Republic of South Africa

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

Case number: 15274/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 13 August 2020
Judgment: 18 August 2020

In the matter between:

CHRISTIAN FINDLAY BESTER N.O. First Applicant
LEGADIMANE ARTHUR MAISELA N.O. Second Applicant
THOMAS CHRISTOPHER VAN ZYL N.O. Third Applicant

and

QUINTADO 120 (PTY) LTD Respondent
Registration Number: 2008/002818/07
Registered office: 2 Harmonie Ave., Boston, Bellville.

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] On 24 February 2020 an order was made placing the respondent company under provisional liquidation. On the extended return day of the accompanying rule *nisi* the

applicants have applied for a final winding up order. The respondent opposed the application, as indeed it also had the application for the provisional order.

[2] The applicants are the joint trustees of the insolvent estate of Petrus Serdyn Louw ('Louw') and Martha Maria Sophia Louw. Louw was at all material times prior to his sequestration one of the two directors of the respondent company. The other director was his brother-in-law, one Markram Jan Kellerman (Kellerman).

[3] Louw, who is a chartered accountant, was the 'executive director' in the sense that it was he who operated the bank account, kept the company's books and carried on the farming operations that were conducted on a property near Porterville that is the company's principal asset. The accounting firm of which he was a founding member and senior director, Louw & Cronje Inc., was also engaged to undertake the supposedly 'independent review' of the company's annual financial statements required in terms of Companies Act 71 of 2008 read with the company's memorandum of incorporation. Having regard to Louw's association with the accounting firm, I would have thought that the inappropriateness of Louw & Cronje's engagement was manifest. Kellerman, who is also a chartered accountant, and the co-founder and chief executive officer of an investment company, Gryphon Asset Management Ltd, reportedly acted as a non-executive director. The shareholders in the company at all material times were the HNP Trust, representing Louw's family interests, and the Markram de Jager Trust, apparently representing Kellerman's interests. Each trust held 50% of the shares in the respondent company.

[4] The HNP Trust's shares in the company were transferred to Kellerman on 18 December 2018, purportedly pursuant to the exercise by the latter of his rights as cessionary in terms of an agreement he had concluded with the HNP Trust on or about 19 October 2018, whereby he was given security for the repayment of a loan he had made to Louw, very shortly before the latter's sequestration, in the sum of R17 680 000 for which the Trust had assumed liability. (The probity of the agreement in terms of which Kellerman obtained the HNP Trust's shares in the respondent is a matter in dispute, but that is not a matter for determination in these proceedings.) Kellerman is currently the respondent's sole director, Louw having been disqualified from continuing in office consequent upon his sequestration.

[5] It is not in dispute that over a period of several years before his sequestration Louw had misappropriated funds entrusted to him for investment by the clients of his accounting firm. An amount of approximately R110 million is said to have been involved. Louw had

misled his clients into believing that their instructions had been duly carried out by issuing them falsified share certificates and investment statements and the like. It is also undisputed that Louw laundered much of the misappropriated money through a number of entities under his control, including the respondent company. A substantial part of the misappropriated funds that flowed into the respondent company's bank account was paid on to Pholaco (Pty) Ltd - a company through which Louw conducted a manufacturing business at Atlantis, and which has since been liquidated - and the rest to the other entities.

[6] Louw also used the respondent company's status as a registered VAT vendor for the purpose of an income tax evasion scheme that he executed on behalf of some of his clients. The scheme involved fictitious agreements of purchase and sale for which VAT invoices were issued. Some of the VAT invoices that Louw gave out to his clients for the purposes of his scheme purported to have been issued by the respondent company. Others were issued by other VAT registered entities over which Louw exercised de facto control. Quite how the flow of funds associated with this scheme worked is not clear on the papers. It would appear from an affidavit made by Louw in February 2019 (annexure AA3 to the answering affidavit of Kellerman *jurat* 20 September 2019) that the clients would pay the amount of the price indicated on the VAT invoices issued by the respondent into the respondent's account and that they would subsequently, in a later tax period, be reimbursed by way of payment on a fictitious invoice in the same amount issued by the client to the respondent. That the scheme was Louw's, not the respondent's, was borne out by the fact that Louw made some of the repayments from his own account. I remarked that it is not clear how the flow of funds worked because the evidence does not explain where the clients' money was held or applied in the period between the issue of the respective VAT invoices. The VAT that was represented on the invoices as being payable in respect of the fictitious transactions was reportedly paid over to the revenue service, but as for the rest it would seem that it would be disposed of as Louw would determine for his own purposes.

[7] In a voluntary disclosure application in terms of Part B of Chapter 16 of the Tax Administration Act 28 of 2011 that was submitted on the respondent's behalf in September 2019 it was stated that the fictitious purchase and sale transactions to which Louw had been party from 2011 to 2018 had resulted in an overpayment of VAT by the company. I do not think that it is necessary to dwell for present purposes on this aspect of Louw's activities because it seems clear from what I have described that should any claims arise against the

respondent therefrom they would be claims by Louw's clients, and not by his insolvent estate.

