

[2] Mars p 250.

which the respondent was paid was the legitimate bank account of Trilinear Capital.

27. One of the examples used by respondent's counsel in support of its argument was a reference to an attorney in relation to matters of a client. However, in *De Villiers NO v Kaplan* 1960 (4) SA476 (C) at 477E van Winsen J set out the position as follows:

> 'Money paid to an attorney by a client to be held and dealt for the client clearly becomes the attorney's property even although it might be paid into a trust account, and when it is so paid in the right to claim the money from the bank similarly remains its property.'

28. Winsen J further held that the attorney in those circumstances has the right to direct the bank at which the trust account is kept to dispose of the amount outstanding to the creditor of that trust account in a manner as directed by him.' (at 479 A) The attorney retained the right to direct the bank to pay the money in his trust account to his trust creditors or to persons to whom such creditors had instructed him to make payment. He also retained the right, if there was a sum in such account in excess of that required to meet the trust obligations, to then direct the bank to pay the excess to his personal creditors or to himself personally. It was therefore held that even although the amount in the trust account, while it was still in such account, was not an asset belonging to the attorney, he had a right of disposal over such an amount, which right empowered him to deal with it in such a way as to make it to, or an equivalent thereto as part of the assets. (479 C) This position was confirmed in *Fuhri v Geyser NO* 1979 (1) SA 747 (N) at 749C-E. The case law is therefore clear that when an attorney

draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity.

29. By parity, *De Villiers NO v Kaplan* and *Fuhri v Geyser* appears to support the applicants' argument that the payment of R4,5 million was made from the bank account of Trilinear Capital, to which Trilinear Capital had a right. In respect thereof, Trilinear Capital had a claim against its bank, Nedbank. Therefore, any money paid into Trilinear Capital's bank account became money in respect of which it held a claim against its bank.

30. Another argument advanced on behalf of the respondent is that, if the R120 million was stolen or obtained by fraud it would not have become the property of Trilinear Capital, and the payment of the R4.5 million to the respondent could not have been a disposition by it. For this proposition, the respondent relies on the case of *Nissan South Africa (Pty) Ltd. v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd. Intervening)* [2006] 4 All SA 120 (SCA). In *Nissan,* the appellant (Nissan) had erroneously caused its bank to transfer an amount in excess of R12 million from its account to an account held by a company, (Maple), which was not entitled to such payment, when it actually intended to make payment to TSW. Upon receipt of the funds into the wrong bank account, the amounts were immediately withdrawn and Maple was liquidated. *Nissan* claimed that of the amount paid erroneously to Maple, an amount of at least R9 750 000,00 could be traced to the amount transferred erroneously by it to Maple's account and that such amount did not form part of Maple's insolvent estate. Maple's

liquidators contended that the money formed part of Maple's property. It was held that a bank that had unconditionally credited its customer's account with an amount received was not liable to pay the amount to the customer on demand where the customer came by such money by way of fraud or theft. The Court held that the amount of R9 750 000,00 plus the interest accrued thereon did not form part of the insolvent estate of Maple and directed that the liquidators of Maple release such amount and the interest accrued thereon to *Nissan*, as the insolvent had not become entitled to the funds erroneously credited to its account.

31. The facts in *Nissan* are distinguishable from the present case. The issue there was a question of the appropriate remedy available to a person laying claim to money wrongfully transferred from its own bank account to another over which it had no control. That is not the case in this case. The money in this case was not paid by mistake. It is furthermore not the case of the applicants that the money from the CCIPF was stolen when it was placed into the account of Trilinear Capital. The applicants' case regarding theft and fraud concerned transfer of the funds to Buthelezi, Kawie and their associates. In any event, the *ratio* in the cases of *De Villiers NO v Kaplan* and *Fuhri v Geyser* referred to above regarding the rights of Trilinear Capital in respect of monies in its bank account apply.

