IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

[illegible]

DATE SIGNATURE

CASE NO: 69975/2009

DATE: 29 July 2011

In the application of

COENRAAD LOUWRENCS STANDER N.O.	1ST APPLICANT
IGNATIUS CLEMENT MIKATEKO SHIRILELE N.O.	2ND APPLICANT

[In their capacity as provisional liquidators of

KIRSTEN LOTTERING SCHEEPERS INC. (in liquidation)

and

DE BRUIN & PARTNERS INC.	RESPONDENT

JUDGMENT

MABUSE J

1. In this application the applicants seek the following order:

1.1 That leave be granted to them in terms of sections 387(3) and 386(4) of the Companies Act NO. 61 of 1973 ("the Companies Act") (as it then was), to launch this application.

1.2. That it be declared that payment of R117, 958.75 to the respondent on 12 May 2009 constituted a void disposition of the property of Kirsten, Lottering, Scheepers Incorporated (in liquidation), after commencement of the winding up in terms of the provisions of section 341 (2) of the Companies Act.

1.3. Alternatively, that the payment of R117, 958.75 to the respondent be set aside as impeachable disposition of the property of the insolvent estate of Kirsten, Lottering Scheepers Incorporated (in liquidation), in terms of the provisions of section 26, alternatively, section 29, and further alternatively section 30 of the Insolvency Act 24 of 1926 ("the Insolvency Act").

1.4. That judgment be granted against the respondent for payment of the amount of R117, 958.75 together with costs, and the costs of this application.

1.5. That the respondent be ordered to pay interest at the rate of 15.5% per annum on the amount of R117, 958.75 from 12 May 2009 to date of payment.

2. <u>THE PARTIES</u>

The applicants are both adult male insolvency practitioners who operate under the name and style of Corporate Liquidators (Pty) Ltd at 120 Lange Street, Nieu Muckleneuk, Pretoria, Gauteng. They were appointed joint liquidators of the Kirsten, Lottering, Scheepers Incorporated ("KLS Inc") by virtue of a Certificate of Appointment issued on 10 July 2009 by the Master of the North Gauteng High Court. The aforementioned liquidators have only been appointed as provisional liquidators of KLS Inc; and their powers are as circumscribed in section 386 of the Companies Act read with section 66 of the Close Corporations Act NO.69 of 1984. They do not therefore have any powers to litigate. It is for the said reason that the applicants seek the order prayed for in prayer one (1) of the notice of motion.

3. The respondent is a company duly registered in terms of the laws of this country and has its registered place of business at First Floor Ladegaard House, 6 Ben Schoeman Street, Vanderbijlpark.

4. This is an application by the applicants to recover the amount of R117, 958.75 from the respondent. The said amount represents payment which was made to the respondent from the funds of an insolvent company on the basis that the said payment was made after the commencement of the wounding up of the concerned company, namely KLC Inc.

5. In contravention of the provisions of section 341 (2) of the Companies Act, as amended, the respondent was paid the amount of R117, 958.75. The said section 341 (2) provides as follows:-

"Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the wound up, shall be void unless the court otherwise orders."

6. In the alternative, the aforementioned payment constitutes, in terms of the provisions of section 26 of the Insolvency, a disposition without value, or, in terms of the provisions of section 29 of the Insolvency Act, a voidable preference, or, in terms of section 30 of Insolvency Act, an undue preference to creditors. The Applicants claim that on the premises set out above, the

respondent is liable to refund the amount that it received by reason of the fact that the said payment was made from the funds of an insolvent company after the commencement of its liquidation, in the alternative, on the basis that the said disposition contravened the provisions of the said sections of the Insolvency Act.

7. Before its liquidation, KLS Inc; was a private company properly registered in terms of the companies statutes of the Republic of South Africa. It conducted its business as a firm of attorneys in accordance with the provisions of section 23 of the Attorneys Act 53 of 1979, "(the Attorneys Act)", read with the provisions of section 53 of the Companies Act at Hertz Boulevard, Vanderbijl Park, Gauteng. Its registered office or address was located at 38 Chopper Street S E 5 Vanderbijlpark.