[8] Kellerman claims to have been unaware of Louw's shenanigans,[1] and to have been misled by the financial statements prepared by Louw for the company that were approved by the directors during the years in question. He does not appear, however, to have been troubled by the lack of any proper independent review mechanisms during the relevant period, for which he undoubtedly bore shared responsibility. The financial statements did not disclose the flow of substantial funds through the respondent's bank account.

[9] Louw's ability to disguise the flow of funds through the company's accounts appears to have been assisted by a peculiar arrangement entered into with the company in terms of which he was permitted to conduct a farming operation for his own account on the company's property using the facility of the company's corporate personality and tax status. There was no evidence that the terms of the arrangement were ever reduced to writing. The arrangement would appear to reflect a verbal understanding between the company's directors. The manner in which *the company's* farming operation was treated as being for Louw's own account was that the profit or loss of the farming operation was reflected as a credit or debit, as the case might be, to his loan account in the company. The explanation given for this arrangement was that Kellerman did not wish the value of his indirectly held interest in the company to be exposed to the risks of the farming business, having invested in the company on the basis that it would only be a property holding enterprise. The applicants contend that the manner in which Louw was permitted to run a business for his own account through the company constituted an irregular use of the company's juristic personality and entailed a contravention of the Companies Act, 2008. This is indeed one of the bases upon which they contend, with some justification in my view, that it would be just and equitable for the company to be wound up.

[10] Indeed, it appears from the judgment in respect of the provisional winding up order that the judge (Papier J) was persuaded that the manner in which the company's juristic

[1] Certain email exchanges between Louw and Kellerman concerning various transactions involving a farming enterprise conducted by H Investments (Pty) Ltd included in the applicants' papers call into question the veracity of Kellerman's claimed ignorance of Louw's use of a scheme involving VAT invoices related to fictitious transactions. The emails were in Afrikaans and their subject line was '*Smokkels*'. It appears from a communication from Louw to Kellerman after his sequestration (annexure AA26 to the answering affidavit by Kellerman jurat 20 September 2019) that Louw was in the habit of describing the tax evasion transactions he engaged in as '*smokkels*'. Despite the scepticism concerning Kellerman's asserted ignorance to which the email exchanges understandably give rise, it is not necessary to make any determination however, because on their face they pertain to a different company.

personality had been misused made it just and equitable that it should be wound up. He was unimpressed by Kellerman's explanation as to his ignorance about Louw's misuse of the company as a conduit for laundering misappropriated money. He held that Kellerman had '*at best abandoned his fiduciary duties and responsibilities, which in* [the learned judge's] *view amounted to a material breach of his fiduciary duties and obligations*'.

[11] The order placing the respondent into provisional liquidation was, according to the judgment, made in terms of s 81(1)(c)(ii) of the Companies Act 71 of 2008. Section 81 applies only in respect of the winding up of solvent companies. And the provision thereof referred to concerns applications by creditors of such a company on the grounds that it would be just and equitable for it to be wound up. In their founding papers the applicants had, however, in point of fact alleged that the company's assets were probably of insufficient value to satisfy their claim, which was tantamount to an allegation that the company was insolvent. The judge, however, made no finding on the solvency status of the company. He also did not make any determination explicitly on the applicants' disputed standing as creditors of the company.

[12] A positive finding that the insolvent estate is a creditor of the company is a juristic prerequisite to the applicants' ability to seek a winding up order, whether it be on the grounds of the company's inability to pay its debts or that it would be just and equitable for it to be liquidated. If the applicants do not succeed in establishing their standing as a creditor, the question whether the respondent should be wound up on either of the grounds contended for is not reached.

[13] The making of the provisional order in terms of s 81 of the 2008 Companies Act, rather than in terms of s 344 of the 1973 Act, suggests that the judge must have proceeded on the basis of an acceptance, prima facie, of the third of three alternative bases (described below) on which the applicants contended that the insolvent estate was possessed of a claim against the respondent company, viz. in the sum of R606 047 reflected in the respondent's financial statements for the year ended February 2019 as being owing to Louw on loan account, for a quantification of the insolvent estate's claim in any of the higher amounts ventured in the applicants' founding papers would be difficult, to say the least, to reconcile with a finding that the company was solvent. There is no indication in the judgment, however, of the basis upon which the judge on that approach must necessarily have rejected Kellerman's evidence that the company's indebtedness to Louw as at the date of his

sequestration had been actually only in the sum of R209 977, payment of which was tendered before the provisional order was made.

[14] Now that a final order is sought, the evidence must be assessed in a different manner from that undertaken for the purpose of making the provisional order. As the respondent's counsel reminded me, in a previous case, *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd and Another* [2012] ZAWCHC 43 (15 May 2012),[2] I described the distinction between the approach adopted in the adjudication of applications for a final winding up order and that in respect of applications for a provisional order as follows:

> 'While the evidence might be the same as it was when the provisional order was granted, the approach to be taken to it for the purposes of considering whether a final order should be made is different. At the provisional stage the applicant had to make out only a prima facie case – in the peculiar sense of that term explained in *Kalil v Decotex (Pty) Ltd* and another 1988 (1) SA 943 at 976D – 978F. In order to succeed in obtaining a final order the applicant has to prove its case on the evidence as it falls to be assessed in the usual manner in proceedings on motion for final relief. The practical distinction between the two requirements thus arises out of the application of the *Plascon-Evans* evidentiary rule in opposed proceedings for a final order; cf. *Export Harness Supplies (Pty) Limited v Pasdec Automative Technologies (Pty) Limited* 2005 JDR 0304 (SCA) [[2005] ZASCA 24 (29 March 2005)], at para. 4. The effect has been described in terms which suggest that a higher 'degree of proof…on a balance of probabilities' is required for a final order than for a provisional order (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA), at para. 3). While the basis for that description is understandable, I would suggest respectfully that the position might more accurately be described as being that while the applicant must establish its case on the probabilities to obtain either a provisional or a final order, in an opposed application, a different, and more stringent approach to the evidence, consistent with the *Plascons-Evans* rule, must be adopted by a court in deciding whether the applicant has made a case for a final order. This is in contradistinction to the approach to an opposed application for a provisional order, when the case is decided on the probabilities as they appear from the papers.' (Footnote omitted.)

In the current matter I have before me not only the evidence that was before the judge who made the provisional winding up order, but also the further papers exchanged between the parties for the return date. The papers have grown like topsy to run in total to just short of 2000 pages. The primary purpose of affidavits in motion proceedings is to set forth what in action proceedings would be contained in the pleadings and to adduce the relevant evidence. Regrettably, in the current matter far too much ink has been used to advance arguments on

[2] In para 4.

affidavit rather than to state facts, and there is also an excessive amount of repetitive material in the papers. Both sides were at fault in this regard.

[15] The applicants predicated their claim that the Louws' insolvent estate enjoys a creditor's claim against the respondent company on any one of three bases, each of them put up in the alternative to the others.

[16] The first basis asserted a claim by Louw's insolvent estate in the sum of R31 141 000,90, identified as the total amount transferred from Louw's banking accounts into that of the respondent company between January 2015 and his sequestration in November 2018. In the alternative, but essentially on the same predicate, it was alleged that the respondent's indebtedness to the insolvent estate was in the sum of R13 686 794,48, being the difference between the aforesaid amount of R31 141 000,90 and the amount of R17 454 206,42 paid from the company into Louw's bank accounts during the same period.

[17] Kellerman, who deposed to the principal answering affidavits on behalf of the respondent, pointed out that most of the money transferred by Louw into the company's bank account was simply paid on to other entities in which Louw had an interest, notably Pholaco (Pty) Ltd. He also showed that the flow of funds into Pholaco was accounted for in the accounts of that company as an indebtedness on loan account to HNP Trust in an amount of more than R14 million. In other words, according to the respondent, it is apparent that Louw used his control of the respondent's bank account to use it as a conduit for payments that *he* (*not* the respondent) was actually making to third parties. Having regard to the origin of the channelled funds, and the purposes for which Louw's clients had provided them, I think it may reasonably be inferred that the reverse flows were probably necessary to pay those of Louw's clients who wanted to cash in the investments that they had been misled into believing he had made on their behalf or to pay them the income that such investments should have generated.

[18] Unless it were established that the respondent was party to the receipt and disposal of the funds that Louw channelled through its banking account, a question I shall address presently, the first basis upon which the applicants' standing is asserted cannot be sustained.

[19] The second, and further alternative, basis of the applicants' case asserts a claim by the insolvent estate against the respondent company of just over R9 million, being the amount reflected in the company's general ledger as owing by the company to Louw on loan account. The correctness of that record was spoken to by Louw's son, Henz Louw, at an enquiry in

terms of s 152 of the Insolvency Act 24 of 1936. Henz Louw was one of the directors of Louw & Cronje Inc, the accountancy firm established by Louw that acted as the company's accountants and auditors. Henz Louw, however, qualified that evidence at a subsequent sitting of the enquiry, when he conceded that the ledger account reflecting an apparent indebtedness by the company in that amount fell to be understood in the context of certain other identified ledger accounts, and agreed that the 'consolidated' position was that Louw was in point of fact indebted to the company in the amount of just over R7 million. Henz Louw made a confirmatory affidavit in these proceedings confirming his evidence at the insolvency enquiry.

[20] The applicants argued that Henz Louw's evidence is meaningless because it is based on cooked accounts. That might well be so, but then so is the computation of the claim by the insolvent estate. If I understood him correctly, Mr *L. Olivier* SC for the applicants (together with Mr *White*) eventually conceded, advisedly in my view, that the attempted formulation of the claim on the second basis asserted in the founding papers was 'an exercise in futility'.

[21] The third basis asserted in the alternative in support of the applicants' standing involved a claim in the amount of R606 047 being the sum reflected in the company's financial statements for the year ended 28 February 2019 as owing to Louw in respect of a 'directors loan'.

[22] What strikes one immediately about these permutations of the applicants' claim is that the first of them of them is based on nothing but a represented flow of funds with no meaningful indication of the basis therefor, the second is predicated on sets of accounts that cannot be relied upon as a true reflection of reality, and the third is premised on a reconstruction of the respondent's accounts by a firm of accountants acting on Kellerman's instructions given on the basis of an uncompleted investigation. They are mutually inconsistent. This begs the question what confidence can there be had in the probative character of any of them.

