Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 2977/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 2 December 2021

(Post-hearing supplementary submissions received on 21 and 26 January 2022)

Judgment: 31 January 2022

In the matter between:

STEPHEN MALCOLM GORE N.O. First Applicant

SELBY MUSAWENKOSI NTSIBANDE N.O. Second Applicant
(in their capacity as joint liquidators of
Brandstock Exchange (Pty) Ltd (in liquidation))

and

BENJAMIN WARD First Respondent

RADICLE PRODUCE COMPANY (PTY) LTD Second Respondent

JUDGMENT

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

BINNS-WARD J:

[1] The applicants, who are the joint liquidators of Brandstock Exchange (Pty) Ltd (in liq.), have applied for the setting aside, in terms of s 26 of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973, of payments of R250 000 made to each of the respondents;[1] alternatively, for a declaration that the payments were made *sine causa*. The payments were made by means of transfers from funds held to the credit of Brandstock's bank account into the respective banking accounts of the respondents. The applicants also seek orders directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of s 26, or on the grounds of their alleged unjust enrichment at the company's expense.

[2] The first respondent is Mr Benjamin Ward of Stellenbosch. The second respondent is Radicle Produce Company (Pty) Ltd, a company also based in Stellenbosch. The first respondent is the sole director of the second respondent.

[3] The application was opposed. The respondents contended that the payments were made not by Brandstock but rather by Mr Bruce Philp, the sole shareholder and director of Brandstock, using funds stolen by Philp from Mr CJ (Neil) Louw. They argue that the funds used to make the payments had not become 'the property' of Brandstock, and that Philp merely used Brandstock's banking account as a conduit for the purpose of fraudulently receiving and disposing of the money that he, and not Brandstock, had obtained from Louw by

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[1] Section 26(1) of the Insolvency Act provides: *'(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.'. Section 340(1) of the Companies Act, 1973, (which continues in effect by virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008) provides: '*Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition*.'.

false pretences. In other words, the respondents deny that Brandstock made 'dispositions' to them within the meaning of that word in s 26 of the Insolvency Act. They also deny that they were enriched by the payments.

[4] It was at Louw's instance that Brandstock was placed in liquidation. He is the only creditor to have proved a claim in the winding-up.

[5] Louw averred in his affidavit in support of the application for Brandstock's liquidation that, on or about 20 April 2018, he had concluded an oral agreement with Philp, representing Brandstock, in terms of which he undertook to finance the purchase by Brandstock of 220 heifers in Cathcart in the Eastern Cape for the VAT-inclusive sum of R2 257 200 so that Brandstock could on-sell the cattle to a buyer in KwaZulu-Natal, one Marinus van Rensburg, at a profit of R440 000. Philp represented to Louw that the purchaser would pay the purchase price 14 days after the delivery of the cattle in KwaZulu-Natal. The agreement was that upon payment by the purchaser, Brandstock would reimburse Louw for his outlay and, in addition, pay him 70% of the profit realised on the transaction.

[6] Subsequently, on 23 April 2018, Philp sent an email to Louw as follows:

'**From:** Bruce Philp xxx@vodamail.co.za

Date: 23 April 2018 at 11:41:24 SAST

To: xxx@icloud.com

Subject: Cattle deal

Hi Neil

Just to confirm our deal:

220 Heifers are being loaded from Cathcart in the Eastern Cape through and (*sic*) agent Jerry Joubert. His commission is being paid by the seller. I shall confirm the sellers (*sic*) details once I receive the invoice tomorrow when I shall need to pay.

Cost: 220 x R9000 = R1 980 000.00 plus VAT = R2 257 200.00

The cattle are being sold to Marinus van Rensburg and they are being delivered to Tugela. I shall invoice him R11 000.00 each. He is paying the transport directly.

Profit on the deal is R440 000.00 of which 70% is payable to you within 14 days.

Please could you pay the cost value into:

Brandstock Exchange Pty Ltd

Standard Bank

Paarl

///////50

051001

Thank (*sic*) for the support.

Regards

Bruce'

[7] Louw testified in the liquidation application that Philp had telephoned him on 24 April 2018 and told him that the cattle were ready to be trucked to the purchaser but that the seller required immediate payment to release them. He asked Philp to provide him with a delivery note or invoice from the seller and was informed by Philp that the seller would send the delivery note that evening as he (the seller) was not in his office at the time. Louw thereupon transferred the required amount in two tranches from his current account into the account of Brandstock. His subsequent endeavours to obtain a copy of the seller's delivery note or invoice from Philp were fruitless.

[8] Louw expected to receive payment in terms of the agreement on or about 8 May 2018. When it was not forthcoming, he went to see Philp at the latter's home at E[...] Farm, Muldersvlei, on 9 May 2018. He found Philp too inebriated to discuss matters. Philp thereafter successfully evaded Louw's further attempts at engagement until 15 May 2018, when Louw came across him in the bar of the Klapmuts Hotel. According to Louw, Philp then said to him 'Can't you afford to wait 10 days for your money?'. Not wishing to make a scene in the presence of the other people in the bar, Louw let matters rest and proceeded on holiday to Namibia hoping for the best.

[9] Louw's hopes were in vain, for payment had still not been made by the time he returned. He therefore went again to see Philp at E[...] Farm, only to find that he had gone missing. Philp was reported as last seen at his office in Stellenbosch on 9 June 2018. Louw discovered that Philp was also in debt in a large amount to his (Philp's) father-in-law, Mr Ivan Starke, and that Starke was searching for him too.

[10] Louw, by that stage understandably doubtful about the authenticity of the cattle deal, undertook an investigation into Philp's affairs and ascertained that he was a director of a number of companies and also the member of some close corporations. Louw testified in the liquidation application that he had been aware for some time that Philp 'focused all of his time and energy' on BRP Livestock CC

but ascertained during his investigation that the close corporation had been finally liquidated on 8 March 2018, a provisional order having issued on 17 November 2017. He also found out that there was an application pending, under case no. 21073/2017, for the sequestration of Philp's estate.

