IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 2412/2023

In the matter between:

BRESLER BOERDERY (PTY) LTD Applicant
(Registration number: 2021/994230/07)

and

REMITTO (PTY) LTD (under provisional liquidation) First Respondent
(Registration number: 2005/012357/07)

THE MASTER OF THE HIGH COURT: FREE STATE BLOEMFONTEIN Second Respondent

CORAM: OPPERMAN, J

HEARD ON: 19 May 2023

DELIVERED ON: 24 May 2023. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 24 May 2023. The date and time for hand-down is deemed to be 24 May 2023 at 16h00

JUDGMENT BY: OPPERMAN, J

SUMMARY: Urgent application – reimbursement of monies erroneously paid into bank account of a provisionally liquidated company – suspicious conduct of the director of the liquidated company to be investigated

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JUDGMENT

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[1] The real truth of this case is that an innocent bystander was unknowingly drawn into possible illegal conduct committed by the director of a company under provisional liquidation.

[2] The *lis* on the untoward conduct lies between the director of the company under provisional liquidation and the provisionally appointed liquidators.[1]

[3] It is prudent to introduce the parties involved at this stage of the judgment:

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1 At pages 52 to 54 of the Indexed Bundle, it was stated by the liquidator, Mr Smith that:

"9.6.1 Upon being informed by the applicant of the purported erroneous payment into the liquidated estate, I requested the applicant to provide the facts and circumstances relevant thereto in order to take instructions and obtain the necessary permission from the creditors of the liquidated estate;

9.6.2 Upon being provided with the applicant's version of events and documentation relevant thereto however, it would appear as if the sole director of the liquidated estate has been conducting the business, and servicing the customers of the liquidated estate through another juristic entity namely Remitto Grow Smarter (Pty) Ltd, which is of course impermissible.

9.6.2.1 Consequently, there is a reasonable apprehension that the business of the liquidated estate has been unlawfully hi-jacked with commensurate effect that an enquiry to determine the true owner of the funds is both necessary and unavoidable. The business to which I which to refer is *inter alia* that of the sale and distribution of herbicides, which was previously conducted by the liquidated estate and which now appears to be conducted by an entity known and described Remitto Grow Smarter (Pty) Ltd;

9.6.2.2 In the current circumstances, Maredi and I, as the duly appointed provisional liquidators of the liquidated estate, are statutorily obliged to investigate the true ownership of the funds paid to the liquidated estate by the applicant in order to protect the interests of the general body of creditors which interests are substantial; and

9.6.2.3 This has necessitated the simultaneous prosecution of an urgent application, in terms in which we shall apply for the extension of our powers and the authorisation of an urgent commission of enquiry. That application will, together with the service and filing of this affidavit, be issued and enrolled to be heard immediately prior to the hearing of this application. The commission of enquiry will furnish us with an extremely effective platform to ascertain the truth and for which exercise a period of approximately 3 months is required."

1. Remitto (Pty) Ltd (Remitto), the first respondent, is a company under provisional liquidation. The first respondent was apparently registered as such in 2005. On the 3rd of February 2023 the business rescue proceedings in respect of Remitto was converted into liquidation proceedings and the company was placed under provisional liquidation in the hands of the Master of the High Court: Free State.
2. The Master is the second respondent in this case. They did not oppose the application.
3. Parallel hereto did the sole director of Remitto, one Alexander, register a company Remitto Grow Smarter (Pty) Ltd, registration number 2015/139292/07 (Remitto Grow Smarter), that conduct the same business as Remitto with, apparently, the same clients.
4. On 23 February 2023 the Master went forth and appointed Mr ER Smith and Mr CT Maredi as provisional liquidators.
5. Standard Bank is the applicant in the liquidation under case no.: 3538/2022 and also the bank that manages the account of Remitto and wherein the erroneous payment was made.
6. Mr Bresler is the single shareholder and a director of the applicant company, Bresler Boerdery (Pty) Ltd, that has its registration number as 2021/994230/07.