[23] The applicants also contend, although this was not discernibly their case in the founding papers, that the respondent was complicit in the fraudulent disposition by Louw of his assets and is therefore liable to the estate for having acted collusively in this regard. The most obvious difficulty that I have with that contention is that it was primarily not Louw's money that was being channelled to the respondent's banking account, but rather that of

Louw's clients. The other difficulty, even if one accepts for the purpose of the argument that the funds in question had become Louw's after his clients paid them into his account (which was the approach adopted in argument by the applicants' counsel), is that payment is a bilateral transaction,[3] and there is no evidence that the respondent intended to accept payments from Louw. Indeed, the effect of the evidence is to the contrary; namely, that Louw was using the respondent's banking facilities, over which he exercised sole control, to launder the pilfered funds and to facilitate the fabrication of accounts that would misrepresent that the beneficiaries of the payments, notably Pholaco (Pty) Ltd, were indebted on loan account to the HNP Trust in respect of the stolen monies they had received. This suggests that in making and processing the payments Louw was wearing his own hat, rather than his cap as a director of the respondent. He was acting in his personal capacity, not for and on behalf of the respondent company. That being the case, there is no basis for the applicants' argument that the respondent colluded with Louw in dealing with the funds.

[24] The applicants' counsel sought to argue, however, that applying the 'directing mind' or alter ego' doctrine[4] the acts of Louw in channelling the funds through the respondent fell to be regarded as the acts of the company, and that the company had in consequence to be taken as having accepted the payments. They referred me in this regard to the discussion on the doctrine in LAWSA Vol. 4(1) 2nd ed. at para 79. But, as the commentators note at that place, citing, amongst other authorities, the judgment of the Supreme Court of Canada in *Canadian Dredge & Dock Co v R* 19 DLR (4th) 314,[5] the doctrine operates only when the action taken by the so-called directing mind (i) was within the field of the company's operation assigned to him or her, (ii) was not totally a fraud on the company and (iii) was by design or result partly for the benefit of the company.[6]

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[3] Cf. *Vereins und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA) at para 11 (Cameron JA), citing *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander*1991 (3) SA 605 (A) at 612C-D (Hefer JA). See also *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 993 A-B, where Jansen JA referred with approval to the following statement in De Wet & Yeats *Kontraktereg en Handelsreg* 4ed. at p. 236: '*Behoudens enkele uitsonderinge, is voldoening 'n tweesydige regshandeling, wat slegs met die medewerking en wilsooreenstemming van albei partye kan plaasvind*.'

[4] Also called the 'identification theory', *Canadian Dredge & Dock Co v R* 19 DLR (4th) 314; or 'the directing mind and will principle', *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd (2)* [2001] ZASCA 104 (1 June 2001); [2001] 4 All SA 250 (A) at para 64-65. The 'directing mind and will' nomenclature derives from the speech of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (at 713).

[5] Also reported at [1985] 1 SCR 662 and 1985 CanLII 32 (SCC).

[6] The commentator in LAWSA loc. cit. (RC Williams, original text by the late MS Blackman) adopts the threefold test framed by Estey J in para 66 of *Canadian Dredge & Dock Co* supra.

[25] As Heher JA observed in *Consolidated News Agencies v Mobile Telephone Networks* [2009] ZASCA 130 (29 September 2009), [2010] 2 All SA 9 (SCA), 2010 (3) SA 382, at para 31, with reference to *Canadian Dredge* and related English and Australian jurisprudence,[7] '*Each* [case] *must of course be read in context. In each case the court strives to determine whether it is the company which has spoken or acted to a particular effect through the voice or conduct of a human agency and thereby to be held to the consequences or whether that agency was engaged in an activity which cannot fairly be attributed to the company. Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own.*' The essence of the learned judge of appeal's remarks echoed the observations of Lord Hoffmann to similar effect in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 (PC) at 928: '*It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in the Ready Mixed Concrete* [8] *case and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see Moore v I Bresler Ltd [1944] 2 All ER 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.*'[9] In *H L Bolton (Engineering Co Ltd) v T K Graham & Sons Ltd* [1957] 1 QB 159 at 173, Denning LJ said '*Whether their intention* [i.e. the intention of the officers and agents of the company] *is the company's intention depends on the nature of the matter under consideration, the relevant position of the officer or agent*

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[7] *El Ajou v Dollar Holdings plc* [1994] 2 All ER 684 (CA), *Re Bank of Credit and Commerce International SA (in liquidation) (No. 15): Morris v Bank of India* [2005] 2 BCLC 328 (CA); [2005] EWCA Civ 693, *Brambles Holdings Ltd v Carey* (1976) 2 ACLR 176 (SA), *Chisum Services (Pty) Ltd and the Companies Act 1961 (*1982) 4 ACLR 641 SC (NSW) and *Entwells (Pty) Ltd v National and General Insurance Co Ltd* (1991) 5 ACLR 424 SC (WA); [1991] WASC 286.

[8] *Supply of Ready Mixed Concrete, Re* (*No 2*), *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 All ER 135 (HL).

[9] Quoted by Wunsh J in *Simon NO and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (W) at 530G-531A.

and the other relevant facts and circumstances of the case.' In *El Ajou v Dollar Holdings plc* supra,[10] Nourse LJ endorsed the adoption of 'a pragmatic approach' as being appropriate in the application of the doctrine.