[11] In the winding up application, Louw testified as follows concerning his aforementioned discoveries:

> '34. Mr Philps (sic) had not informed me of his dire financial position when we met on 20 April 2018 in order to discuss the agreement concluded in respect of the cattle. Had I been aware of his financial position, and that of BRP Livestock CC, I would not have concluded the agreement with [Brandstock].
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> 35. Moreover, upon investigation, I managed to obtain the contact details of the alleged purchaser in our agreement, to wit, Marinus van Rensburg. Mr van Rensburg however informed me that he knew Mr Philp but there was no deal in place for him to purchase any cattle from either [Brandstock] or Mr Philp.
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> 36. I have also tried to research the seller and/or his/her/its agent, without any success and have accordingly not been able to confirm whether [Brandstock] ever in fact purchased any cattle and I suspect that it did not and that the entire deal was a fraudulent act on behalf of (*sic*) Mr Philp representing [Brandstock].
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> 37. Moreover, on 15 June 2018 when I telephonically contacted Mrs Philp, she informed me that Mr Philp had told her that he only had three options at that time: the first option was to somehow find a way to pay all of his debts and those of his companies; the second option was to commit suicide; and the third option was to run.

38. I understand that portions of this affidavit constitute hearsay evidence, however I have been unable to obtain confirmatory affidavits from Mrs Philp or Ivan Stark who have informed me that they have been advised by their legal representatives to not assist me any further.

39. I submit that it is evident from the above that [Brandstock], duly represented by Mr Philp, committed fraud in concluding the oral agreement with me in respect of the cattle.'

The evidence suggests that Philp had chosen the third 'option' and decamped to Thailand.

[12] Louw's testimony in support of the application for Brandstock's liquidation was further contextualised in his supporting affidavit to the applicants' reply in the current proceedings. Louw testified there that he had done business with Philp on several occasions since 2009 through BRP Livestock CC. He averred that Philp had advised him that BRP Lifestock's account had been frozen because of some or other accounting problem, and that it was for that reason that the April 2018 transaction concerning the sale of cattle to Van Rensburg was being done through Brandstock. Of course, but unbeknown to Louw at the time, the objectively established facts indicate that Philp was disabled from using BRP Livestock or its banking facilities as cover for his fraudulent scheme because the close corporation had been placed into liquidation.

[13] Louw's version about his dealing with Philp stands factually uncontroverted. The endeavour by the first respondent, relying on the reference in Philp's email of 23 April 2018 to 'our deal', to suggest that the transaction was understood by Louw as one between him and Philp, and not with Brandstock, does not bear scrutiny. The expression 'our deal' could be ambiguous if read in isolation, but it is clear in the context of Louw's evidence concerning Philp's explanation why Brandstock was involved rather than BRP Livestock, which was the entity

historically used for such transactions, that Louw was led by Philp to understand that he was contracting with the company and not Philp in his personal capacity.

[14] It appears from the liquidators' founding affidavit in the current proceedings that Philp started using Brandstock in December 2017, apparently with the intention of continuing with the business that he had reportedly conducted through BRP Livestock CC until its winding up in November of that year. The extracts from the CIPC records included in the papers indicate that Brandstock was incorporated in 2015 and that Philp had at all times been its sole director.[2] Quite how the company operated is not clear on the evidence. All that one can tell from the papers is that, as mentioned, Philp opened a banking account for the company. The liquidators' report to the second meeting of creditors tentatively suggested that Brandstock conducted the business of buying and selling cattle, yet there does not appear to be any record that the company in point of fact carried on such business or any commercial enterprise at all. Indeed, the liquidators testified in their founding papers in the current proceedings that the description concerning its business in their report to creditors may well have been something of an overstatement.

[15] It is evident from Brandstock's bank statements for the period 16 April to 14 May 2018, copies of which were attached to the applicants' founding papers in the current proceedings, that its current account had a credit balance of only R72.50 on 16 April, and that debits to the account on that day totalling R1330.00 in favour of Virgin Active were reversed as 'unpaid items'. There were no transactions on the account between 16 April and 24 April, when the account was credited with two amounts totalling R2 257 200 - plainly in consequence of the payments made by Louw pursuant to Philp's telephone call to him that day. There were no further credits to the account in the period covered by the attached bank statements.

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[2] The deponent to the principal founding affidavit averred that Philp '*acquired*' Brandstock when BRP Lifestock CC was placed into liquidation, but that is plainly incorrect in the context of the information in the CIPC records.

[16] Several large payments were made from the account on 25 and 26 April, including R250 000 to the first respondent and R400 000 to the Starke Family Trust on 25 April and R250 000 to the second respondent on 26 April. Other substantial payments made from the account during the last week of April 2018 included transfers to Philp's personal account and a Paarl firm of attorneys.

[17] Using the information obtained from the transactions reflected in Brandstock's banking records, the liquidators commenced recovering moneys paid from the company's account to what they termed 'third parties'. The current proceedings are part of that exercise. In this regard, the deponent to the principal founding affidavit in the current proceedings made the following averments (at para. 6.7):

> 'In recovering the amounts paid from Brandstock's bank account to third parties, it came to the applicants' attention that numerous payments were made to parties who had either transacted with BRP Livestock or Mr Philp himself, and who were entirely unaware of the existence of Brandstock. Many of these transactions fit the description of "robbing Peter to pay Paul" and when he ran out of options, Mr Philp absconded to Thailand.'

[18] The first respondent testified that the payments that the applicants seek to impeach in the current proceedings were made by Philp in partial redemption of two 'investments', each in the amount of R1 million, that the first respondent had made in March 2015. The 'investments' were in what he had been led to believe was Philp's cattle farming business. The first respondent attached to his answering affidavit copies of two identically worded contracts that he had concluded with Philp in that regard. The terms of the agreements, both titled 'Investment Agreement', did not correspond at all with the first respondent's understanding of the import of the transactions. They did not reflect an investment in a cattle business but instead the advance by the first respondent to Philp of two interest-free loans. They did not even read sensibly in important respects, and it is

evident that the first respondent was naïve and misdirected to have executed them.

[19] The contracts gave the 'period of the investment' as 12 months. Perhaps unsurprisingly in the context of what we now know about him, Philp did not make payment when the period expired. More than three years later, as of April 2018, the loans advanced by the first respondent remained wholly unredeemed.