8. KLS Inc: was provisionally liquidated by an order of the Court issued on 27 May 2009 following an application that had been issued, for that purpose, on 25 November 2008, under case number 55052/08. The applicants contend that in terms of the provisions of the said section 341 (2), the commencement date of the winding up of KLS Inc: was the date on which the applicants' application under case number 55052/08 was issued by the office of the Registrar of the Court. The final winding up order of the said KLS Inc; was granted by the Court on 25 August 2009.

9. For the purposes of this judgment, the circumstances that led to the liquidation of KLS Inc: are not relevant. In its answering affidavit, the respondent did not dispute the applicant's allegation that, as on the date on which the application for its winding up was issued, KLS Inc: was insolvent

and unable to pay its debts. Accordingly it is common cause between the parties, or, it is not in dispute that on 25 November 2008 KLS Inc: was not only insolvent but was also unable to satisfy its debts. The respondent is unable to deny that the amount of R117, 958.75 was received by it from the funds of the insolvent company and that the said amount was paid to the respondent after the commencement of the winding up of the company from whose funds the said amount was paid. Nowhere in its affidavit did the respondent challenge this allegation.

10. The issue this court is called upon to decide is whether the said payment contravened the provisions of section 341 (2) of the Companies Act or, in the alternative, the said sections of the Insolvency Act and whether or not it is void or liable to be impeached as claimed by the applicants.

11. The respondent admits that on 11 May 2009 it was paid an amount R117, 958.75 in order to enable it make certain payments for specific purposes. It denies however that the said payment to it by KLS Inc; constituted a contravention of the provisions of section 341 (2) of the Companies Act.

12. Against this application, the respondent has raised three defences. The respondent opposes the application on the basis, firstly, that the amount of R117, 958.75 that it received from the KLS Inc; was deposited into its trust account which it operated in terms of the provisions of section 78 (1) of Attorneys Act; secondly, it contends that the attorneys acting for the applicant should have taken steps to contact Pieter Hendrik De Bruin("De Bruin"), the deponent of the answering affidavit, who is the sole director and shareholder in the respondent company; and thirdly, that section 341 (2), which constitutes

the basis of the applicants' application, is unconstitutional as it is against the spirit of section 9 (1) of the Constitution of the Republic Act No. 108 of 1996 ("the Constitution"). I now wish to turn my attention to the grounds of defence raised by the respondent.

13. The respondent contends that, because all the monies received from KLS Inc; or Mrs Scheepers were deposited into its trust account opened and operated in accordance with provisions of section 78 (1) of the Attorneys Act, such monies never constituted part of its estate nor were they ever appropriated by the respondent. This contention is disputed by the applicants, whose view is that the respondent's reliance on the provisions of the said section 78 (1) was flawed by reason of the fact that the respondent received the said amount of R117, 958.75 well knowing not only about the pending liquidation application against KLS Inc: but also the grounds for such liquidation. With such knowledge the respondent nonetheless made those payments from the said amount.

14. It is only apposite at this stage to analyse the provisions of section 341 (2) of the Companies Act *vis-a-vis* the respondent's three grounds of defence in order to establish whether such grounds are valid. In order to achieve this goal, it is very important that one should look at the relevant section 341(2) in order to establish what the applicant should prove in order to succeed with its application. In doing this it will become evident that the target of the provisions of the said section is not so much the conduct of the person or persons, party or parties that received the money as it is the conduct of the

person or persons, party or parties that made the payment. Even then it is the source of such money that is equally important. Accordingly it is the conduct of the company that pays out the money and not of the company that receives it that determines whether or not such a disposition is tainted by the provisions of section 341 (2). In terms of the provisions of the said section 341(2), only the effect and the intention of the disposition need to be considered. All that the applicants need to establish is actual prejudice to the creditors or preference of one creditor or some creditors above others.

