IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9530 / 2021

In the matter between:

LAMBERTUS VON WIELLIGH BESTER N O **First Applicant**

JOHNNY BASSON N O **Second Applicant**

(The joint provisional liquidators of the third applicant)

OCTOX (PTY) LTD **Third Applicant**

(In final liquidation)

and

MARA-LI MASSYN **Respondent**

Coram: Wille, J

Heard: 14th of September 2021

Delivered: 15th of October 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application for a judgment sounding in money. The applicants are the joint provisional liquidators of the third applicant[1]. The applicants initially sought payment from

[1] The third applicant was placed into final liquidation on the 22nd of January 2021.

the respondent (on motion), in the sum of R903 327,00. The applicants now seek an amendment to increase this claim against the respondent, to the sum of R1 195,382.00.[2]

[2] The cause of action piloted by the applicants against the respondent for the money judgment is primarily based on an action for unjust enrichment *sine causa*. This, because they contend no valid causa existed for certain payments made by the third applicant[3], to the respondent. In the alternative, the liquidators seek reliance on the provisions of certain sections of the Insolvency Act[4], which provide, inter alia, for voidable dispositions.

PRE-LIMINARY ISSUES

LOCUS STANDI

[3] The respondent contends for the position that the applicants are not possessed of the necessary *locus standi* to pursue any money judgment against the respondent. The complaint by the respondent is that the liquidators are not vested with the necessary authority to pursue this application against her.

[4] This shield falls to be dealt with swiftly. The third applicant is now in final liquidation and the first and second applicants have subsequently been appointed as the final liquidators. Besides, the applicants (as the then provisional liquidators), in any event, obtained the requisite

[2] More about this amendment later.
[3] By the company in liquidation.
[4] This in terms of sections 26, 29,30 and 31, read with section 32(1) (b) of Act, 24 of 36.

power to proceed with this application in terms of sections 386(4) and 386(5) of the Companies Act[5].

THE AMENDMENT

[5] At the commencement of the hearing the applicants sought leave to amend the monetary amount of the relief against the respondent, by way of an increase in quantum. This from R903 327, 00 to R1 195 382, 00. Coupled with this application for an amendment was the request for the introduction of a further affidavit, dealing with and in support of the amendment.

[6] This amendment application is buttressed by a professional report compiled by Mr Fourie.[6] He was appointed by the 'Financial Sector Conduct Authority' to investigate certain of the affairs of the third applicant. The report confirms, *inter alia,* the following: that the sum of R903 325, 00 was indeed paid to the respondent from the third applicant during the period of the 1st of January 2018 to the 6th of August 2020[7] and, that a total amount of R1 195 382,00 was indeed paid by the third applicant to the respondent, *sine causa*.

[5] The Companies Act, 71of 2008, read with the transitional arrangements and the previous Companies Act, 61of 1973.
[6] From Accountants @ Law.
[7] The relevant period.

PRESCRIPTION

[7] The respondent contends and puts up a shield to the effect that any portion of the applicant's claim, which related to payments that were made to her, prior to the 4th of June 2018, have since prescribed due to the effluxion of time[8].

[8] The application for the liquidation of the third applicant was presented to court on the 30th of November 2020. It is further trite in terms of the Companies Act[9], once a court has made an order for the winding-up of a company, all civil proceedings by the company remain in abeyance and suspended until the appointment of the liquidators of the company, so liquidated.

[9] Moreover, in terms of the Prescription Act[10], a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. It is trite law that prescription in respect of statutory claims in liquidation can only start running from the date of the appointment of the liquidators and once the liquidators are appraised of all the facts of the claim, or could reasonably have been expected to have known such facts.

[10] The liquidators were provisionally appointed on the 16th of October 2020 and finally on the 3rd of June 2021. This application was launched and served on the 4th June 2021. The prescription defences are accordingly euthanized.

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[8] This being the period (3) years prior to the launching of the application.
[9] Section 359 of the the Companies Act, 61 of 1973.
[10] Section 12 (3) the Prescription Act, 68 of 1969.

THE RELEVANT BACKROUND AND FACTUAL MATRIX

THE LIQUIDATION OF THE THIRD APPLICANT

[11] Imagina FX (Pty) Ltd[11], conducted, *inter alia*, the business of 'fund managers' trading in foreign currency. This 'business' was in contravention of certain financial services legislation. *Imagina* was provisionally liquidated on the 7th of October 2020 and finally liquidated on the 9th of November 2020.