[20] The first respondent testified that he had been placing 'extreme pressure' on Philp to make repayment. The nature of the pressure was not disclosed but it was evidently sufficient to induce Philp, in April 2018, to announce that he would pay R500 000. The first respondent told Philp to deposit half of the amount into his (the first respondent's) personal account and pay the rest into the account of the second respondent, as he needed to capitalise the latter's business. Payments in accordance with the first respondent's directions were duly received. The first respondent did not concern himself with their source. He testified (and there is no reason to disbelieve him) that he had never heard of Brandstock until he received letters from the applicants' attorneys demanding that the money be repaid to Brandstock's liquidators.

[21] The first respondent contends that as it is obvious that the transaction that Philp represented to Louw he would be financing was a sham, it followed that Philp's representations were nothing more than a device to obtain money from Louw that Philp had no intention ever to apply for Brandstock's purposes but instead 'to misappropriate for his personal purposes'. The first respondent averred:

> '19. Based on these established facts, and the applicants' allegations of fraud on the part of Mr Philp, I deny that Brandstock obtained any rights whatsoever to Mr Louw's funds channelled through its bank account. Mr Philp caused the funds to be paid into Brandstock's bank account as part of his fraudulent scheme, which I have

explained. Brandstock was not party to the receipt and disposal of the funds that Mr Philp channelled through its bank account. Brandstock had no benefit from the funds channelled through its bank account and it had no claim to those funds either.

20. Mr Philp caused Mr Louw's funds to be channelled through Brandstock's account because he, Mr Philp, was facing sequestration proceedings and an investigation into his affairs.'

The first respondent proceeded to quote at length from the judgment of (Diane) Davis AJ of 8 March 2018, in which the learned acting judge refused an application by Philp to put BRP Livestock CC into business rescue and instead, acting in terms of s 131(4)(b) of the Companies Act 71 of 2008, made an order placing the close corporation into liquidation. In the course of her judgment, Davis AJ, with reference to the history of that litigation, noted the occasions on which Philp appeared to pay off the creditors who had applied in series for the entity's liquidation. The judge pointed to various indications of possible fraud by Philp that deserved investigation.

[22] The first respondent then proceeded as follows in his answering affidavit:

21. It is clear from what is pleaded by the applicants (and based on [the quoted extracts from the judgment of Davis AJ]) that Brandstock's bank account was being misused as a conduit for payments that Mr Philp (not Brandstock) was actually making to his creditors and those of BRP Livestock. Mr. Philp's conduct was a fraud on Brandstock. The applicants concede this in their founding affidavit.

22. Brandstock at no stage obtained any rights to the funds that were fraudulently channelled through its bank account, including particularly those of Mr Louw.

23. The applicants, qua liquidators of the insolvent Brandstock, are accordingly not entitled to claim back money to which Brandstock had no rights in law.

[23] In reply, as already mentioned, the applicants adduced the evidence of Louw, who testified that he had dealt with Brandstock, represented by Philp, and *not* with Philp in his personal capacity. The circumstances in which Louw understood he was dealing with Brandstock, and not BRP Livestock as he had done in similar circumstances previously, have already been described.

[24] Louw's understanding of the identity of the counterparty with whom he was dealing was, of course, based on Philp's representations and instructions. The reality could be different if Philp had been acting fraudulently. Louw thought he was dealing with a company that had brokered a sale of cattle to a purchaser in KwaZulu-Natal, but there was no such sale, notwithstanding Philp's representation that Van Rensburg was the purchaser and Brandstock the broker. The question then is should Brandstock nevertheless be treated as bound by (i.e. party to) the agreement in terms of which Louw performed by making the payments into the company's bank account or liable in delict for the consequences of Philp's misrepresentations. If it should be, then it would follow on the facts that Louw properly falls to be regarded as a creditor of the company, regardless of any other remedy he might also enjoy against Philp personally on account of the latter's fraud.

[25] It is axiomatic that being inanimate, a company has no mind of its own, and is therefore capable of acting only through a human agency. The law treats the company as the principal in relation to the actions undertaken in its name and on its behalf and the persons acting for it as its agents. A company is therefore bound only by the actions of persons who have authority to represent it. The authority may be actual, as, for example, where the board of directors has resolved to authorise a particular representative to undertake a specific act or type of act on behalf of the company, or it may be apparent or ostensible, where the

company's conduct gives rise to the representation that a particular person has the relevant authority to represent it.

[26] The law reports bear witness that it is by no means unprecedented for persons acting, or purporting to act, on behalf of a company, on occasion, to misuse the opportunity for fraudulent purposes, and to do so entirely for their own dishonest ends to the prejudice of those with whom they purported to treat in the name of the company, and often at the same time also to the prejudice of their supposed principal. Such behaviour has begged the question where the resultant loss should fall: On the company that was not party to the agent's fraud, or on the third party induced to enter into the transaction by the agent's misrepresentations?

[27] Judicial precedent holds that if the transaction was of a nature that the fraudster was authorised to enter into on the company's behalf, the company is bound by it notwithstanding that the fraud may have redounded to its prejudice as much as that of the deceived third party.[3] The answer is informed by legal policy. Willes J articulated that policy as follows in *Barwick v English Joint Stock Bank* LR 2Ex 259 at 266 (endorsed by the House of Lords in *Lloyd v Grace, Smith & Co* 1912 AC 716 at 736): 'In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true that he has not authorised the particular act, but he has put the agent in his place to do that class of act, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in'. In *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 739, Watermeyer CJ remarked of that dictum '(t)his statement gives no reason why the master should be liable, but merely states the principle of liability in an axiomatic form, but it has been accepted ... as probably the best explanation that can be given'.

[3] See, for example, *Glofinco v Absa Bank Ltd t/a United Bank* [2002] ZASCA 91 (30 August 2002); 2002 (6) SA 470 (SCA) at para 18 (majority) and 46 (minority); *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 (4) SA 363 (A) at 372 and *Rhodes Motors (Pvt) Ltd v Pringle-Wood NO* 1965 (4) SA 40 (SRA).

[28] Was the purported transaction one of the nature that Philp was authorised to enter into on Brandstock's behalf? The answer appears to be obvious. The ultimate control of a company's affairs is vested in its board of directors; see s 66(1) of the Companies Act 71 of 2008. Philp, as Brandstock's sole director, was its board to all intents and purposes. He therefore fell to be regarded as its authorised agent with virtually plenipotentiary powers.