15. In order to succeed in its application in terms of section 341 (2) of the Companies Act, the applicants need only to prove that; (a) the payment that is challenged was made by a company; (b) that such a payment was a disposition; (c) that the company disposed of its property; (d) that at the time the company disposed of its assets or property it was unable to pay its debts; (e) and, that the company disposed of its assets or property after steps had been taken to liquidate or wind it up. These are all the requirements of the law that the applicants must comply with in terms of section 341 (2) of the Companies Act in order to show the Court that they are entitled to the remedy they seek. Unless the court orders otherwise there is, in my view, no reason why it cannot grant the relief, if it is satisfied with the other requirements for the application.

16. As correctly pointed out by counsel for the applicant the purse of Section 341 (2) is to ensure that the property of the company threatened with winding up is not improperly dissipated before the commencement of winding up so that it is available for the satisfaction of the claims of the creditors on the footing of equality of treatment, subject only to any security or preference which any of

them may enjoy under the Insolvency Act. See, in this regard, Herrigel N.O v. Bon Roads Construction Company (Pty) Ltd 1980 (4) SA 669) (SWA) at p. 678. In his heads of argument the respondent's counsel hit the nail on the head when, though for a different reason, he referred this court to the court's description of the provisions of section 115 (the predecessor of Section 341 (2)), in Lief v Western Credit Africa (Pty) Ltd 1976 (3) SA344 at 347 B – C. The court stated in that case that:

"*The mischief aimed at by Section 115 is a possible attempt by dishonest companies or directors or creditors or others to snatch some unfair advantage during the period between presentation of the petitioner for the wounding up order and the granting of that order by a court.*"

17 It is clear that the respondent's defence is not that it did not know about the pending liquidation application nor is it the respondent's defence that it was not aware of the pending liquidation application. On the contrary it holds the view that it acted *bona fide* in accepting the said payment from KLS Inc; and furthermore in making payments to some people from the said payment. In fact save for stating that the provisions of section 341 (2) are unconstitutional on the basis that they are inconsistent with the provisions of section 9 (1) of the Constitution, the respondent has not mounted any credible challenge against the provisions of section 341 (2), even though Counsel for the respondent, in his heads of argument, very tersely dealt with what the word "*disposition*" as used in the said section 341 (2) meant. He argued that the payment of the said amount of R117, 958. 75 by KLS Incorporated to the respondent did not constitute a disposition for the purposes of section 341 (2) of the Companies Act. Section 2 of the Insolvency Act defines disposition as

being " *any transfer or abandonment of rights to the property and includes a sale, mortgage, pledged, 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".* The payment by KLS Inc; of the sum of R117, 958.75 to the respondent constitutes a disposition that is liable to be set aside on the basis that it is void. It is a contravention of the provisions of section 341(2) of the Companies Act.

18. In support of his argument counsel for the respondent relied on the provisions of section 78 (7) of the Attorneys Act, which provides that:-

"*No amounts stating to the creditor (sic) of any practitioner's trust account shall be regarded as forming part of the assets of the practitioner, or may be attached on behalf of any creditor of such practitioner.*"

According to his argument, KLS Inc; was not dispossessed of the funds when it transferred them from the KLS account to the trust account of the respondent. While the said amount remained in its (the respondent's) trust account, it was always the property of KLS Inc.

19. At any rate it is irrelevant whether or not the said amount became part of the respondent's estate or that it was deposited into its trust account. If it was not the intention of the legislature to regard monies paid into an attorney's trust account as a disposition in terms of section 341 (2) of the Companies Act, or a disposition without value, in terms of section 26 or voidable preference in terms of section 29 or an undue preference to a creditor in terms section 30, all of the Insolvency Act, the legislature would have made it clear. Moreover

section 341 (2) uses the words "*Every disposition ....*", clearly with no exception.

20. Again it is clear from the wording of the said section 341(2) that lack of knowledge or ignorance about the fact that the company that made the payment was, at the time it made such payment, insolvent and unable to pay its debts and being wound up, affords the receiver of the money with no defence. In my view the respondent is a firm of attorneys who should have known better and who should have exercised caution in its dealings with KLS Inc.