[4] The calamity of the case has its origin on the farm Kroonland where Mr Bresler started to prepare for the 2023 planting season. He ordered herbicide from Remitto Grow Smarter.

[5] On 27 February 2023 he received a tax invoice from Remitto Grow Smarter to the amount of R1 300 000.00 under document D52120.

[6] The banking details on the invoice is for a First National Bank account wherein the payment was due.

[7] On 28 March 2023 his wife, that manages the payments for the applicant, made a payment of the amount due to Remitto Grow Smarter in the amount of R1 300 000.00 into the Standard Bank account of the first respondent, Remitto.

[8] It is common cause that the error was *bona fide*. The applicant did business with Remitto in the past and Mrs Bresler did not take cognisance of the details of the bank account of Remitto Grow Smarter.

[9] It is common cause that the applicant was not a debtor of the first respondent during February – March 2023 and did not owe any money to the first respondent, Remitto.

[10] In the meanwhile, Remitto Grow Smarter delivered the herbicide to the applicant on the farm Vierdehoek in the beginning of March 2023. The amount of R1 300 000.00 was paid for the product on 28 March 2023 into the account of Remitto.

[11] Mr Bresler received a call from Remitto Grow Smarter in April 2023 and he realised that the deposit of the monies was made into the wrong account. He was also later issued with a credit note from Remitto Grow Smarter and threatened with the repossession of the herbicide delivered to the farm Vierdehoek.

[12] Crucial is the fact that the planting season must commence within three weeks from the date of delivery of this application on 15 May 2023. Farmers nationwide are preparing fields for planting after having gathered the 2022-2023 harvest. The herbicide ordered by the applicant, and now in Mr Bresler's possession, is all but unobtainable currently due to the demand therefor. The price of the herbicide increased extensively and is almost 20% higher than what the applicant paid for it during March 2023. As result of the small profit margins in grain farming due to various factors such as inflation, fuel costs, equipment costs and other factors; the applicant's farming operations will be dealt a devastating blow if it was forced to plant its fields without the necessary herbicide being used to prepare the fields. It is the case of Mr Bresler, that the applicant's cashflow and business will not survive the devastating blow of losing the R1 300 000.00 and not being able to plant the next season's harvest.

[13] Central to the application is also the fact that Mr Bresler at all times presented to this court that he wants to comply with the law and at all times do what was honourable and legal; hence the application.

[14] After the information that the monies were erroneously paid into the Standard Bank account came to his notice, Mr Bresler immediately contacted his attorney and they contacted the provisional liquidator, Mr Smith on 17 April 2023. Mr Smith investigated the situation and informed that they will give feedback to the applicant "by end of business on 12 May 2023". This was on 8 May 2023.

[15] On 11 May 2023 the situation turned dire when Remitto Grow Smarter issued a credit note and threatened with repossession of the herbicide.

[16] The applicant launched an urgent application on 15 May 2023 for the monies to be returned to their account and for the provisional liquidators to authorise the payment.

[17] The provisional liquidators maintained the refusal to release of the R1 300 000.00 to the applicant on the grounds that they are duty bound to investigate the conduct of Alexander. They opposed the application on urgency and merits.

[18] The Master is apparently not legally authorised to intervene or authorise any payments of monies that lie in the hands of the liquidators.[2]

[19] Lateral hereto the liquidators applied, on an urgent and *ex parte* basis, for an extension of their authority to investigate the conduct of the first respondent and its director. The cases were set down for 19 May 2023.

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2 Section 361(1) of the Companies Act, 71 of 2008 reads: "In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office." This necessarily implies that upon the appointment of the provisional liquidator the latter has custody and control of the company's property (Delport and Vorster Henochsberg on the Companies Act 71 of 2008 (LexisNexis, Durban 2021) vol 1 at 764 and Blackman above n 10 at 14-251).