[12] In turn, the third applicant was provisionally liquidated on the 9th of December 2020 and finally liquidated on the 22nd of January 2021. This, by the liquidators of *Imagina*. It is common cause that the third applicant was a conduit utilised by *Imagina* and was as an integral part of the irregular investment scheme by *Imagina*. In this connection, many 'investors' paid billions[12] into the bank account of the third applicant, which funds are now mostly unaccounted for. It is alleged that the mastermind of the scheme conducted through the vehicle of *Imagina* and the third applicant, was Mr Massyn.[13]

COMMON CAUSE FACTS

[11] *Imagina.*
[12] South African Rands (ZAR).
[13] The respondent's husband.

[13] It is common cause: that this 'forex scheme' conducted through the third applicant was unlawful: that Mr Massyn was the only person in 'control' of both of the bank accounts utilised for this forex scheme: that Mr Massyn controlled and dictated how the funds from the investors would be utilized: that Mr Massyn misappropriated certain of these funds: that the respondent was never employed by either *Imagina* or the third applicant: that the third applicant caused to be paid to the respondent the sum of R903 327,00[14]: that the respondent appeared at an insolvency enquiry on the 7th of May 2021 and that the full record of her evidence appears from certain annexures to the papers that presented before me.

THE INSOLVENCY ENQUIRY

[14] The respondent conceded that she bore no knowledge of the existence of the third applicant. She had no knowledge of the link between the third applicant and *Imagina* (if any). She conceded that she indeed received certain payments. She says these payments, were from *Imagina.* She avers that she also made certain payments to *Imagina*.

[15] However, the respondent admitted also having received certain payments from the third applicant during the relevant period. Her reason being that these payments were to cover her expenses as she was unemployed at the time. Moreover, she conceded that she received an amount of R557 489,00 (during 2019), from a discrete company called Praesidium[15]. This

[14] This during the period 1st January 2018 to 21st October 2020.
[15] Praesidium Wealth (Pty) Ltd.

ostensibly for decorating services rendered by Benz Massyn Interiors[16], for and on behalf of Praesidium.

[16] In addition, the respondent also testified that she personally paid the sum of R100 000,00 to the third applicant. The *causa* for this payment was to repay a loan that was advanced so as to decorate the offices of Praesidium.

THE APPLICANTS' CASE

[17] The applicants contend for the position that the sum of R903 327,00 that was paid from the bank account of the third applicant to the respondent is not the subject of a dispute. On this, I agree. The respondent personally received these funds from the third applicant's bank account.

[18] The liquidators say there is no justifiable reason for these payments for, *inter alia*, the following reasons: that the respondent was neither employed by the third applicant, nor by *Imagina*: that neither of these entities were indebted to the respondent: that the third applicant had no lawful authority to make any of these payments to the respondent: that the third applicant never owed any money to the respondent and that the third applicant did not have any obligation to make any payment to or for and on behalf of the respondent. On this, I again agree.

THE RESPONDENT'S CASE

[16] BMI means Christine Benz t/a Benz Massyn Interiors.

[19] The respondent's case now advanced is that there were indeed certain payments made to her account, by the third applicant, this because of the following, namely: that at least R250 000,00 was due to her by Praesidium for interior decorating services rendered by BMI to Praesidium: that the third applicant had assumed liability for this payment and that this was, *inter alia,* because her husband was entitled to receive remuneration from the third applicant and *Imagina.*

DISCUSSION

[20] The respondent's contention that she was entitled to these payments from the third applicant is highly improbable and patently untenable. It is also irreconcilable with the common cause facts. I say this because, *inter alia,* the BMI agreement was with Praesidium. Nothing more and nothing less. This agreement was also purportedly signed by the respondent on behalf of Praesidium. This agreement contained the standard 'vanilla' non-variation clause. The third applicant was never a party to, or part of, this agreement and no goods or services were ever rendered to the third applicant under and in terms of this purported agreement.

[21] Most significantly, the BMI agreement was concluded on the 10th May 2019. The payments to the respondent commenced flowing from the third applicant already in the November of 2018. There is not an iota of evidence in support of the bald allegation that the third applicant, conveniently and by the process of 'osmosis' assumed the liability to make payment of the alleged services rendered and goods supplied, by BMI to Praesidium.

[22] Payment is a bilateral act requiring the co-operation of the payer and the payee[17]. This requires an agreement as between the parties as to the debt. This notwithstanding, the funds paid into the bank account of the third applicant were designated as 'investor funds' and could never be utilized to discharge third party debts. This much is absent any doubt.

[23] In addition, this 'shield' was never raised by the respondent during the course of the insolvency proceedings. Besides, she acknowledged the existence of the separate agreement between BMI and Praesidium. Praesidium paid her in full for the services rendered to them. No plausible explanation is provided as to why these payments were made into her personal bank account and not into the account of BMI.