[29] His authority was actual, not apparent or ostensible authority. Whereas ostensible authority depends on the relationship between the principal and the third party by virtue of a representation by words or conduct by the former and its effect on the latter,[4] actual authority arises from the legal or consensual relationship in place between the principal and the agent and exists quite independently of the third party's understanding of the facts.[5]

[30] In the circumstances, there is no doubt in my mind that Brandstock was accountable to Louw for the money that was stolen by Philp. And Louw's status as a creditor of Brandstock was accordingly quite rightly accepted in the application that he brought for Brandstock's liquidation.

[31] Mr *de Jager*, who appeared for the respondents, sought in argument, however, to rely on the directing mind doctrine in support of his contention that Philp's fraudulent conduct could not be attributed to Brandstock and fell to be treated as a frolic of his own. He referred in this regard to my passing consideration of the doctrine in *Super Group Trading (Pty) Ltd t/a Super Rent v Bauer and Another* [2021] ZAWCHC 173 (2 September 2021) at para 11-12, where, citing *Canadian Dredge & Dock Co v R* 19 DLR (4th) 314, I noted that the doctrine appeared to apply on the premise that 'the acts of the directing mind will

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[4] I do not apprehend that the legal position in this regard has in any relevant way been affected by the somewhat controversial decision concerning the character of ostensible authority by the majority in the Constitutional Court's judgment in *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 (26 April 2016); 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC). But if I have misunderstood *Makate*, it matters not because, as I have said, the character of Philp's authority was actual.

[5] The distinction is lucidly explained by by F Cassim and M Cassim in '*The authority of company representatives and the Turquand rule revisited*' (2017) 134 SALJ 639.

be attributed to the company 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'. I also made reference at the place cited to *Consolidated News Agencies v Mobile Telephone Networks* [2009] ZASCA 130 (29 September 2009); [2010] 2 All SA 9 (SCA) ; 2010 (3) SA 382 (SCA) at para 29-31 and to another earlier judgment of mine, *Bester NO and Others v Quintado 120 (Pty) Ltd* [2020] ZAWCHC 80 (18 August 2020) at para 23-25.[6]

[32] Mr *de Jager* argued that as Philp's conduct was as much a fraud on Brandstock as it was on Louw and was not by design or result for the benefit of the company, his actions in obtaining and disposing of the money did not fall to be attributed to the company. The argument was directed in support of counsel's contention that Louw did not enjoy a claim against Brandstock, and that the company's bank account had been used by Philp merely as a conduit, similarly to the situation held to have been the case in *Quintado*. In the latter case, the bank account of Quintado 120 (Pty) Ltd had been used by a dishonest director of that company to channel funds stolen by the director from the clients of an unrelated incorporated partnership, of which he was also a director, to another company controlled by him. According to the argument, as the stolen money had never accrued to or been appropriated by the company - as was held, on the facts of that case, to have been the position in *Quintado* - the liquidators enjoyed no claim to it.

[33] It was stressed in both *Consolidated News Agencies* and *Quintado*, however, that the applicability of the directing mind doctrine is context specific. It is a concept that is applied flexibly and pragmatically, when appropriate, dependent on the facts of the given case and the nature of the question in issue. There is no reason to resort to the doctrine to displace the rules of the law of

[6] Indeed, because a judgment was expected from the Constitutional Court on appeal from this court's judgment in *Quintado*, judgment in this matter was reserved so that counsel might have regard to the outcome and make further submissions on the application of the directing mind doctrine if so advised. It subsequently transpired that Constitutional Court's judgment (delivered on 13 December 2021) did not enter into the question (*Bester NO and Others v Quintado 120 (Pty) Ltd* [2021] ZACC 49), but counsel nevertheless requested and were afforded the opportunity until 27 January 2022 to submit supplementary written argument.

agency in a situation in which those are applicable and available to determine a company's liability in a contractual context. In *Quintado*, for example, the fraudulent director had not dealt with the persons from whom he had stolen the money in his capacity as a director of the company. He had dealt with them in a different capacity and then, without their agreement or knowledge, used the banking account of Quintado 120 (Pty) Ltd, over which he happened to have control, to launder the stolen funds. Importantly, there was no contractual nexus between the victims of the fraud and the company, as there was between Louw and Brandstock in this matter. There was also no contractual nexus between Quintado and the ultimate recipient of the stolen funds that were channelled by the fraudster through its bank account. The factual context of that case was therefore quite distinguishable. The rules of agency found no application there, in contrast to the situation in the current case.

[34] The respondents' counsel also contended that the funds stolen from Louw could not have become Brandstock's property by virtue of their nature as stolen property. This was to equate the funds electronically transferred to Standard Bank for the credit of Brandstock's account with corporeal goods. The equating was misdirected, as was counsel's endeavour to rely in support of his argument on the judgments of the Supreme Court of Appeal ('the appeal court') in *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd intervening)* [2004] ZASCA 98 (1 October 2004); 2005 (1) SA 441 (SCA); [2006] 4 All SA 120 and *Joint Stock Company Varvarinskoye v Absa Bank Ltd. and Others* [2008] ZASCA 35 (28 March 2008); [2008] 3 All SA 130 (SCA); 2008 (4) SA 287 (SCA).

[35] In fairness to counsel, I should mitigate the rejection of his argument by acknowledging that the case does take one into what has been described as a 'complex area of the law'.[7] The distinctions that have been drawn in the

[7] See *Trustees Estate Whitehead v Dumas and Another* [2013] ZASCA 19 (20 March 2013); 2013 (3) SA 331 (SCA) at para 26 (per Cachalia JA) and consider Helen Scott, *Interference without ownership: The theft of incorporeal money in the South African law of unjustified enrichment*, 2021 Acta Juridica 343, in which the author remarks that 'it has proved difficult to find a satisfactory juristic explanation for [the] series of decisions' comprised of *First National Bank of Southern Africa*

jurisprudence are, to say the least, nuanced, and the precedential judgments in point have not escaped adverse commentary from some quarters in academia. [8] That said, none of the criticism that I have read lends support to the respondents' contentions. Whatever the reservations that have been expressed, a clear body of authority has been developed, however, and, as I shall demonstrate presently, the facts, and consequently the legal implications, of the current matter are in my view materially indistinguishable from those that obtained in *Trustees Estate Whitehead v Dumas and Another* [2013] ZASCA 19 (20 March 2013); 2013 (3) SA 331 (SCA), to which neither side referred in oral argument notwithstanding the quite extensive treatment of it in *Quintado*.[9] In the circumstances I am satisfied that the current case falls to be determined in the relevant respect in accordance with *Whitehead*, as indeed argued in the applicants' supplementary written submissions. The cases cited by the respondents' counsel were distinguishable from the current matter on their facts.