[20] Prayer 7 to the effect that the funds deposited with the liquidated estate in the amount of R1 300 000.00, to which Bresler Boerdery (Pty) Ltd has laid claim by way of the application launched under civil case cover number 2412/2023, to be kept in trust in an interest-bearing account up and until 24 August 2023, by which date the liquidators must inform Bresler Boerdery (Pty) Ltd whether or not they accept or reject the claim; was denied. The concession was made by advocate Tsangarakis that it would not be appropriate to grant prayer 7 due to the urgent application from Bresler Boerdery that had to be adjudicated first and foremost.

[21] The conundrum on the facts is that Bresler Boerdery will suffer a severe injustice should the urgent application for the release of the money from the Standard Bank account not be granted. An innocent bystander will definitely be punished for the suspected illegal conduct of the sole director of the first respondent. A dispute in which Mr Bresler has not an inkling of interest or fault.

[22] The facts have shown beyond any doubt that the application is urgent and that the applicant did all it could to expedite the events. The delay was with the provisional liquidators that took some time to reply to the request of the applicant. The prejudice to the applicant will be severe if the matter is not adjudicated immediately and this application is the only remedy.

[23] This brings me to the law that regulates the facts of the case.

1. The cases of *FirstRand Bank Limited v The Spar Group Limited* (1334/2019) [2021] ZASCA 20 (18 March 2021) (the Spar Group - case) and *Nissan South Africa (Pty) Ltd v Marnitz No and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) (the Nissan - case) dictates the law on the facts of this case.
2. In the Nissan - case the court was required to decide whether a bank can unilaterally reverse a credit without the consent of the recipient. In answering this question, the Supreme Court of Appeal held that payment in these scenarios is a bilateral act and requires the meeting of two minds. In the circumstances where

Nissan did not intend transferring R12.7 million into the recipient's account, there was no meeting of minds and consequently *no valid transfer of funds*. On the facts, the recipient's conduct in using the funds for its own purposes' amounts to appropriation and fraud.

3. Nissan South Africa (Pty) Ltd (Nissan) instructed its bank, FNB, to make certain payments to its creditors. One of the creditors that had to be paid an amount of R12 767 468.22, was TSW Manufacturing. However, due to a clerical error, the wrong banking details were furnished. This resulted in the payment being made into a third party's account namely, Maple.

4. At no point in time was any amount due to Maple by Nissan. Once Maple realised that the money was deposited to its account, it transferred R12 700 000.00 from its Standard Bank account to its FNB receipts account. Soon thereafter Maple transferred the money to its payments account. Here the funds were being utilising in conducting the day-to-day business of Maple.

5. Twenty days later TSW made enquiries about the payment. Nissan now became aware of the erroneous payment and demanded that the funds be returned. Maple indicated that they were prepared to comply with the demand subject to it retaining the interest earned thereon and a lavish "administration fee" of 4% of the amount concerned.

6. Nissan obtained a court order to freeze Maple's account. This, according to the sole member of Maple; Stanley, placed considerable financial strain on Maple. It caused the voluntarily liquidation of Maple.

7. Similar to the situation *in casu*, Stanley and Maple's liquidators contended that this amount formed part of Maple's insolvent estate and is therefore subject to the *concursus creditorum*.

8. Nissan therefore applied to court for an order declaring that the money and any interest that accrued thereon did not form part of the insolvent estate of Maple Freight CC (in liquidation) and directing the first and second respondents to pay the amount to the appellant, alternatively, FNB.

9. The Supreme Court of Appeal held that a bank which had unconditionally credited its customer's account with an amount received was not liable to pay the

amount to the customer on demand where the customer came by such money by way of fraud or theft. If stolen money were paid into a bank account to the credit of the thief, the thief had as little entitlement to the credit as he had to the money itself.

10. *It further held that payment was a bilateral juristic act which required there to be a meeting of two minds. There was no meeting of the minds in this scenario, therefore Maple had not become entitled to the funds erroneously credited to its account.*

11. Accordingly, the Supreme Court of Appeal upheld the appeal and held that the order of the Court *a quo* had to be replaced with an order declaring that the funds did not form part of the insolvent estate of Maple (in liquidation) and directing the release of the funds to Nissan.

