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

Case No: 9400/2022

In the matter between:

RENEE BERNICE BAILEY N.O.	**First Applicant**
AVIWE NTANDAZO NDYAMARA N.O.	**Second Applicant**

vs

ENDERSTEIN VAN DER MERWE INC	**Respondent**

Matter Heard: 06 September 2023
Judgment Delivered: 12 October 2023

JUDGMENT

MANTAME J

[1] In this application, the applicants ("*the joint provisional trustees of the insolvent estate of the Laumas Trust*") claim repayment of an amount of R1 505 000.00 that was received by the respondent ("*EVDM/attorneys*") from the Laumas Trust, less than two (2) years before the Laumas Trust estate was sequestrated. The claim is premised on Section 26(1)(b) of the Insolvency Act, 24 of 1936 ("*the Insolvency Act*") which provides as follows:

"*(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) ...

(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 ..."

[2] The said amount was utilised by EVDM to pay their fees and disbursements from Counsel's fees for their legal representation of Craig Massyn ("*Mr Massyn*") and other entities in various legal proceedings. The applicant postulates that the Laumas Trust made these payments when it was insolvent, and the payments amount to dispositions made not for value and should be set aside.

[3] EVDM opposed this application on the basis that, *first*, the Laumas Trust did receive value as deposits into their account were made for the specific purpose of making payments to EVDM. *Second*, the value need not originate from EVDM. *Third*, the nett asset position of the Laumas Trust was not adversely affected by the receipt and further payment of the monies to EVDM. *Fourth*, the Laumas Trust never traded and had no income of its own. The only creditor of the Laumas Trust that was identified by the applicants was Octox (Pty) Ltd ("*Octox*"). When payments were made to EVDM there were no funds received from Octox in the account and any payment to EVDM could not be prejudicial to such creditor.

[4] Although an order was made by this Court on 6 September 2023 that the only part of the application (Section 26(1)(b) of the Insolvency Act) would be heard, and the remaining part of the application based on enrichment and in terms of Section 29 of the Insolvency Act as well as the application for the admissibility of evidence and the respondent's application to strike out shall stand over for a later determination, I consider it relevant that it should reflect in this judgment that this matter comes before this Court on a limited scale - i.e., for determination of the application in terms of Section 26(1)(b) of the Insolvency Act.

Relevant Facts

[5] At the core of this application, the applicants alleged that Mr Massyn conducted an unlawful and fraudulent Ponzi-investment scheme. He operated it through a variety of related entities. Funds in excess of R1.5 billion were solicited from and paid by the general public into the scheme purportedly for purposes of trading in foreign currency. The investors were advised that currencies would be bought and sold, while taking advantage of fluctuating relative values between different currencies. However, it turned out that only a considerable percentage of funds deposited by investors for the aforesaid purpose are now lost or unaccounted for.

[6] The scheme was conducted and operated by Mr Massyn through the entities known as Imagina FX (Pty) Ltd (in liquidation) ("*Imagina FX*"), Octox (Pty) Ltd (in liquidation) ("*Octox*"), and Trius Capital Ltd ("*Trius Capital*"). Other entities are not relevant in this application.

[7] Imagina FX investment scheme collapsed in or about June 2020 when the Financial Sector Conduct Authority ("*the FSCA*") intervened and suspended the FSP licence under which the scheme purportedly conducted its business. This led to investigation conducted by the FSCA into the Imagina FX investment scheme and a flurry of litigation against the entities that formed part of the Imagina FX investment scheme and Mr Massyn personally.

[8] Mr Massyn, as the alleged mastermind and controller of the Imagina FX investment scheme, approached EVDM for legal advice and to oppose or defend certain legal proceedings that were instituted after the collapse of the Imagina FX investment scheme.