[36] In *Nissan*, a payment intended by the appellant for payment to one of its creditors was mistakenly paid into the account of an entity called Maple because of an error on the payment instruction as to the intended payee's bank account number. The question was whether the appellant (Nissan) was entitled to recover the mistakenly directed funds from the bank by which those funds were being held by Maple while Maple's account there was still in credit. Maple had been placed

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v Perry, *Nissan South Africa v Marnitz NO* and *Absa Bank v Lombard Insurance* as well as *Trustees, Estate Whitehead v Dumas* and *Absa Bank v Moore*.

[8] See, for example, R. Sharrock's questioning of the reasoning in *Trustees, Estate Whitehead v Dumas* at 2013 Annual Survey of SA Law (Juta) at 557-8 based on his concern about the looseness of the phrase 'in a contractual context'. Sharrock considered that the payment by Dumas had been made *in anticipation of* the conclusion of an agreement rather than *in terms of* an agreement, and accordingly doubted whether the matter was truly distinguishable from *Nissan*. Consider also the observation at note 148 of FR Malan and JT Pretorius's article *Credit transfers in South African law* (2007) THRHR 1 at 17 that there was 'considerable academic writing critical of the conclusions reached in *Nissan*', citing, amongst others, the trenchantly expressed article by JC Sonnekus, *Rei vindicatio vir vorderingsregte* 2005 TSAR 410. The academic debate continues, as evidenced in Sonnekus's recent article following on the appeal court's judgment in *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20 (18 March 2021); [2021] 2 All SA 680 (SCA); 2021 (5) SA 511 (SCA): *'n Verrykingseis behoort slegs suksesvol te wees mits ongegronde verryking ter sprake is en 'n deliktuele vordering slegs mits aan al die aanspreeklikheidsvestigende elemente voldoen is* 2021 TSAR 794 at 817-819.

[9] In para 32-37.

into liquidation by the time Nissan brought the recovery proceedings. The question was answered affirmatively in Nissan's favour.

[37] The appeal court rejected the contention by the liquidators of Maple and an intervening party that the funds, once credited to Maple's account, had become part of the property available to satisfy the claims of the *concursus creditorum*. The contention had been advanced on the predicate of the correctness of the criticism directed in Malan and Pretorius, *Malan on Bills of Exchange, Cheques and Promissory Notes* 4th ed at the judgment of Thirion J in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N). The essence of the argument advanced on behalf of Maple's liquidators ('the first and second respondents') was described by Streicher JA as follows at para 13-15 of the appeal court's judgment:

> '[13] In *Bank of Lisbon*, money was fraudulently obtained by one of the respondents (Reob) from the Commissioner of Customs and Excise by way of cheques that were deposited into Reob's bank account with the Bank of Lisbon. Thirion J held that 'the circumstances under which Reob obtained the moneys . . . were such as to deprive delivery to Reob of any legal effect'. He held, furthermore, that the ownership of the money, being *res fungibiles*, and the bank having received it without reason to believe that it had been stolen or obtained by fraud, passed to the bank when it was paid into the account with the bank. For that reason, the money could not be reclaimed by a vindicatory action. The *Bank of Lisbon* argued that the Commissioner's only remedy was to obtain judgment against the thief, Reob, and then to levy execution against any claim which the thief may have against the bank in respect of any credit balance in his bank account. Thirion J was of the view that our law would be gravely deficient if it did not provide a better remedy to a party in the position in which the Commissioner found himself. He

proceeded to find that the *actio Pauliana* and also the *condictio sine causa* were such better remedies. ...

[14] *Malan and Pretorius* say, in respect of this decision, that, since there was no agreement between the parties as to the purpose for which the cheques were given, no contract came about between them on the instrument. The Commissioner could have recovered the cheques by way of *rei vindicatio* or, after payment of the cheques, the amount paid, on the ground of enrichment or as damages. The specific passage relied upon by the first and second respondents reads as follows:

> '*... The crucial fact is that the respondent bank is obliged, in terms of the bank and customer contract subsisting between it and the company, to pay cheques of the company drawn on it or repay the amount standing to the credit on the account to the company on demand. This contract is neither invalid nor illegal but enforceable by the company or its liquidator. To allow the Commissioner to claim the amount standing to the credit of the company would, at best, deprive the company or the general body of creditors of this asset or, at worst, force the respondent bank to pay the same amount twice! There is, surely, no room for an action by the Commissioner against the respondent bank, whether this be the actio Pauliana or a condictio sine causa.'*

Both an interdict and attachment are, according to *Malan and Pretorius*, adequate remedies, available without the need for judgment against the thief first having been obtained.

[15] In *Commissioner of Customs and Excise v* [*Absa Bank Ltd* 2003 (2) SA 96 (W)] Van der Nest AJ stated that he shared *Malan and Pretorius*'s

criticism of the judgment in *Bank of Lisbon*. In his view, the duty of the Bank of Lisbon to repay the amount deposited and to honour cheques and withdrawals whilst the account was in credit was unaffected by the initial fraud perpetrated on the Commissioner. By paying the funds into its account, Reob acquired a personal claim against the bank.'

[38] The appeal court held in *Nissan* that the criticism in *Malan and Pretorius* of *Bank of Lisbon*, insofar as that judgment suggested the availability to the party whose money had been stolen of a *condictio sine causa* against the thief's banker, was misplaced. The court rejected the argument that once a bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft. It pointed out that '(i)f stolen money is paid into a bank account to the credit of the thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account'.[10] Streicher JA stated that if an account holder drew on funds that it knew should not have been credited to its account it would make itself guilty of theft.[11] Such an account holder obviously had no right as against the bank to payment or retention of such funds. Accordingly, were the bank to retain the funds against the demand of the party from whom they had been stolen, it would be unjustly enriched. Streicher JA recommended that a bank finding itself in a situation such as that which had arisen on the facts of Nissan should adopt the position of a stakeholder, which, in effect, is what the bank involved in that case had done.