[26] In my view, the use by Louw of its banking account for money laundering purposes in relation to his personal defalcations or fraudulent tax schemes was in a sense a fraud on the company in the broad meaning of the word. I am also not persuaded that his fraudulent activity could fairly be said to be within the field of the respondent company's operations assigned to him. It in fact had nothing to do with the respondent's operations. And even if I am wrong on those counts, the action of utilising the respondent's banking account as a conduit for the execution of his own nefarious purposes was not by design or result for the company's benefit. I am also unable to conceive of any reason in legal policy why, in the peculiar facts and circumstances of the case, Louw's fraudulent actions should be attributed to the respondent.

[27] Mr *Olivier* also sought to make the respondent a party to Louw's fraud for the purpose of establishing that it received the payments knowingly and therefore with the intention to receive them, and consequently was not merely an uninvolved conduit for the stolen monies, by relying on the dictum of Trollip J in *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 53G-H that *'... that where the representor is a company the knowledge of the relevant facts that is required is its actual or imputed, and not merely constructive, knowledge (Houghton & Co. Ltd v Nothard, Lowe & Wills, 1928 A.C. 1 at pp. 14 - 15, 18 - 19 and 33). That would, therefore, include the knowledge of any of its agents or servants possessed and acquired by him in the course of his employment under such circumstances and being of such a nature that it was his duty to communicate it to the proper authority in the company (Barberton Town Council v Ocean Accident & Guarantee Corporation Ltd., 1945 T.P.D. 306) unless that agent or servant is perpetrating a fraud on the company in relation to the matters of which he so possesses or acquires knowledge (R v Kritzinger, 1953 (2) P.H. H 109 (A.D.); Houghton & Co. Ltd.'s case, supra; Halsbury, 3rd ed. vol. 6 p. 436)*'. As counsel pointed out, the dictum was subsequently referred to with approval by the appeal court in *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at para 42.

[10] Note 7 above.

[28] In my judgment, counsel's reliance on the dictum in *Connock's Motor Co* was misconceived. The dictum was uttered in wholly distinguishable circumstances. The learned judge was dealing with the position of a defendant company as representor in the context of an alleged estoppel. In *Connock's Motor Co* the plaintiff sued for payment of the price of goods ostensibly sold and delivered to the defendant company on open account. It was common cause that the orders had been placed by an employee of the defendant who had been acting fraudulently to procure the goods for himself. The plaintiff replicated to the defendant's denial of liability for the unauthorised actions of its fraudulent employee by pleading that the defendant was estopped from denying that the fraudulently placed orders had been authorised. In the course of a general discussion on the developing law on estoppel the learned judge noted that it appeared to be accepted in our law, as distinct from the position in England, that the reasonable effect of the representation involved had to be judged taking into account not only the position of the representee, but also with regard to the representor's knowledge of the relevant facts. It was in the latter connection that the dictum was uttered. The plaintiff's reliance on estoppel in *Connock's Motor Co* was unsuccessful for a reason adumbrated in the dictum, and which has some resonance on the facts of the current matter; viz. the employee who had placed the orders had, obviously unbeknown to the defendant company, been perpetrating a fraud on his employer by his abuse of his inside knowledge of the company's ordering procedures when he put in the orders in the defendant's name.

[29] In relevant part the matter in *Afrisure* concerned the *par delictum* defence raised by the first appellant to the respondents' claim under the *condictio ob turpem vel iniustam causam* for the repayment of more than R5 million paid to the appellant in terms of an unlawful brokerage agreement with the medical aid scheme of which the respondents were the liquidators. The respondents sought to avoid the incidence of the *par delictum* rule by contending that the dishonourable conduct of the medical scheme's principal officer, who had concluded the agreement on its behalf, could not be attributed to the scheme because the directing mind of the scheme in law resided with its board of trustees, not its principal officer. It was in rejecting that contention that Brand JA made reference to the dictum uttered by Trollip J in a quite distinguishable context in *Connock's Motor Co*. Trollip J was concerned with the principles of agency when he uttered the dictum relied on by the applicants' counsel, not the directing will doctrine.

[30] The difference between the position of the principal officer in *Afrisure* and that of Louw in the current case is that the principal officer was acting within the ordinary ambit of his authority as agent of the scheme in concluding the contract. The agreement that he concluded on the scheme's behalf might, to his knowledge, have been unlawful by reason of the statutory contraventions that were involved, but he was not on a frolic of his own for his own purposes when he entered into the contract.[11] On the contrary, he was exercising his functions as principal officer entirely for the purposes of the scheme. The scheme's responsibility for its principal officer's actions in concluding the contract could just as easily (and probably more appropriately) be attributed to the scheme under the well-established principles of agency. By contrast, in the current case, Louw acted for himself in using the respondent company's bank account for his own nefarious purposes; he did not act for the company. Louw's conduct was excluded from being attributed to be that of the respondent company in the circumstances because he was in fact acting in fraud of it and with no intention to benefit it and not within the field of the company's operation assigned to him.