[9] Subsequent thereto, EVDM concluded three (3) separate "*attorney and client fee agreements on 17 July 2020 which contained a mandate to represent Mr Massyn personally, a mandate to represent Imagina FX and a mandate to represent Trius Capital.*" Mr Sean Pienaar ("*Mr Pienaar*"), the director of EVDM represented Mr Massyn, Imagina FX and Trius Capital in various legal proceedings. After the conclusion of the fee agreements, EVDM rendered legal services based on these three (3) agreements.

[10] According to Mr Pienaar, Laumas Trust paid a major portion of the fees incurred by all three (3) of them. Less than two (2) years before the sequestration of its estate, the Laumas Trust paid various accounts totalling R1 505 000.00. It is not disputed that the amounts were paid because Mr Pienaar advised Mr Massyn sometime during July / August 2020, that the insolvent scheme operated by Mr Massyn was unlawful, Imagina FX would be liquidated and Mr Massyn's estate would be sequestrated. He therefore

instructed Mr Massyn to make payments of legal fees from third parties. Mr Massyn and his wife Mara-Li Massyn ("*Mrs Massyn*") advised Mr Pienaar that they would get funds from third parties, including the Laumas Trust. They further made an undertaking that funds will *'not be from illegal source'*, and were content that '*there were no funds left from the Imagina days. ...'*[1]

[11] The applicants asserted that there was no legal or justifiable basis for the payments by the Laumas Trust of legal fees to the EVDM and that these payments should be impeached in terms of Section 26 of the Insolvency Act.

[12] Mr Massyn was the founder of the Laumas Trust and the trust was registered at the Master's Office, Pretoria in January 2014. He is the trustee and the beneficiary of the Laumas Trust. He was the only trustee with the power to nominate and appoint a trustee of his choice in his Will to replace him as a trustee. The Laumas Trust was formed and incorporated as a family trust for the Massyns (Mr and Mrs Massyn) and for the benefit of their children. Mrs Mara-Li Massyn was also a trustee and beneficiary of the trust. Mr Massyn controlled and made decisions for and on behalf of the Laumas Trust.

[13] The Laumas Trust was provisionally sequestrated by this Court on 9 June 2021 and the provisional order was made final on 12 August 2021. The Laumas Trust was sequestrated because it was unable to pay its debts. Essentially it was insolvent and was said that it would be to the benefit of the creditors for it to be wound-up. From the sequestration application, and subsequent evidence obtained from Mr and Mrs Massyn at an inquiry in terms of section 414 and 415 of the Companies Act 61 of 1973 ("*the 1973*

[1]See para [14] at 14.1 Answering Affidavit, Record page 286

Companies Act") into the business and affairs of Imagina FX and Octox, the applicants' investigation revealed that:

13.1 The Laumas Trust never conducted any income generating business, did not earn any income and did not keep any conventional books or records of "*its business and affairs*" as required in the trust deed;

13.2 The sole source of all the funds received by Laumas Trust during its existence was the investor funds unlawfully transferred from Octox to the Laumas Trust;

13.3 Apart from one (1) meeting held by the trustees of the Laumas Trust (Mr Massyn, Mrs Massyn and Roland Allan Hendrikse ("*Mr Hendrikse*") on 11 September 2015 in terms whereof the trustees, apparently jointly decided to open a bank account on behalf of the Laumas Trust, and appointed Mr and Mrs Massyn as the authorised signatories to such account, no further meetings were held and / or no further decisions were taken by the trustees jointly thereafter;

13.4 Mr Massyn took all the decisions and actions for and on behalf of the Laumas Trust. According to Mrs Massyn, she provided him with a power of attorney to act in her place and stead as a trustee of the Laumas Trust.