[39] In the circumstances, the appeal court made an order, as prayed by Nissan, declaring that the balance of the mistakenly transferred funds remaining in Maple's account and any interest accrued thereon did not form part of the insolvent estate of Maple (in liquidation), and directing the liquidators of Maple to release the funds

[10] In para 23, citing *S v Graham* 1975 (3) SA 569 (A) at 573E-H.
[11] In para 24-26.

(which at that stage were, by agreement between the parties, being held in an account controlled by the liquidators) to Nissan.

[40] As I shall presently discuss with reference to *Trustees Whitehead v Dumas* supra, the most important point of distinction between *Nissan* and the current case, is that the recipient of the funds in *Nissan* did not receive them in a contractual context. There was never an intention by the Nissan to pay Maple, whereas in the current matter Louw did intend to pay Brandstock. It was the absence of a contractual context for the crediting of Maple's account that gave rise to the consideration of an entitlement based on unjust enrichment by Nissan against the bank. In the current case, Louw's remedies for recovery of the embezzled funds lay against Brandstock and Philp, not the bank. Certainly, once the bank, in ignorance of the fraud, complied with Brandstock's instruction to debit its account for the purpose of making the payments that were made to the third parties, there could be no suggestion of any liability by the bank to Louw in respect of the amount that had been credited to Brandstock's account, which is the other point of distinction with *Nissan*. As I shall also seek to show, an appreciation of these considerations bears on the question whether the payments to the respondents constituted dispositions by Brandstock within the meaning of the Insolvency Act.

[41] The facts in *Joint Stock Company* supra were also very different from those presented in the current matter. In *Joint Stock Company* an account in the bank's customer's name was used, by agreement between the applicant and the customer, to 'warehouse' funds payable by the customer to its subcontractors under a mining engineering contract with the applicant. The bank was fully aware that its customer had no right to the warehoused funds, which were paid into the account for the exclusive purpose of satisfying the subcontractors' claims. A special withdrawal system had been put in place to ensure that the customer could not draw on the account other than to make payments or transfers to the subcontractors. The bank nevertheless purported to set off the credit balance in the account against the amounts owed to it by its customer on other accounts

conducted at the bank by the latter that were overdrawn. The appeal court held that the bank was not entitled to have done so because of its knowledge that the customer had no right to the funds in the special account other than for the designated purpose. An order was therefore made declaring that the rights to the amount standing to the credit of the account before the purported set off vested in the applicant and the bank was ordered to pay the amount, together with mora interest, to the applicant. In *Joint Stock Company*, the bank's appropriation, by way of book entries, of the funds standing to its customer's credit in the special account to settle the customer's indebtedness to the bank on other overdrawn accounts occurred in a contractual context. On the facts of that case, it was the effect of the peculiar contractual context and the bank's privity with it that invalidated the bank's actions.[12]

[42] In the current case, because Louw intended to pay Brandstock in terms of his contract with the company, Brandstock obtained an effective right against its banker to deal with the resultant amount standing to the credit in its banking account. The bank would not be at liberty to reverse the credit without Brandstock's concurrence.[13] In that sense the funds became Brandstock's 'property' when it received the payment; certainly within the very wide definition of the term in section 2 of the Insolvency Act.[14] Pursuant to the instructions of Brandstock's agent, Philp, the credit was applied by way of payments to the respondents, amongst others, in settlement of the payees' claims against third parties such BRP Livestock and Philp personally. It cannot be suggested that Philp made the payments in his personal capacity because it is apparent that the

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[12] It bears mention that *South African Reserve Bank v Leathern NO and Others* [2021] ZASCA 102 (20 July 2021); 2021 (5) SA 543 (SCA); [2021] 4 All SA 368 (SCA) was decided on essentially the same basis as *Joint Stock Company*. Both matters involved instances in which the account holder had (or was assumed to have had) a contractually restricted right to deal with the funds in its bank account. Analogous reasoning informed the decision in *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20 (18 March 2021); [2021] 2 All SA 680 (SCA); 2021 (5) SA 511 (SCA).

[13] Cf. *Nissan* supra, at para 22 (qualifying Harms JA's statement in *Take and Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1 (27 February 2004); 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) at para 17).

[14] The definition goes as follows: '***property*** *means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fideicommissary heir or legatee*'. Regard should also be had in the same section to the definition of '***immovable property***' to mean '*every kind of property and every right or interest which is not immovable property*'.

bank in making the transfers acted on Philp's instructions in his capacity as its account-holder's representative. The fact that stolen moneys were used to make them did not detract from the effectiveness of the payments; cf. *Absa Bank Limited v Moore and Another* [2016] ZACC 34 (21 October 2016); 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC).

[43] The point that the money paid to it by Louw became Brandstock's 'property' is illustrated by the appeal court's decision in *Trustees Whitehead v Dumas* supra. As noted, the background facts of the current matter far more closely resemble those that presented in *Trustees Whitehead v Dumas* than the cases relied on by the respondents' counsel.

[44] In *Trustees Whitehead v Dumas*, Dr Dumas was duped by an agent into investing in a Ponzi scheme operated by Whitehead. He consequently deposited R3 million into a bank account conducted by Whitehead at Absa Bank. He was led to understand by the agent that the transferred funds would remain as his property until he concluded a written contract with Whitehead. Before that could happen, Whitehead was arrested, and Dumas consequently came to realise that he had been conned. He instructed his bankers to reverse the transfer. That resulted in Whitehead's account being placed on 'hold', i.e. effectively frozen. The account was in credit to the sum of more than R3 million when it was placed on hold.

[45] An urgent application was meanwhile brought by a third party for the sequestration of Whitehead's estate. The upshot was that the funds standing to the credit of Whitehead's sequestered account were ultimately transferred to an account operated by Whitehead's trustees. That account was also conducted at Absa bank.

[46] Dumas sought to recover the money he had transferred to Whitehead's Absa account. In finally amended form, and notwithstanding that the bank had not been party to the transaction between Dumas and Whitehead, Dumas's claim was

formulated as a *condictio ob turpem vel iniustam causam* against the bank. The bank abided, whilst Whitehead's trustees opposed the claim, contending that the transferred funds fell into the insolvent estate.