[24] It is common cause that the respondent personally received the amounts in question and that these payments were made from the bank account of the third applicant. As a matter of logic, if no valid *causa* existed for the receipt of these funds, the respondent was enriched at the expense of the third applicant and by implication, the creditors of the third applicant. Accordingly, I find on these facts that the respondent is indebted to the third applicant in the sum of R903 327,00. This must be so because there was and is no lawful, justifiable or valid *causa* for these admitted payments by the third applicant to the respondent.

[25] What remains is for me to deal with the issue of the alleged repayments to the sum of R200 000,00. The respondent avers that she personally, alternatively BMI, made two payments to the third applicant. These were 'categorized' as loan repayments of R100 000,00 each into the

[17] *Volksas Bank Bpk v Bankers Bpk (H/A Trust Bank)* 1991 (3) SA 605 (A) at 612 C to D.

bank account of the third applicant on the 30th of May 2019. The respondent avers that these payments fall to be deducted from the sum of R903 327,00.

[26] The applicants' acknowledge a single credit of R100 000,00 made by respondent on 30th May of 2019 into the bank account of the third applicant. The applicants say that any such payments that were allegedly made, do not fall to be deducted from the sums claimed by them, but rather form the subject of a concurrent claim against the liquidated estate of the third applicant. In short they say, set-off does not apply and no preference should be afforded to these payments to the detriment of the general body of creditors.

[27] The difference in value between the initial claim and the now advanced amended claim is the sum of R292 055,00. The facts pleaded supporting the amendment support the increased amount contended for, albeit for an earlier period in time, being from the 22nd of March 2016 to the 30th of December 2017.

[28] I am inclined to grant the amendment. The respondent in any event does not oppose the grant of the amendment. Further, the respondent's counsel indicated at the hearing of the matter that no additional point of prescription will be raised by the respondent in connection with the new increased amended claim and the time periods relating thereto.

[29] The only remaining arguments advanced by the respondent are the following, namely: that the monies that were paid into the bank account[18] by the investors, cannot be categorized as the 'property' of the third applicant and that in any event, the third applicant had no 'control' over these monies. This because, this 'control' vested solely in the hands of Mr Massyn who was not a director of the third respondent during the relevant period. This is a highly technical legal argument. In my view, this argument cannot be chartered in isolation and without due reference to the facts and documents in this matter, which are, as I have stated, mostly common cause.

[30] The investment mandate agreement records an agreement between *Imagina*[19], which seemingly has an address in both Pretoria and in Mauritius. This mandate agreement however has a number of anomalies which cannot be ignored. The mandate records that the potential client has cash available for investment and seeks to mandate *Imagina* to manage a 'Forex Trading account' that has been established for that purpose at the Mauritius Commercial Bank Limited.

[31] The actual *Imagina* account is however held with the FNB in South Africa. In addition, it is recorded that *Imagina* shall provide the 'services' of the opening of a 'Trade-Sub Account'. The bank statements for the account held at FNB exhibit the designated account holder to be the third applicant and the individual assigned thereto is designated as Mr Massyn. This, together with an address in South Africa, in 'Silverlakes' situated in Pretoria.

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[18] Held at First National Bank Ltd ('FNB').
[19] Trading International Ltd (Registration Number: C11102 888)

[32] The 'Appointment of Sole Administrator' form completed with FNB for the third applicant for this account is Mr Massyn in his capacity as a director of the third applicant, This form was signed on the 14th of March 2019. It is common cause: that the third applicant was incorporated on the 30th of June 2008: that Mr Massyn was the sole director of the third applicant until he resigned on the 16th of April 2009: that Mr Massyn was a director on the 14th of March 2019 and that it was because he held this position of a director at that time, that he was given these powers of control by FNB over the subject investment account in the name of the third applicant.

[33] Most significantly, in my view, at the time when the investor mandates were signed, the account into which the investors were, by mutual agreement, mandated to pay their investor funds into, was indeed the FNB account and not the bank account held at the Mauritius Commercial Bank Limited.

[34] The respondent contends for the position that the ownership of the 'investors' money did not pass to the third applicant. Accordingly, it is argued that the third applicant did not have a valid claim to the money standing to the credit in the bank account of FNB. The argument being that the third applicant accordingly could not be said to have been impoverished when certain payments were made to the respondent.

[35] I disagree. I say this for the following reasons, namely: that the monies were paid directly by the investors into the bank account held at FNB in terms of the investment mandate agreement: that the actual name of the account on the investment mandate matters not: that

when the sole administrator form was signed Mr Massyn was a director of the third applicant and the third applicant and Mr Massyn were in 'control' of the bank account held at FNB into which the investor funds were paid.

[36] As a matter of logic, it must be so that the payments made by the investors into the FNB bank account were made with the intention that the money so paid and received into that account, would be controlled by the third applicant. This despite that the investment scheme was a 'sham'. Put in another way, the bank account held at FNB was undoubtedly the account used for the deposits made by the investors irrespective of the name of the account that appeared on the mandate agreement.