13.5 The third trustee, Mr Hendrikse, was after 11 September 2015 never part of any decision and / or action taken by the Laumas Trust and was merely added as trustee because he was Mrs Massyn's business advisor;

13.6 During the period 2 July 2014 to 21 October 2020, Octox alone paid an amount of R4 798 979.19 to the Laumas Trust. Octox paid this amount to the Laumas Trust without any valid reason or *causa*, when the payments were not due, owing or payable to the Laumas Trust by Octox. These funds

were utilized by the Laumas Trust for and on behalf of the Massyns, and to pay the legal fees of EVDM;

13.7 In addition to the absence of any valid *causa* for the payment, the Laumas Trust's payments to EVDM were made contrary to the express provisions of the Trust Deed, in that, *inter alia*:

13.7.1 The payments were not properly authorised by all the trustees voting together, but were made by Mr Massyn without the knowledge or consent of his co-trustees.

13.7.2 The payments were made to EVDM to pay for Mr Massyn's legal fees and that of Imagina FX which was the alter ego of Mr Massyn. The funds were therefore paid for the personal benefit of Mr Massyn and his scheme contrary to the powers of the trustees in terms of the Trust Deed.

[14] According to the EVDM, the amounts totalling to R1 505 000.00 were paid because Mr Pienaar of EVDM advised Mr Massyn sometime during July / August 2020 (and prior to 6 August 2020) that, (i) the investment scheme operated by Mr Massyn was unlawful; (ii) Imagina FX would be liquidated; (iii) Mr Massyn would be sequestrated; and (iv) the EVDM could not receive funds from "*an illegal source*," which presumably included Mr Massyn, Imagina FX or Trius Capital and required an outside third party to fund the litigation. The Laumas Trust proceeded to make payments to EVDM between 6 August 2020 and 18 May 2021. When the Laumas Trust made those payments, it was insolvent. This amount was utilized by EVDM for legal fees and disbursements, including Counsel's fees relating to litigation concerning Mr Massyn and his entities.

[15] The respondent disputed that all the monies paid to the EVDM originated from Octox. In fact, it prepared a table to disprove the fact that the sole source of funds received by the Laumas Trust was from the investor funds. The respondent stated that the deposits that were made into Laumas Trust bank account originated from various sources and these deposits were received by the Laumas Trust from 6 August 2020 to 18 May 2021. Despite the table referred to that contained some private names, companies and different amounts, no bank statements were furnished to back up this allegation.

Discussion

[16] For the applicant to succeed with their application in terms of Section 26(1)(b) of the Insolvency Act, it must prove:

16.1 a disposition;

16.2 by an insolvent;

16.3 not made for value;

16.4 within two years of sequestration;

16.5 the person benefitting by the disposition is unable to prove that the amount of the Laumas Trust's assets exceeds its liabilities immediately after each payment was made.

[17] There seems to be no dispute that the Laumas Trust disposed of its property or made payments to the EVDM at the time it was insolvent. An application for liquidation of Laumas Trust was issued on 21 May 2021 and a provisional order of liquidation was granted by this Court on 9 June 2021 and was made final on 12 August 2021. When Octox obtained a liquidation order, it was settled that from the period 2 July 2014 to 21

October 2020, Octox alone paid an amount of R4 798 979.19 to the Laumas Trust and the trust was unable to pay such debt.

[18] According to the applicants, the Laumas Trust paid various amounts totalling R1 505 000.00 to the EVDM less than two (2) years of the sequestration of its estate. This disposition was not made for value. As it stands, the EVDM is unable to prove that the amount of the Laumas Trust's assets exceeded its liabilities immediately after each payment was made.

[19] The respondent appears to avoid the applicant's allegations that the amounts that were deposited to the Laumas Trust were from Octox by alleging that the amounts originated from various depositors on the basis that such funds would be utilized to pay Massyn's legal fees which the Laumas Trust undertook to pay towards EVDM. That might be so, however, no proof was furnished in the form of bank statements to back up such allegations.