12. The Supreme Court of Appeal in 2021 delivered judgment in the matter of *FirstRand Bank Limited v The Spar Group Limited* (1334/2019) [2021] ZASCA 20; [2021] 2 All SA 680 (SCA); 2021 (5) SA 511 (SCA) (18 March 2021). It was ruled that:

    i. A customer with no entitlement to monies deposited into its account and who knows that it enjoys no such entitlement, may not pay out monies against the credit to the account and if the customer does so, it amounts to theft;

    ii. a third party whose monies are deposited into the customer's account enjoys a claim against the customer's bank for the amount so credited if the bank is aware that the monies belong to the third party; and

    iii. a bank that knows that its customer enjoys no entitlement to funds deposited into the customer's account, but still allows the customer to pay out those funds, renders itself a joint wrongdoer. In these circumstances, the bank owes the third party whose funds were wrongly paid into the customer's account, a legal duty. Such third party can claim any loss suffered as a result of the bank permitting the withdrawal of the funds wrongly paid into the customer's account.

13. The question that now arises is when can a credit transfer be reversed from an account?

14. The general principle regarding the reversal of credit transfers is that a bank may not reverse a credit from a customer's account without that customer's authority.[3]

15. In *Nedbank Limited v Pestana* (142/08) [2008] ZASCA 140; 2009 (2) SA 189 (SCA) ;(2009) 71 SATC 97; [2009] 2 All SA 58 (SCA) (27 November 2008),[4] the Supreme Court of Appeal held that the bank intended to make an unconditional payment on behalf of its customer and intended to receive payment unconditionally on behalf of the recipient. In these circumstances, Nedbank was not entitled to reverse the transfer from the recipient's account despite receiving a section 99 order from the South African Revenue Services earlier on the day of payment. The Court however commented, albeit obiter, that payments may be validly reversed when a credit into an account is treated as provisional and is subjected to a hold in terms of standard banking practice, the recipient received the credit by way of fraud or theft, or where an account was erroneously credited.

16. In *Ixocure (Pty) Ltd v Firstrand Bank Ltd* (19619/2014) [2017] ZAWCHC 139 (30 November 2017) the Court took account of the fact that the bank's witness gave evidence to the effect that the credit entry into the recipient's account was provisional and the entry was not finalised before the hold was placed on the recipient's account because the transfer into its account was reported as

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[3] Schulze, WG: Professor in Banking Law, University of South Africa: Journals Collection, Juta's/Mercantile Law Journal (2000 to date)/SA Mercantile Law Journal/2020 : Volume 32/Part 1 : 1 - 174/Articles/The reversal of electronic payments under South African law: Possible guidance from recent developments in European Union law URL: http://jutastat.juta.co.za/nxt/gateway.dll/jelj/samerclj/3/55/56/59/61?f=templates$fn=default.htm as on 23 May 2023. *The reversal of electronic payments under South African law: Possible guidance from recent developments in European Union law* 2020 SA Merc LJ 22. *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA). For a discussion of Take and Save Trading CC, see Van Heerden, (Juta 2016) 378–379.

[4] The judgment of the full court (per Schwartzman J; Goldstein and Tshiqi JJ concurring) has been reported: see *Pestana v Nedbank* 2008 (3) SA 466 (W); [2008] 1 All SA 603 (W). The judgments of the two courts below have attracted academic discussion, both pro and contra. See: W G Schulze, *Electronic Fund Transfers and the Bank's Right to Reverse a Credit Transfer: One Small Step for Banking Law, One Huge Leap for Banks* (2007) 19 SA Merc LJ 379–387 (Schulze 2007); W G Schulze, *Electronic Fund Transfers and the Bank's Right to Reverse a Credit Transfer: One Small Step (Backwards) for Banking Law, One Huge Leap (Forward) for Potential Fraud: Pestana v Nedbank (Act One, Scene Two)* (2008) 20 SA Merc LJ 290–297 (Schulze 2008); J C Sonnekus, *Eensydige Terugskryf van Kliënt se Krediet deur Bank Onregmatig*, (2008) TSAR 348–354.

fraudulent. The court ultimately held that the bank was entitled to reverse the credit transfer.