32. A related argument made on behalf of the respondent was that only the Trust or the provident funds have a right to make a claim for the return of the funds paid to him, similar to the letter of demand that was sent to him

before the institution of these proceedings. However, this point which amounts to *locus standi* point, was not raised in the papers. In any event, it cannot be suggested that Trilinear Capital does not have the right to reclaim a payment which resulted in its impoverishment.

33. I therefore find, on a balance of probabilities, that there was a disposition made by Trilinear Capital within the contemplation of section 2 of the Insolvency Act.

Not for value

34. The respondent argues that, since Pasima held 100% of the shares in Trilinear Holdings, which in turn held 100% of the shares in Trilinear Capital, there was a close relationship between Pasima and Trilinear Capital, who paid the debt due by Pasima. The answer to this is that Pasima was not a shareholder of Trilinear Capital. It was a trust belonging to Buthelezi, who was a director of Trilinear Capital. Furthermore, there is no evidence that Buthelezi or Pasima were acting on behalf of Trilinear Capital when they paid the R4.5 million to the respondent.

35. It is furthermore argued on behalf the respondent that in paying the amount of R4,5 million to the respondent, a debt was discharged, and this added value to Trilinear Capital. In the result, it is argued that any claim that Trilinear Capital may have should be made against Pasima or Buthelezi. In support of this argument I was referred to *Pro-Med Construction CC (in liquidation) v Wayne Adrian Botha* (A5052/2011, 2005/22436) [2012]

ZAGPJHC 145 (24 August 2012) where it was reiterated that one of the critical tests to determine whether a disposition was made for value or not was whether there was a *quid pro quo* which need not be monetary or even tangible.[3] However, as pointed out on behalf of the applicants, it was stated in the same case[4] that some ascertainable commercial advantage will suffice in order for a disposition of property not made for value to be set aside by a court. In this case, the evidence is Trilinear Capital gained no commercial advantage from the disposition, and was instead impoverished without receiving any present or contingent advantage in return. It was supposed to be investing the money on behalf of the SACTWU workers, but there were no returns, and that money was lost to the workers and to Trilinear Capital. Trilinear Capital was under no obligation to make the payment of R4,5 million to the respondent. In fact, that is not in dispute on the facts.

36. By contrast, Buthelezi, Pasima and Kawie appear to have benefited from the transaction in that a debt incurred in Buthelezi's personal capacity and on behalf of Kawie's company, Eclipse Capital, was discharged at the expense of Trilinear Capital and the SACTWU workers. This evidence has not been disputed by the respondent. The evidence is that, during the relevant period, Buthelezi was not acting to the advantage Trilinear Capital, but was acting for his own interests and those of Pasima, his trust and of Kawie.

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[3] At para 20. See also *Estate Jager v Whittaker* 1944 AD 246 at 250; *Goode v Durrant and Murray Limited v Hewitt and Cornell NNO* 1961 (4) SA 286 (N) at 291F-G.
[4] Para 20.

37. There are numerous irreconcilable, unsatisfactory and inherent improbabilities raised by the respondent's version of the alleged loan agreement transaction which is his explanation for the payment of the R4.5 million. The most prominent amongst them is why the payment was made by Trilinear Capital, with whom he had no agreement, when the debt was incurred by Buthelezi and Pasima.

38. Some of the questions left unanswered by the respondent follow below. Most of these issues were raised in the respondent's replying affidavit, and the respondent did not endeavour to deliver a further affidavit in reply. Firstly, in terms of the loan agreement, the capital amount to be advanced by the respondent amounted to R4 million. Yet the amounts he advanced amounted to R4.2 million. There was no explanation provided by the respondent for this discrepancy. Secondly, out of the capital amount of R4 million that was apparently agreed to in the loan agreement of 12 April 2007, an amount of R3.2 million had already been advanced, over a period of six months, prior to the loan agreement. This is also not explained by the respondent. Thirdly, R1.2 million of the money advanced by the respondent in terms of the loan agreement was paid to Eclipse Capital, a company controlled by Kawie. Not one of these advances was made to Buthelezi or Pasima, let alone Trilinear Capital. This, despite the fact that the loan was with Buthelezi and Pasima. Fourthly, the lender in terms of the loan agreement was the respondent in his private capacity. Yet the bank statements provided as proof of the payments advanced are in the name of Mantis Projects (Pty) Ltd, a company of the respondent. There is no explanation for why the agreement was not entered into with Mantis