[20] Even if this Court were to assume for a moment that such deposits were made from various sources for the payment of EVDM's legal fees and disbursements, such arrangement in my view, does not suggest that the EVDM should be preferred against the actual creditors of the Laumas Trust. It should be borne in mind that Laumas Trust at the time had no business with EVDM. Whatever monies deposited to the Laumas Trust had to be first utilized for the trust's own responsibilities and/or obligations. Once the money gets deposited to the Laumas Trust bank account, it becomes the asset and / or property of the trust. There is no legal basis reasonably discernible to utilize Laumas Trust as a *conduit* for the monies to be paid to the third parties.

[21] In circumstances where the Laumas Trust was later on liquidated for its inability to pay its creditors, it is not open for the respondents to simply state that the monies that were paid to the Laumas Trust and for the benefit of the Trust were made in order to make payments to EVDM. Notably, these payments and / or dispositions were made in circumstances where the trust was insolvent. Clearly, if that is the case, such disposition was not made for value. It is not disputed that the disposition was made within two (2) years of the trust's sequestration. Most importantly, EVDM having been benefitted by these dispositions it did not admit nor deny that Laumas Trust assets at the time of these dispositions exceeded its liabilities immediately after each payment was made.

[22] The legal position regarding the bank accounts was clearly stated in *S v Kearney*[2] that:

> *"[N]ow it has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer; ..."*

Similarly, once the bank honours the deposit from (customer) whoever deposited the money, it is obliged to comply with instructions of the account holder after crediting the amount deposited. The account holder (Laumas Trust) has the power to dispose of the credit balance. It is not for the Massyn's nor the EVDM to give instructions of what must happen to that credit balance. The contention that the deposits were meant for the monies to be paid to the EVDM by Laumas Trust is completely flawed.

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[2] 1964 (2) SA 495A at 502H – 503A

[23] In this instance, having been established that the Laumas Trust was insolvent, nevertheless, it proceeded to make dispositions not made for value. A disposition without value is liable to be set aside on certain specified situations. For instance, *first,* the EVDM obtained a benefit of credit to its account which it used to pay for legal fees and disbursements. *Second,* the EVDM was able to reduce the debt which was owed to it by Mr Massyn and other entities that were sued. *Third,* the Laumas Trust had nothing to do with the ongoing litigation at the time. *Fourth,* there was absolutely no value that was derived by the Laumas Trust, being a third party from paying legal fees that belonged to the EVDM.

[24] The respondent submitted that the object of Section 26 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or contingent advantage in return.[3] A disposition without value is one for *quid pro quo.*[4] Value is not confined to monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. It must be determined by reference to all the facts and circumstances under which the transaction was made.[5] Not made for value means for no value at all.[6]

[25] The respondents captured the general application of Section 26 quite well. However, each case has to be judged according to its merits. The applicants submitted that the SCA has recently pronounced in the context of payments received for legal fees by an attorney from an insolvent third party which the insolvent third party paid on behalf

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[3] Estate Wege v Strauss 1932 AD 76 at 84
[4] Jager's Estate v Whittaker and Another 1944 AD 246 at 250 - 251
[5] Goode, Durrant and Murray Ltd v Hewitt and Cornell NND 1961 (4) SA 286 (N) at 291 E - F
[6] Strydom v Snowball Wealth 2022 (5) SA 438 (SCA) at [36]

of the attorney's client. For instance, in *Van Wyk Van Heerden v Gore and Another,*[7] the SCA had no hesitation to find that the dispositions are not for value where they are made by a third party, and the legal services are not provided for the payer. In para [41] it stated:

> *"[41] The attorney made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. As such, they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account. As between the attorneys, BRP and Philp, the application of these funds to settle fees and disbursements was lawful and appropriate. If BRP or Philp had deposited these amounts, they would have received value for them. But the deposit was made by Brandstock, which did not receive value. When applied to amounts due by BRP and Philp, these two deposits became dispositions which fall within the provisions of s26(1)(b). ..."*

[26] Likewise, the Laumas Trust having been an insolvent third party, received no benefit from the EVDM. Payments were made by the Laumas Trust pursuant to an agreement reached between EVDM and Mr Massyn and other two (2) entities. Since EVDM utilized the funds to reduce the debt of Mr Massyn and other entities, obviously it benefited from the payments.