[47] The court of first instance upheld Dumas's asserted right to the funds, reasoning that as he had caused the transfer of the money into Whitehead's bank account by reason of the latter's fraud, Whitehead had no entitlement, and thus no claim against Absa, to the money. It concluded that the money therefore fell outside Whitehead's estate, was not subject to the *concursus creditorum*, and the bank, which would be enriched if it kept the money, had to repay the amount to Dumas.

[48] In *Trustees Whitehead v Dumas,* the appeal court noted that the judgment in *Nissan* supra had been the 'foundation' of the court of first instance's reasoning. In upholding the appeal from the judgment at first instance, the court distinguished *Nissan*, pointing out that the latter case had been concerned with theft or fraud outside of a contractual context. Cachalia JA explained the legal consequences of the payment made by Dumas to Whitehead as follows (in para 13-15 and 22-24):

> '[13] Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of *commixtio*, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made. The account-holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of that amount http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/2013/19.html&query=Dumas -sdfootnote3sym from the bank, arising from their bank-customer relationship. This is also so where, as in this case, no money in its physical form is in issue, and the payment by one bank to another, on a client's instruction, is no more than an entry in the receiving bank's account. The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions. Where the depositor is

not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the account-holder's concurrence.

[14] Once ownership passes to the bank it immediately incurs the obligation to account to its customer. But 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 in the account were forgeries. It is contended on behalf of Dumas that because he was the victim of fraud or theft by Whitehead the bank must reverse the credit in the trustees' account.

[15] Where, as in this case, A causes the transfer of money from his bank account to the account of B, no personal rights are transferred from A to B; what occurs is that A's personal claim to the funds that he held against his bank is extinguished upon the transfer and a new personal right is created between B and his bank. Ownership of the money – insofar as money *in specie* is involved – is transferred from the transferring bank to the collecting bank, which must account to B in accordance with their bank-customer contractual relationship. This is so even where A was induced to enter into an agreement through B's fraudulent misrepresentation. In that case A will have a claim for delictual damages against to compensate him for his loss but will not be able to claim a retransfer of the credit from the bank. And if B is subsequently sequestrated the claim will lie against B's estate because an insolvent's personal right to credit falls into his estate upon sequestration.

...

[22] The reference to "fraud or theft" in *Nissan* must be understood in context: and one must have regard to the approach of Thirion J in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd*,

which Streicher JA approved. Here, R defrauded the Commissioner and paid an amount of money into his bank account with the Bank of Lisbon. The circumstances under which R obtained the money – the taking of the moneys having been nothing short of theft – Thirion J held were such as to deprive its delivery of any legal effect. In other words the bank acquired ownership of the money without a corresponding obligation to account to its customer and the customer had no contractual or other right to the funds. And, although he considered it unnecessary to decide whether the Commissioner could invoke an enrichment action against the bank because the matter was referred to the trial judge for oral evidence to be heard, he accepted that such a claim (the *condictio sine causa*) was competent.

[23] So both *Nissan* and *Bank of Lisbon* were concerned with theft or fraud outside a contractual context. By contrast the investment transaction between Dumas and Whitehead, though tainted by fraud, nevertheless constituted the *causa* for the payment. Dumas intended to pay Whitehead and voluntarily made the payment into Whitehead's account; it is immaterial that the payment was solicited through Whitehead's misrepresentation and fraud.

[24] As I have said, as between the account-holders no personal rights are transferred; the personal right to the credit of the one account-holder is extinguished upon the transfer and a new personal right created immediately for the other. Whitehead, as a customer of Absa, immediately acquired the new right to the money in his account, which was enforceable against the bank when ownership passed to it, despite the absence of valid causa – ie a valid underlying agreement. Absa then had both a duty to account and a corresponding liability to its customer, Whitehead, and on his sequestration two weeks later, to the trustees of the insolvent estate. Absa is therefore not enriched and no enrichment action lies against it. Dumas had only a delictual claim against Whitehead arising from the fraudulent

misrepresentation, which induced the transfer of the money, and on the latter's sequestration a claim against the trustees.'[15]

[49] The effect of the payments made by Louw to Brandstock in the current case cannot be materially distinguished from that of the payment made by Dumas to Whitehead. The fact that the payment was made to the intended payee in terms of a contract meant that it could not be regarded (to use the language employed by Thirion J in *Bank of Lisbon* supra, at p.208G) as being deprived of any legal effect. That is the critical point of distinction between this case and *Nissan*. Furthermore, in the current case, it is clear that by disposing of the funds credited to its account as a consequence of Louw's payments, Brandstock exercised the personal right it had acquired against its banker in consequence of the payments.

[50] The contractual character of the transaction in terms of which the payments to Brandstock were made by Louw also disposes of the contention by the respondents' counsel that, payment generally being regarded as a bilateral transaction,[16] it had not been established that Brandstock, as distinct from Philp personally, had intended to receive the payment. If it is recognised, as I have held it has to be, that the dealings between Louw and Philp resulted in a contract between Louw and Brandstock, and that Louw's payments were made in terms of that contract, it can hardly be maintained that Brandstock did not receive them when Louw performed under the contract. Any doubt that could be raised in that regard vanished when Brandstock appropriated the funds to make payments to various third parties. As mentioned, Philp's role, in causing those payments to be made, also involved using his authority to operate on the bank account as Brandstock's agent.[17]

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[15] Footnotes omitted.

[16] Cf. *Vereins und Westbank AG v Veren Investments and Others* [2002] ZASCA 36 (2 April 2002); 2002 (4) SA 421 (SCA) at para 11, *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n Ander* [1991] ZASCA 57; 1991 (3) SA 605 (A) at 612C-D and *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 993 A-B.

[17] In his supplementary submissions the respondent's counsel sought to rely on the judgment in *Gainsford NNO v Gulliver's Travel (Bruma) (Pty) Ltd* [2009] ZAGPJHC 20 (7 April 2009) to support his argument that Brandstock had never become entitled as against its banker to the funds. However, *Gainsford* also involved an entirely distinguishable set of facts. In that matter, to the knowledge of the parties who transferred funds into the account of the company concerned

[51] The question remains whether the payments made by Brandstock, which fell to be regarded as thefts from Louw,[18] were 'dispositions' by the company within the meaning of the term in the Insolvency Act. The term is defined in s 2 of the Act as follows: '*"disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and "dispose" has a corresponding meaning*'. '*Property*' is similarly very widely defined; see note 14 above.