Projects in the first place, or why the payments were made by the company when it did not enter into the loan agreement. Fifthly, the written acknowledgement of payment signed in respect of the repayment loan is inexplicably signed only by the respondent, in the presence of certain witnesses whose relation to the transaction is unexplained. Sixth, according to the respondent, no timeous payment was made on the loan, and he was therefore entitled to interest. Yet the written acknowledgement of repayment signed on 23 January 2008 makes no mention of the interest payable. In fact, according to the respondent, he and Buthelezi agreed about the interest amount of R300 000 when they negotiated the sale of the GPI shares. The conclusion of the share sale and purchase agreement was on 23 January 2008. One would have expected the parties to mention the interest payable on the loan agreement in the written acknowledgement of payment. Seventh, the written acknowledgement of repayment states that the principal amount on the loan agreement is R4 million; and yet, according to the respondent he had advanced the amount of R4.2 million. This discrepancy is not explained by the respondent. The amendment of the purchase price also inexplicably occurred a year after the share sale agreement was concluded. Furthermore, the respondent has not given any explanation for why the purchase price needed to be rectified, and why by the exact amount of R4.5 million.

39. Another irreconcilable fact about the respondent's version is that he claims that *"prior to the conclusion of the formal loan agreement… I contacted a gentleman known to me by his first name only being Munroe, who was a trustee of the SACTWU pension fund who assured me that Mr Buthelesi*

(sic), Mr Kawie and Trilinear were acting with full support of the trustees and that Kawie in particular was trusted by the leadership. Mr Kawie was advisor to Trilinear and the pension fund." I find it extraordinary that a businessman would advance an amount of R4,2 million on the assurance of a person he only knew 'by his first name only'.

40. The applicants' case is that it is curious that the purchase consideration reflected in the share sale agreement between Arrow Creek and the respondent was inflated by the exact amount of R4.5 million, which was the amount paid by Trilinear Capital on 24 January 2008. According to the applicants the only reasonable explanation is that this was a simulated agreement in that the purchase price of the GPI shares was inflated in the share sale agreement by R4.5 million; and this amount was paid back to the respondent a day later, on 24 January 2008. Based on the balance of probabilities, I agree with this conclusion.

41. Based on the *Plascon Evans*[5] rule, I reject the respondent's version as being palpably implausible, far-fetched and is untenable.

42. I therefore find, on the balance of probabilities, the amount of R4.5 million was a disposition not for value.

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5 *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623.

Limitation of the claim

43. In terms of section 26 of the Insolvency Act, if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess. On the basis of this provision, the respondent argues that the applicants' claim should be limited to R810 120. This is because the forensic report concludes that, at 24 January 2008, Trilinear Capital was insolvent to the extent of R810 120. According to the applicants, to this amount must be added the amounts of R100 million, R12,54 million and R15 million which are dealt with as misappropriations by Buthelezi, Kawie and associations in the papers.

44. The accountant's forensic report dated 18 April 2018, makes no mention of the R100 million. In the founding affidavit, several allegations and dates are made regarding the amount of R100 million. In paragraph 27 of the founding affidavit it is stated that, as at 28 February 2011, the Trust had advanced to Canyon Springs, through Trilinear Capital, funds amounting to over R100 million. At paragraph 28 of the founding affidavit, it is stated that Canyon Springs obtained loans in excess of the amount of R100 million between March 2007 in December 2009 from the Trust. At paragraph 29 of the founding affidavit it is stated that the losses of over R100 million were incurred primarily during the course of 2007. Because of these varied statements, it remains unclear when exactly the debt of R100 was incurred, and how much of it was incurred in 2007.