[27] It was Mr Pienaar's evidence that he requested in writing for proof of source of funds on 14 April 2021. It does not appear that Mr Massyn furnished him with such information. The table of payments listed in the heads of arguments, is unclear where it

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[7] 2023 (1) SA 80 (SCA)

emanates from. Mr Pienaar was unable to state categorically that the Laumas Trust remained solvent after these payments were made. He was adamant that Mr Massyn as a beneficiary to the trust, the trust had to protect his interests by paying his legal fees. In circumstances where the trust was insolvent, it makes no sense for an insolvent trust to pay for the beneficiaries' debts.

[28] At the Section 414 and 415 inquiry referred to above, the applicants were advised by the Massyns that there was only one meeting that the trustees had, to open a bank account and to nominate signatories[8]. However, when Mr Pienaar opposed this application on behalf of the EVDM, he mentioned a number of decisions that other trustees were part of, including a resolution of 15 April 2021 authorising Mr Massyn to make payment of legal fees from Laumas Trust bank account[9]. This assertion is at odds with his further allegation in his answering affidavit that "Clearly, *the Trust undertook towards Massyn, the depositors and the Respondent that the capital distribution or loan to be made to Massyn would be made to the Respondent.*"[10] The same Mr Pienaar, went on to state that, *"I do not have any personal knowledge of the internal affairs of the Trust and do not know whether the amounts paid by the Trust to the Respondent were loans granted by the Trust to Massyn as anticipated in clause 11.2.5 of the trust deed or interim distributions of capital to Massyn as provided for in clause 11.2.28 thereof as read with clause 12*[11]. Mr Pienaar clearly contradicted himself. This therefore means that respondent's defence is founded on unverified hearsay. The trustees themselves could not explain convincingly the nature of payments made from Laumas Trust to the EVDM.

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[8] See para [13] at sub-para 13.3 supra
[9] See para [20] Answering Affidavit, Record page 288
[10] See para [38] Answering Affidavit, Record page 298
[11] See para [32] Answering Affidavit, Record page 296-297

[29] The only evidence on record is that the source of funds to the Laumas Trust was from Mr Massyn's illegal Ponzi-scheme – hence Octox made an application for liquidation of the trust. From the applicants' facts, it is undisputed that Octox has a substantial claim of an amount of R4 798 979.19 against the Laumas Trust. Even if this Court were to believe that the amount left in the trust's banking account was negligible, as per the respondent's version when a number of depositors started depositing the funds, the fact remains that the EVDM is not a preferrent creditor of the trust. Clearly, the Laumas Trust could not have preferred the EVDM's debt against that of Octox for instance.

[30] In my view, the applicants have demonstrated that at all relevant times these payments were made, the assets of Laumas Trust did not exceed its liabilities. In the result, the disposition was not for value, as it was made from the third party's account, and the legal services provided by EVDM were not provided for the benefit of the payer.

[31] In conclusion, I find that the applicant's application has merit and the payments impeachable. Consequently, this order shall issue:

31.1 The dispositions by the Laumas Trust to the respondent in the sum of R1 505 000.00, are set aside in terms of Section 26(1)(b) of the Insolvency Act 24 of 1936;

31.2 The applicants are declared to be entitled to payment on the sum of R1 505 000.00 in terms of Section 32 of the Insolvency Act;

31.3 The respondent is directed to pay to the applicants:

31.3.1 The amount of R1 505 000.00;

31.3.2 Interest on the amount of R1 505 000.00 at a rate a *tempore morae* from 3 June 2022 to date of payment;

31.4 The respondent is ordered to pay the costs of this application, including the costs of two (2) Counsel.

MANTAME J

WESTERN CAPE HIGH COURT