[31] Kellerman pointed out that the applicants have, by their own conduct, actually acknowledged that Louw utilised the bank accounts of the respondent company in order to make payments to third parties thereby using the respondent as nothing other than a conduit, that is in a way that did not give rise to any advantage to or liability for the respondent, but merely gave rise to the misleading impression that payments had been made by the company instead of by him. Kellerman referred in this regard to an action instituted by the applicants in this court under case no. 9723/19 against various defendants who were the ultimate beneficiaries of a number of payments made by Louw from the proceeds of the above-mentioned loan made to him by Kellerman in October 2018. The particulars of claim in the action allege that the payments in question, which the applicants seek to have set aside as voidable dispositions in terms of the Insolvency Act, were effected from funds transferred by Louw to the respondent company. The tenor of the case pleaded by the applicants in the action is that the payments were made by *Louw* using the respondent company's bank account as a conduit. Similar allegations were made by the applicants in their application for the sequestration of the HNP Trust. In that matter the applicants alleged that Louw had lent and advanced moneys to Pholaco (Pty) Ltd through the conduit of the banking accounts of entities that he controlled, including that of the respondent company.

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[11] Cf. *Beach Petroleum Nl and Claremont Petroleum Nl v Malcolm Keith Johnson and Others* [1993] FCA 283; (1993) 115 ALR 411; (1993) 11 ACSR 103, at para 575.22.35, as to when a director's conduct might *not* be treated as a 'frolic of his own'.

[32] Relying on the judgment of the appeal court in *Trustees Estate Whitehead v Dumas* 2013 (3) SA 331 (SCA), the appellants' counsel submitted that the funds credited to the respondent's account pursuant to the deposit therein by Louw of the funds misappropriated from his clients fell to be regarded as having been appropriated by the respondent by reason of what they contended was the personal right that the company had against its bankers to all of the money standing to the credit of its account in the banks books. The case in *Dumas* is, however, quite distinguishable on its facts from the current case. I shall pause to discuss *Dumas* at greater length than might ordinarily have been warranted. It is appropriate to do so because of the emphasis placed on it by the applicants' counsel, who sought to equate the respondent's position in the current case with that of D in that matter. I shall simplify the facts slightly for the purpose of narration.

[33] The essence of the matter in *Dumas* was that D, an innocent party, was induced by the fraudulent misrepresentation of W or his agent to invest a sum of money in a Ponzi scheme operated by W. He did so by causing the funds to be transferred to W's banking account. The moneys were transferred with the common intention by transferor and transferee that the payment was for investment by W in the purported investment scheme. Very soon after the transfer had been effected, D became aware of the fraud and sought to recover his funds from the bank on the basis that W had no entitlement to the benefit of them by reason of the fraud. The affected funds were then held in a suspense account that was frozen pending the determination of the claims on them. A short time thereafter W's estate was provisionally sequestrated in terms of an order which directed the bank to pay the frozen funds into the account of the provisional trustees, which happened to be conducted at the same bank. D then instituted a claim under the *condictio ob turpem vel iniustam causam* — a remedy available to a plaintiff who innocently transfers money to a defendant under an agreement which, to the knowledge of the defendant, is illegal. A number of parties were joined as defendants, including the bank and the trustees of W's insolvent estate. As Cachalia JA pointed out, the first problem with the claim advanced against the bank was that it was had not been party to the agreement or illegality.

[34] The bank understandably took the position of a stakeholder and abided the court's determination. The only parties to oppose D's claim were the trustees of W's insolvent estate, who asserted W's right against the bank to the monies standing to the credit of his account at the date of his sequestration.

[35] The court of first instance upheld D's claim on the basis of the judge's understanding of the import of the appeal court's judgment in *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA), [2006] 4 All SA 120. On appeal, the Supreme Court of Appeal held that the circumstances of the case in *Nissan* were materially distinguishable, and that the first instance judge had been incorrect to apply that judgment in respect of D's claim. Cachalia JA identified the character of the issue in D's matter as follows at para 16 of *Dumas*: '*The enquiry in this case … turns on whether or not* [W] *acquired a personal right to the credit when* [D] *caused the money to be transferred to* [W's] *account. If he did, the funds accrued to* [W's] *estate upon sequestration. However, if* [W] *himself did not acquire a personal right to the funds, neither would his estate have upon sequestration; the funds then remain the property of the bank, with* [W's] *estate having no claim to its payment. And the bank would be unjustly enriched, at* [D's] *expense, if it retained the funds without incurring an obligation to release it to the trustees.*' The learned judge of appeal proceeded, in para 23: '*So both Nissan and Bank of Lisbon* [12] *were concerned with theft or fraud outside a contractual context. By contrast the investment transaction between* [D] *and* [W], *though tainted by fraud, nevertheless constituted the causa for the payment.* [D] *intended to pay* [W] *and voluntarily made the payment into* [W's] *account; it is immaterial that the payment was solicited through* [W] *misrepresentation and fraud*.' (My underlining.) Just as much as D intended to pay W, so W also intended to receive the payment; thus, in contradistinction to the position in the current matter, the payment transaction in *Dumas* was truly bilateral.