45. During argument the applicants' counsel emphasised the fact that no books of accounts were kept by Trilinear Capital, and that nil returns were filed for the periods 2004 to 2008. He also sought to rely on the outcome of the commission of enquiry and investigations of the applicants, for the submission that the R100 million debt had been incurred by 24 January 2008. However, none of the outcomes of these investigations were before me.

46. The amount of R12.54 million is also not mentioned in Sinclair's forensic report. What is clearly stated in the founding affidavit is that Buthelezi misappropriated this amount of money on or about 15 August 2008, and utilised the money to settle a debt owed to the Public Investment Corporation. The amount of R12.54 million therefore cannot be taken into account when considering the insolvency of Trilinear Capital at the time of the disposition of 24 January 2008.

47. The evidence is that Buthelezi misappropriated the amount of R15 million from funds held by the Trust during May 2007. The applicants' case is that this money was misappropriated through Trilinear Capital, and was paid to Pasima, Buthelezi's trust. The respondent is unable to dispute this evidence.

48. I am therefore satisfied, on a balance of probabilities that, as at 24 January 2008, Trilinear Capital was insolvent by at least R15 million plus R810 120.

Accordingly, the limitation in terms of section 26 of the Insolvency Act does not apply.

Section 33(1)

49. The respondent argues that section 33(1) of the Insolvency Act is applicable in this case. Section 33(1) of the Insolvency Act provides as follows:

> "*(1) A person who, in return for any disposition which is liable to be set aside under section twenty six, twenty nine, thirty or thirty one, has parted with any property or security which he held or who has lost any right against another person, shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such property or security or for losing such right.*"

50. The respondent argues that section 33(1) is applicable because no bad faith or collusion has been shown on his part in receiving the R4.5 million, and the applicants have not indemnified him prior to these proceedings, should the Court set aside the disposition. As a result, the applicants are not entitled to an order for repayment of the R4.5 million.

51. In reply the applicants argue that the respondent has failed to show the loss of a right within the contemplation of that provision. Furthermore, the respondent still has a claim against Buthelezi or Pasima or their estates if they are insolvent.

52. As was stated in *Barclays National Bank Ltd v Umbogintwini Land and investment Co (Pty) Ltd are (in liquidation) and another*[6], the purpose of section 33(1) of the Insolvency Act is to ensure that, in the stated circumstances when a disposition is set aside, there is *restitutio in integrum*, that is, the restoration of both parties to their position before the disposition was made.

53. The onus of proving the requirements of section 33(1) is upon the respondent.[7]

54. It is difficult to find that the respondent has shown good faith, given the numerous irreconcilable issues raised by his defence to this case. I have set out my reservations regarding the inherent improbabilities of his case in the section dealing with 'not for value' above. I am of the view that the respondent has failed to show good faith as required in terms of section 33(1) of the Insolvency Act.

55. For all these reasons, I am satisfied that the applicants have met the requirements of s 26 (1) of the Insolvency Act, and that section 33(1) does not find application.

56. In the result, the following order is made:

a. It is declared that the payment in the amount of R 4 500 000 by Trilinear Capital (in liquidation) to the respondent on 24 January 2008 is a disposition without value in terms of section 26 (1) of the

[6] *Barclays National Bank Ltd v Umbogintwini Land and investment Co (Pty) Ltd are (in liquidation) and another* 1985 (4) SA 407 (D) at 411B – D.
[7] *Ruskin NO v Barclays Bank DCO* 1959 (1) SA 577 (W) at 583.

Insolvency Act 24 of 1936, read with section 340 of the Companies Act 61 up 1973, and is accordingly set aside;

b. The respondent is ordered to pay back to the estate of Trilinear Capital (in liquidation) the amount of R4 500 000, together with interest thereon at the prescribed rate of interest in terms of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975, from 18 May 2018 to date of payment;

c. The respondent is ordered to pay the costs of this application.

N. MANGCU-LOCKWOOD
Acting Judge of the High Court

APPEARANCES:

For The Applicant	:	Adv A.G Woodland SC
Instructed By	:	Hogan Lovells, Sandton
For The Respondents	:	Adv M. Ipser
Instructed By	:	Ms O. Ringer