21. In his answering affidavit, the said De Bruin stated it quite unequivocally that, as a result of certain untoward dealings by a certain Kottie Kirsten and his involvement with the investment scheme called "Molokiba", KLS Inc was in financial difficulties. He stated furthermore that he was not aware that KLS Inc. had been served with a copy of the application for its winding up. The problem that I have with this statement is that he failed to furnish further details about the date on which he became aware of the financial difficulties that KLS Inc; was experiencing or to explain fully what it was that he became aware of.

22. To be fair to De Bruin I will accept that he was not aware, in November 2008, that the applicants had launched an application for the winding up of KLS Inc; On his version, I will accept furthermore, that a copy of the said application

was served on KLS Inc; during November 2008. It is possible that he did not know about the pending application to wind up KLS Incorporated until in January 2009. At any rate no evidence has been placed before me to show that De Bruin knew about the said application before January 2009. However on his own evidence, De Bruin knew already in January 2009 that there was pending application for the winding up of KLS Inc. He started knowing about this application when he was approached by Scheepers, according to his own version. Section 348 of the Companies Act states that:

" A winding up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up".

23. That the said Scheepers approached him with a copy of the application for the winding up of KLS Inc; is clear from his own affidavit where he states that:

"*21*

On 11 May 2009 the Respondent received a cheque from KLS in the amount of R117,958.75. A copy of the cheque is attached to the Applicant's Founding Affidavit and the receipt was recorded in the respondent's trust ledger a copy of which is attached hereto as Annexure "1".

22.

Upon receipt of the aforesaid amount and because the application had been enrolled for hearing on 27 May 2009 I briefed Adv. Ellis SC to appear on behalf of KLS".

24. KLS Inc; was provisionally liquidated on 27 May 2009. Accordingly any reference to the application that was enrolled on 27 May 2009 can only refer to one application and that is the application for the KLS Inc's winding up. Accordingly I agree with the applicant's contention that the respondent knew about the application for the winding up of KLS Inc; and that, under those circumstances, he cannot escape the provisions of section 341(2) of the Companies Act or the other sections of Insolvency Act.

25. The respondent's view is that he received the sum of R117, 985.75 and made certain disbursements from it in the ordinary course of business. In Malk (Pty) Ltd v Franks v Solomon N.O. (1935 TPD, 85, at p 91, De Wet, stated, with reference with regard to the question of payment being made "*in the ordinary course of business*" that;

"*Whatever definition is adopted we think the transaction must not be regarded as standing by itself, but must be regarded in the light of all the surrounding circumstances.*"

26. There is no doubt that there was a relationship between the said Scheepers and the respondent. Scheepers was a member of KLS Inc;. According to the evidence of the respondent, Scheepers had financial problems which had been caused by the said Kottie Kirsten. In order to solve those problems he was forced to approach the respondent in order for the respondent to assist

him with such problems. In that manner Scheepers became the respondent's client.

27. It is not clear whether Scheepers approached the Respondent as a member of KLS Inc; or in his personal capacity. This however seems to be otiose by reason of the fact that the money i.e. R117,985.75 belonged to KLS Inc; and it is KLS Inc; that is in the spotlight because of the said payment. It has not been disputed that the said money belonged to KLS Inc. Although De Bruin contends that he acted *pro amico* for him, Scheepers was however obliged to pay him for his disbursements and expenses. In that regard, any payment that Scheepers would make to the respondent would be payment made in ordinary course of business. However in Est. van Schalkwyk v Hayman and Lessom 1947 (2) SA 1025 CPD at p.1046, the Court, in approving the Court approached Rex v Patel 1932 TPD 130 at 133 stated that:

"Although the mode only and not the intention of the disposition is relevant nevertheless the consequences which follow from the mode employed, whether or not such consequences were ever intended, must in absence of other evidence be relevant in determining whether in the words of DE VILLIERS, J.P. in Van Eeden's Trustee v Pelunski and Mervis (1922, O.P.D. 144) at p 149:

"The disposition is in accordance with the principles, practices, usages and methods adopted de facto by or between solvent men of business or which would be so adopted by them under the circumstances in question".

The Court held that:

"... the fact that the payment was made by the insolvent in fraud of the rights of third parties, though the defendants were not knowingly a party to the fraud, made it impossible to hold that it was made in ordinary course of business.