[36] In the current case the funds were taken by Louw from his investors to be legitimately invested for them according to their instructions. In breach of his contractual obligations to his clients and for his own purposes, viz. to apply the funds in the businesses he conducted in Pholaco (Pty) Ltd and certain other entities, Louw transferred the funds into the respondent company's banking account. He did that to launder the funds. He did not do that by any arrangement with the respondent company. He was not acting for the respondent when he made the transfers into and out of the respondent's bank account, and the respondent did not in the circumstances receive or accept the funds by virtue of any transactional relationship with Louw or his clients. The money was paid into the respondent's account as part of Louw's fraudulent scheme of which the respondent was no part. Its bank account, which is

[12] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N).

merely one of its facilities and does not equate to its corporate personality, was utilised irregularly by the person (Louw) who had control of it for his own purposes.

[37] As Cachalia JA acknowledged in *Dumas,* at para 14, *'... a customer does not always acquire an enforceable personal right to the credit in his account merely by virtue of the deposit. A bank is entitled to reverse a credit in the account-holder's bank account if it transpires that the account had been credited in error, that the customer had acquired the money by fraud or theft, that the drawer's signature on a cheque had been forged, or that the bank notes deposited into the account were forgeries*'. In my judgment, the facts in the current case demonstrate just such a situation. Unless Louw was acting on its behalf as much as he was on his own account in making the deposit to the respondent's account, which in my view he was not, the respondent obtained no enforceable right against the bank to payment of the funds so deposited.

[38] In the circumstances of the current case, the persons entitled to proceed against the bank to recover the stolen funds, for so long as those funds remained to the credit of the respondent's account in the bank's books, were Louw's clients, not Louw; cf. *First National Bank of Southern Africa Ltd v Perry N.O. and Others* 2001 (3) SA 960 (SCA) at 972C, cited in *Nissan* supra, in para 21 and note 16. When Louw caused the funds that he had stolen and deposited into the respondent's banking account to be paid on to his actually intended beneficiaries, he was not disposing of funds to which the respondent had any entitlement and, despite superficial appearances, he was obviously therefore also not acting on the respondent's behalf in doing so.

[39] In argument it was variously contended by the applicants' counsel that the insolvent estate's claim against the respondent – they were evidently referring to the first of the abovementioned alternative bases of claim - is of a nature enforceable by means of a *condictio sine causa* or a claim under the *actio Pauliana*. In my judgment there is no merit in either of these contentions. As to the first, there is no evidence that the respondent was enriched and Louw impoverished by the funnelling of funds through the respondent. As to the second, the *actio Pauliana* is a remedy available to creditors of an insolvent estate from which dispositions have been made to the prejudice of the creditors to recover the dispositions from the party to which they have been made. It is available when the creditors can show that the recipient of the disposition was complicit in the fraud on the creditors or when the recipient has received the disposition *ex titulo lucrativa* (ie gratuitously). In *Nedcor Bank Ltd v ABSA Bank and Another* 1995 (4) SA 727 (W); [1995] 3 All SA 291 (W) at 729

G-I (SALR), Nugent J explained the nature of the *actio* as follows: '*The actio Pauliana is not a remedy for recovery by a claimant of property which he has lost as a result of fraud. It is a remedy to set aside a disposition of assets which a debtor has made for the purpose of avoiding the assets falling into his estate on insolvency and thereby becoming available for distribution to his creditors. The party to whom the disposition was made can be made to restore the property for the benefit of creditors if he colluded in the disposition or if he received the property gratuitously. This I think is clear from the cases referred to above. (See, too, Mars The Law of Insolvency in South Africa 8th ed at 233,*[13] *and the authorities cited in Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another 1994 (1) SA 205 (N).).*' It has not been established that the respondent was complicit in the fraud, nor indeed that it 'received' the funds in the relevant sense. It is also less than clear that the dispositions were made for the purpose of avoiding the assets falling into his estate on insolvency.

[40] The applicants' counsel also submitted in their heads of argument that the respondent's financial records were kept in such a manner as to reflect that Pholaco was its debtor in respect of the funds channelled through the company. The implication of the submission being that the accounts evidenced an appropriation by the respondent of the funds paid into its account by Louw. While there may be some basis to the contention in regard to the manner in which certain ledger accounts were written up, the annual financial statements of the respondent that were approved by Louw and Kellerman as the directors during the relevant period did not reflect that the respondent's assets included any claim against Pholaco (Pty) Ltd. The respondent's financial statements did not reflect the channelled funds in any way whatsoever. In all the circumstances of the case I do not think any credence can be attached to the manner in which Louw had the respondent's accounts written up.

[41] Reverting now to the third of the aforementioned bases for the applicants' assertion that the insolvent estate is a creditor of the respondent. Kellerman averred that he had the respondent's financial statements redrawn after the discovery of Louw's misfeasance, and that the amount owed to Louw on loan account as at the date of his sequestration was in fact only in the sum of R209 977, which has since been paid to the applicants. It is therefore denied that the applicants have any outstanding claim against the company. The calculation of the admitted claim of R209 977, which arose out of the aforementioned arrangements in

[13] See p. 307 of the current (10th ed.) edition.

terms of which Louw had conducted the farming operations on the respondent's property, was set out in detail by Kellerman in his answering affidavit *jurat* 20 September 2019.