17. The above indicates that where a credit emanates from a valid and correct instruction; the recipient's consent is required before the reversal of the transfer. Where the transfer is invalid or a *bona fide* error, it might be legal to argue that the reversal of that credit can be effected without the recipient's consent.

18. The circumstances of each matter will dictate whether the credit can be reversed and whether such reversal requires the recipient's consent.

[24] In the instance:

1. The monies that were transferred by *bona fide* error into the Standard Bank account was the property of Bresler Boerdery (Pty) Ltd before it landed into the account.
2. <u>*It is further clear that the payment had to be a bilateral juristic act which required "a meeting of two minds". There did not occur a meeting of the minds in this scenario. For this reason, Remitto as the provisionally liquidated estate, did not become entitled in any way to the funds erroneously credited to its account.*</u>
3. The liquidators may not lay claim to it; not even to finalise their investigations and in the interim. This is specifically pertinent in the light of the severe prejudice that the Bresler Boerdery will suffer.
4. The money may not be captured to ease the duties and investigations of the liquidators. They have the right and remedy to take action against Remitto Grow Smarter and to do so on an urgent basis at a suitable time in future. They may not use an innocent bystander to promote their cause. It is just not fair and equitable, no matter the noble intentions to protect the interest of the liquidated company's creditors. The right(s) of the one does not exceed the other. Bresler Boerdery may not be held accountable for the suspected and not yet proven illegal conduct of Alexander from Remitto Grow Smarter.
5. The money is the *de facto* property of Bresler Boerdery to be appropriated as they see fit. In the instance the bank has *de iure* control awaiting the authorization of the liquidators to deal with it in whatever way they direct; this to play it safe.

6. The above said; the caveat is that the judgments of the Supreme Court of Appeal indicate that where a credit emanates from a valid and correct instruction; the recipient's consent is required before the reversal of the transfer. Where the transfer is invalid or a *bona fide* error, it might be legal to argue that the reversal of that credit can be effected by the bank without the recipient's consent.
7. The first respondent as represented by the provisional liquidators will have no option but to authorise the reversal of the monies to the account of the applicant.
8. The liquidators were not cited in the litigation but Advocate Tsangarakis gracefully pointed out that the Supreme Court of Appeal has ruled that and order against the estate in liquidation is an order against the liquidators. This in accordance with *Gainsford N.O. and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford N.O. and Others v Tanzer Transport (Pty) Limited and Others* (076/2013) [2014] ZASCA 32; 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA) (28 March 2014).
9. Standard Bank was not cited and is not a party to the litigation. They are however the applicant in the liquidation of Remitto.
10. Advocate van Rensburg conceded to an interest rate of 10,5%.

[25] **ORDER**

1. The court is satisfied that the abridgement of times and the deviation from the Uniform Rules are justified by the circumstances of the case; and if the matter is not heard immediately, that the applicant will not be afforded substantial and effective redress at a hearing in due course. Condonation is thus granted to the applicant to have the matter enrolled in terms of Rule 6(12) of the Uniform Rules of this court.
2. The relief sought in the notice of motion is granted and as per the alternative prayer to prayer 2:
   - 2.1 It is ordered that the first respondent make payment to the applicant in the amount of R1 300 000.00 plus interest calculated on the said amount at 10,5% interest per annum *a tempore morae* and immediately on the service of this order on the first respondent.

2.2 The first respondent to pay the applicant's costs.

M OPPERMAN, J

APPEARANCES

On behalf of the applicant — **ADVOCATE GS JANSE VAN RENSBURG**

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