28. It is not hard to find the reason for the Court's approach. If the Court were to hold that the payment that had been made by the plaintiff in that manner was proper, the Court would have condoned the violation of the law by the defendants. In equal measures if this Court were to approve of the payment by the KLS Incorporated of the amount of R117, 958.75 to the respondent, the Court would in that manner be condoning Scheepers' violation of the provisions of section 341(2) of the Companies Act. There is another reason for which this Court, the same as Estate Van Schalkwyk v.Hayman & Lessom, supra will not approve of the said payment. The espondent, though acting *pro amico* for Scheepers, as he claimed, was at all material times aware of the financial situation of KLS Inc;. Therefore, his reliance on the provisions of section 78(7) of the Attorneys Act lacks merits.

29. On the defence that the provisions of section 341(2) of the Companies Act was unconstitutional, the applicant's approach is that, in challenging as unconstitutional the provisions of section 341(2), the respondent failed to observe the correct procedure set out in Rule 16A of the Uniform Rules of the Court. Rule 16A (1) provides that:

"Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of the filing of the relevant affidavit or pleading".

According to the said sub-rule, the respondent should have given such a notice simultaneously with the filing of his affidavit. It is clear that the rule does not envisage a situation where such cumbersome and time consuming for the registrar to read affidavits in order to establish whether parties have in such affidavits given the notice required by the said Rule. Accordingly the said notice must be given separately from the affidavit or pleading. As there is no such notice, the respondent may not now rely on the perceived unconstitutionality of the said section 341(2) of the Companies Act. Therefore I agree with the applicant's contention that the respondent cannot argue the point relating to the unconstitutionality of section 341(2) of the Companies Act when he did not follow the correct procedure.

30. I have already made a finding that, commencing in January 2009, the respondent was already aware of the financial difficulties of Scheepers; that he knew that there was a appending application to liquidate KLS Inc.; that he knew about the circumstances under which the application to wind up KLS Inc. had been brought and furthermore that in dealing with the said Scheepers, he should have been more cautious and should have appreciated the consequences of receiving payment from him or his wife. Since I have already indicated that the said payment by Scheepers from the funds of an insolvent company which was unable to pay its debts and which was already being wound up amounted to a violation of the provisions of the said section 341(2), I find it difficult to exercise my discretion in favour of the respondent,

as that may have the effect of emasculating the purpose of the said section 341(2).

31. In the result I must, without much ado, find that the applicants have made out a good case. I have not found any valid reason why I should refuse the application. Therefore I find, on the facts placed before court and which the respondent has not disputed or has disputed on grounds which are not valid, that by making a payment of R117, 958.75 to the respondent, KLS Inc. made a disposition of its property when it was already being wound up and at a stage when it could not pay its debts. The said disposition was prejudicial to the rights of other creditors of KLS Inc. In my view, the said disposition should therefore be declared void. In the result, I make the following order:

1. The applicants are hereby granted leave, in terms of the provisions of sections 387(3) and 386(4) of the Companies Act NO. 61 of 1973 (as it then was), to bring this application on behalf of Kirsten Lottering Scheepers Inc;(in Liquidation).

2. It is hereby declared that payment of the amount of R117, 958.75 made to the respondent on 11 May 2009 after the commencement of the winding up in terms of the provisions of section 341(2) of the Companies Act NO. 61 of 1973 (as it then was) constituted a void disposition of the property of Kirsten Lottering Scheepers Inc; (in liquidation).

3. Judgment is hereby granted in favour of the applicants in their aforementioned capacity against the respondent for payment of the said sum R117, 958.75, with interest at 15.5% reckoned from 12 May 2009 to date of payment.

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

MABUSE J.

APPEARANCES

Applicants' Attorneys	Strydom & Bredenkamp Inc:
Applicants' Counsel	Adv. M A Bardenhorst SC.
Respondents' Attorneys	Rudman Attornerys
	Instructed by De Bruin & Partners;
Respondents' Counsel	: Adv. P Ellis SC.