[52] The reported cases show that the defined terms have been very widely construed in a purposive manner to give effect to the evident legislative intention in the 'claw back' provisions in the Act, such as s 26. An example that seems to me to be apposite on the facts of the current matter is *De Villiers NO v Kaplan* 1960 (4) SA 476 (C), which was concerned with the application of s 29 of the Insolvency Act on payments made by an attorney using funds misappropriated from his attorneys' trust account. The legislation in force at the time provided, similarly to s 88 of the currently applicable Legal Practice Act 28 of 2014, that the amount standing to the credit of an attorney's trust account did not form part of the attorney's assets. The effect of the judgment in that case is described as follows in Bertelsmann et al, *Mars, The Law of Insolvency in South Africa* 10th ed. at p.278: 'An attorney, notary or conveyancer making payment to another from the trust account at a bank, which he is obliged to keep by law, makes a disposition of "his property" as in so doing he exercises a power of disposal enjoyed by him,

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(Tuscan Mood 1224 (Pty) Ltd) and that of its de facto controllers, the company was not entitled to the funds put into the account conducted in its name. The depositors and the persons in control of what was ostensibly the company's account were all aware when the payments were made that the account was being used to launder the proceeds of fraudulent share transactions. The bank account concerned had been fraudulently opened for that very purpose using the forged signature of a 'shadow director' of the company who had been appointed as a puppet by the money launderers. It was accordingly argued in that case, and apparently accepted by the court, that the banking account concerned was, despite appearances, not actually that of the company.

[18] See note 11 above and *Absa Bank Ltd v Lombard Insurance Co Ltd* [2012] ZASCA 139 (28 September 2012); 2012 (6) SA 569 (SCA); [2012] 4 All SA 485 (SCA) at para 14.

arising from the relationship of banker and customer, although the actual funds while in the bank account are not his property'.[19]

[53] Just as the dishonest attorney did in *Kaplan*, Brandstock had the power of disposal of the funds standing to the credit of its bank account and it was able to exercise that power by virtue of its banker-customer relationship. Just as in *Kaplan*, the exercise of that power to cause payment of the funds transferred to its account by Louw to be made to anyone other than Louw would be unlawful. But once having been exercised, and a payment to any party of the funds having been made by the bank pursuant to Brandstock's instruction, the power of disposal was exercised and a resultant disposition made, irrespective of whether it acted lawfully or not in making it.

[54] In *Kaplan*, the fact that the attorney had been the beneficiary of the unlawful withdrawals made from his attorney's trust account appears to have weighed decisively in the court's decision to characterise them as dispositions of his property for the purposes of s 29 of the Insolvency Act. In the current matter, however, as indeed stressed by the respondents' counsel, Brandstock did not derive any identified benefit from the payments made to redeem the debts of BRP Livestock and Philp to third parties. I nevertheless consider that the reasoning of the court in *Kaplan* would be applicable in the current case if the effect of exercise of Brandstock's power to direct its bankers to make the payments were to adversely affect Brandstock's ability to reimburse Louw or pay its other creditors. It did, and by parity of reasoning with the approach taken by Van Winsen J in *Kaplan*, therefore falls, in my judgment, to be considered as a disposition of property for the purposes of s 26 of the Insolvency Act. Reference may also usefully be had in this regard to *Herrigal NO v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA) at 674-5.

[19] It is not uncommon for 'powers' to be equated to 'rights'; see, for example, *Communicare and Others v Khan and Another* [2012] ZASCA 180 (29 November 2012); 2013 (4) SA 482 (SCA) para 7 fn 3.

[55] There was, understandably in the circumstances, no suggestion by the respondents that the dispositions were for value. On the contrary, they accepted for the purposes of their contentions that Brandstock had received no value for the payments.

[56] It follows that the application will be upheld. It is unnecessary in the circumstances to deal with the alternative claim based on unjust enrichment. Suffice it to say, however, that I do not consider that a proper case was made out for relief under the alternative claim. Apart from any other consideration, the respondents were not enriched by the payments. They *pro tanto* extinguished the first respondent's claim against Philp[20] and in all probability gave rise to a loan account liability by the second respondent in favour of the first respondent.

[57] The applicants claimed *mora* interest on the amounts that they are entitled to recover from the respondents with effect from 18 July 2019, being the date upon which they demanded payment. It appears to me, however, that, although the liquidators' cause of action to have the dispositions set aside accrued earlier, the incidence of the respondents' obligation to pay the amounts sought to be recovered arises only from the date upon which the court sets the impugned dispositions aside; cf. *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34 (29 March 2010); 2010 (4) SA 499 (SCA); [2010] 4 All SA 154 (SCA) at para 10. The respondents will thus be in *mora* only with effect from the date of the court's judgment.

[58] An order will issue in the following terms:

1. The following payments by Brandstock Exchange (Pty) Ltd are set aside in terms of section 26 of the Insolvency Act 24 of 1936 as dispositions without value:

[20] The question whether either of the respondents might in the circumstances be entitled to an indemnity from the applicants in terms of s 33(1) of the Insolvency Act was not raised in these proceedings, and this judgment should accordingly not be read as in any way anticipating the issue should it arise.

1.1 The payment of R250 000 made to the first respondent on 25 April 2018;

1.2 The payment of R250 000 made to the second respondent on 26 April 2018.

2. The first respondent is ordered, pursuant to the applicants' entitlement in terms of s 32(3) of the Insolvency Act to recovery of the amount referred to in paragraph 1.1, to pay the said amount of R250 000 to the applicants, together with interest thereon *a tempore morae* at the rate applicable in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975 (as amended) from the date of this order to date of payment.

3. The second respondent is ordered, pursuant to the applicants' entitlement in terms of s 32(3) of the Insolvency Act to recovery of the amount referred to in paragraph 1.2, to pay the said amount of R250 000 to the applicants, together with interest thereon *a tempore morae* at the rate applicable in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975 (as amended) from the date of this order to date of payment.

4. The respondents shall be jointly liable for the applicants' costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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