[37] The investors in this matter, under and in terms of the investment mandate, paid certain funds into a bank account, which funds in turn, were under the effective control of the third applicant. In my view, the funds therefore became the property of the third applicant within the wide and broad definition of 'property' in terms of the Insolvency Act[20].

[38] This must be so, because the unlawfulness of the investment scheme piloted by Mr Massyn did not nullify the effect of the transactions undertaken in the course of the operation of the 'sham' investment scheme.[21]

[39] By contrast, in my view, the *Maxprop*[22] case, does not support the arguments advanced by the respondent on this score. This because in *Maxprop*, it was not alleged that the 'fraudster'

[20] Section 2 of the Insolvency Act indicates that property *'…includes contingent interests in property ….'*
[21] *MP Finance Group v Commissioner for the South African Revenue Services* 2007 (5) SA 521 (SCA) at para [12].

had control over the account into which the funds were paid by the 'clients' who had been duped. Undoubtedly, in this case, the third applicant controlled the bank account held at FNB. The full and actual rights of disposal of these monies, in turn, vested in and with Mr Massyn.

[40] The property and control argument is by its very nature inextricably linked with the unjust enrichment argument. The monies received by the respondent from the account of the third applicant, did not occur because of a gift, the payment of discharging a debt, or in terms of a promise, or any other obligation or any other lawful ground justifying the enrichment. Put in another way, there was no valid entitlement to these funds by the respondent. The respondent did not render any 'performance' that was validly causally connected to the receipt of the funds by her. The third applicant's bank account was accordingly impoverished by these payments to the respondent which were made *sine causa*. Unjust enrichment now having been clearly established, brings me to the final issue to be adjudicated upon, namely the repayment 'set-off' arguments advanced on behalf of the respondent.

[41] The bank statements of the third applicant reflect two 're-payments' both made on the 30th of May 2019 into the account of the third applicant. The first payment is labelled with the description 'BMI Interiors' and the second payment is labelled with the description 'Mara-Li Loan Account'.

[42] The respondent's case on this score, is the following: that BMI had an agreement with Praesidium: that BMI had rendered interior design services to Praesidium: that the third

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[22] *Khan NO v Maxprop Holdings (Pty) Ltd* (5419/2012) 2017 ZAKZDHC 32 (18 August 2017) at para [21].

applicant paid these BMI invoices on behalf of Praesidium: that these payments were made into the bank account of the respondent and that the respondent, who was an employee of BMI, accepted these payments on behalf of Praesidium.

[43] The respondent admits and concedes that she bore no independent knowledge of the existence or otherwise, of the third applicant. Despite this, she 'repays' the third applicant. Not surprisingly, she now admits having received certain payments from the third applicant during the relevant period. These payments were made into her bank account to cover her 'expenses' while she was unemployed and received no income.

[44] The BMI agreement contended for by the respondent exhibits some interesting features, which are *inter alia*, the following: that the agreement was only concluded on the 10th May 2019[23]: that this agreement was signed by the respondent on behalf of both BMI and Praesidium and that the agreement contained the usual 'vanilla' non-variation clause.

[45] Of equal importance is the fact that the third applicant was never a party to this agreement. Praesidium and the third applicant were two completely discrete companies with no business relationship and there was in existence no legal or factual nexus for the third applicant to assume and pay any of the debts of Praesidium.

[46] Other than the 'labels' that appear on the two re-payments allegedly made by the respondent, the record is absent any 'evidential material' that these payments were made by the

[23] This after funds were paid out by the third applicant to the respondent as early as November 2018.

respondent from any of her own funds. The one label describes the re-payment of a loan. This, in the circumstances where the actual terms and conditions of this loan are not pleaded and are absent the papers.

[47] Accordingly, in the event that the respondent enjoys a claim for the sum of R200 000,00 as contended for, this claim, in my view, in these circumstances, falls to be pursued via the claim process as a concurrent claim against the liquidated estate of the third applicant. All the documentation in 'support' of these claims will of necessity be required to be attached to the claim forms filed with the first and second applicant in their capacities as the liquidators of the third applicant,

ORDER AND COSTS

[48] In the result, the following order is granted, namely:

1. That the amendment sought at the instance of the applicants is hereby granted.

2. That the respondent is accordingly hereby ordered to repay to the applicants, the sum of R1 195 382,00 within (10) days of the grant of this order.

3. That the respondent shall pay to the applicants mora interest at the legal rate, as determined from time to time, on the said sum of R1 195 382, 00.

4. That the respondent shall be liable for the costs of and incidental to this application (including the costs of (2) counsel), on the scale as between party and party, as taxed or agreed.

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E.D. WILLE

Judge of the High Court
Western Cape Division