[42] Mr *Olivier* contended, without much conviction it seemed to me, that Kellerman's qualification of his earlier admission that the extent of the company's indebtedness to Louw on loan account was in the sum of R606 047, being the figure reflected in the company's February 2019 financials (in the drafting of which Kellerman had been personally involved) was so far-fetched it could be rejected on the papers on the basis of the qualification to the *Plascon-Evans* rule. The test for departing from the general tenet of the *Plascon-Evans* rule and rejecting a respondent's evidence on the papers has been described as a 'stringent' one.[14] The applicants' criticism of Kellerman's evidence does not come near to satisfying it. On the contrary, on the face of it the explanation that has been given in the respondent's papers of Kellerman's recalculation of Louw's claim on loan account is cogent.[15] There is certainly no basis to reject it on the papers as far-fetched or untenable.

[43] In the circumstances described above it does not appear to me, assessing the evidence in accordance with the rule in *Plascon-Evans*, that the applicants have established on a balance of probabilities that the insolvent estate has an outstanding claim against the respondent. Certainly, the applicants have not established that the estate enjoys a liquidated claim that is not genuinely disputed by the respondent. Payment of the admitted claim was tendered before the provisional order was made.

[44] The provisional order must therefore be discharged and the application dismissed. In my view it would be fair, however, having regard to its admitted indebtedness when the application was instituted, for the respondent to be held liable for the applicants' costs of suit up incurred up the delivery of the respondent's answering papers including their costs in respect of the perusal and consideration of those papers, and for such costs to include the fees of two counsel where such were engaged. Save as aforesaid, the applicants will be ordered to pay the respondent's costs of suit, also including the costs of two counsel.

[45] It only remains to dispose of an application by the respondent for the striking out of certain parts of the applicants' replying papers delivered in response to the affidavits

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[14] See *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at para 21-22 and *Mathewson and Another v Van Niekerk and Others* [2012] ZASCA 12 at para 7.

[15] The explanation was set out in detail in Kellerman's affidavit *jurat* 20 September 2019 and further in his affidavit opposing the application for a final order, *jurat* 22 May 2020.

delivered by the respondent in opposition to the application for a final winding-up order. When the matter was argued, Mr *van Eeden* SC, who appeared for the respondent together with Mr *Baguley*, defined the material sought to be struck out more narrowly than in the notice of application. He restricted the attack to paragraphs 22.2, 22.3, 22.5, 22.6, 27, 28 and 29 of the applicants' further replying affidavit and the whole of the affidavit of Barend Ferreira *jurat* 25 June 2020. The application in respect of the identified parts of the further replying affidavit was made on the grounds that those parts constituted new matter or were vexatious, scandalous or irrelevant. It was contended that the content of Ferreira's affidavit was irrelevant and that it constituted new matter.

[46] The impugned subparagraphs in paragraph 22 of the further replying affidavit bore on certain emails exchanged between Louw and Kellerman concerning what may have been fictitious transactions in H Investments (Pty) Ltd of the nature of those used in Louw's tax evasion scheme that had resulted in VAT invoices being issued by the respondent in respect of fictitious transactions. The evidence went to the issue of the credibility of Kellerman's professed ignorance about the tax evasion scheme. I agree that it was irrelevant. I do not agree that it was scandalous or vexatious. In terms of rule 6(15) a court may not uphold a striking out application in respect of irrelevant matter unless it is satisfied that the applicant will be prejudiced if the application is not granted. The reason for this qualification is obvious. Much unnecessary time and effort would be taken up if courts were required to deal with applications to strike out objectionable material in affidavits that despite its objectionable nature nevertheless did not occasion the affected litigant cognisable prejudice in the principal litigation. The parts of paragraph 22 to which objection has been taken by the respondent were so patently irrelevant to the case against the respondent that it should have been reasonably apparent that the court would pay no regard to them in the determination of the application. Insofar as they might be regarded by Kellerman as prejudicial to his reputation and good character, it should be remembered that he is not a party to the litigation, and nor does he stand for relevant purposes to be regarded as the respondent's alter ego. It is only with the question of prejudice to the respondent company that I must concern myself with. I am not satisfied that the parts of paragraph 22 to which objection has been taken occasion any such prejudice.

[47] There is no reason to deal with the application to strike out paragraphs 27-29 of the further replying affidavit any differently from the subparagraphs of paragraph 22 discussed above. The evidence in those paragraphs might aptly be described as 'more of the same'.

[48] In my judgment, the content of the affidavit of Barend Ferreira was neither irrelevant, nor 'new matter'. It was a legitimate response to the evidence put in by the respondent premised on the redrawing or revision of the company's financials by Mr Boshoff of Merlin Chartered Accountants based on the information provided by Kellerman concerning the investigative work that he had undertaken of the company's accounting records subsequent to the exposure of Louw's fraudulent activities.

[49] In the result the striking out application will be dismissed with costs.

[50] The following orders are therefore made:

1. The provisional order of liquidation in respect of the respondent (Quintado 120 (Pty) Ltd) is hereby discharged and the winding-up application is dismissed.

2. The respondent shall the applicants' costs of suit in the winding-up application incurred up to the delivery of the respondent's answering papers including their costs in respect of the perusal and consideration of those papers, and such costs shall include the fees of two counsel where such were engaged.

3. Save as provided in paragraph 2 above, the applicants shall pay the respondent's costs of suit in the winding-up application, including the fees of two counsel where such were engaged.

4. The respondent's application to strike out is dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD

Judge of the High Court

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