IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4220/2022
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

ELRICH RUWAYNE SMITH N.O 1ST Applicant

ZIYAD SONPRA N.O. 2ND Applicant
(in their respective capacities as liquidators of **Golden Ribbon Trading 86 (Pty) Ltd** (in liquidation), Master of the High Court, Bloemfontein, reference no. **B62[…]**)

and

FREDERICH WILHELM ALEXANDER MAGNUS N.O. 1ST Respondent

MARIA MAGDALENA MAGNUS N.O 2ND Respondent

JOHANNES JACOBUS JOUBERT N.O 3RD Respondent
(In their capacities as the duly appointed Trustees for the time being of the **MAGNUS BOERDERY TRUST, IT1[…]**)

THE MASTER OF THE FREE STATE HIGH COURT,

BLOEMFONTEIN 4TH Respondent

Case number**: 4221/2022**

In the matter between:

ELRICH RUWAYNE SMITH N.O. 1ST Applicant

ZIYAD SONPRA N.O. 2ND Applicant
(in their respective capacities as liquidators of **Golden Ribbon Trading 86 (Pty) Ltd** (in liquidation), Master of the High Court, Bloemfontein, reference no. **B62[…]**)

and

JACOBUS MATJAM JOOSTE 1ST Respondent

THE MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN 2ND Respondent

JUDGMENT BY: REINDERS J

HEARD ON: 4 MAY 2023

DELIVERED ON: 4 AUGUST 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

[1] An application for the liquidation of Golden Ribbon Trading 86 (Pty) Ltd [hereafter "Golden Ribbon"] was lodged by First National Bank ("FNB") on 17 July 2019 with the final order of liquidation granted in this court on 20 February 2020. At

the time when the liquidation application for Golden Ribbon was issued, it was under business rescue. The court, on 10 October 2019, granted the provisional order and at the same time made an order terminating the business rescue proceedings. The duly appointed liquidators of Golden Ribbon (the applicants) lodged applications, amongst others, under case numbers 4220/2022 and 4221/2022 which served before me for adjudication. In both applications the relief sought are that certain payments made by Golden Ribbon to the respective respondents herein, be confirmed to be void and be set aside. The applicants claim payment of the said amounts, interest thereon and costs.

[2] The first, second and third respondents under case number 4220/2022 are respectively Mr Magnus, Mrs Magnus and Mr Joubert (in their capacities as trustees of the Magnus Boerdery Trust, IT 154[…] – "the Trust) [hereafter the "Magnus" application]. Mr Jooste is the first respondent under case number 4221/2021 [hereafter "the "Jooste" application]. The mentioned respondents opposed the relief on the same grounds. In both applications the Master of the Free State High Court is cited as a respondent but no relief is claimed against it.

[3] The parties in both the Magnus and Jooste applications are represented by the same attorneys of record. The respondents opposed the mentioned applications and filed conditional counter-applications, praying for ratification and confirmation of the payments. In the Magnus application two separate payments totalling R 512,023.00 were made to the trust on 26 July 2019 (R 490,360.00) and 4 September 2019 (R 21,632.82) respectively. These payments were made in terms of a harvest/lease agreement for the Trust's farm. In the Jooste application an amount of R 698,469.51 was made in favour of Mr Jooste on 26 July 2019 in respect of a written lease agreement of his farm.

[4] It is common cause that Golden Ribbon was a financially distressed company and as such was placed in business rescue on 10 August 2018. The duly appointed business rescue practitioner (the "BRP") proceeded at the time with the then existing lease agreements with the relevant respondents herein in respect of their farms. Whilst still in business rescue an application for the liquidation of Golden Ribbon was

issued on 17 July 2019. Ultimately this court granted provisional and final orders of liquidation respectively on 10 October 2019 and 20 February 2020. After the date of the petition, 17 July 2019, and before the date of provisional liquidation, the payments now claimed by the applicants were made by the BRP on the dates as mentioned herein above.

[5] It is against this background that the applicants move for orders in terms of the provisions of s 341(2) read with s 348 of the Companies Act 61 of 1973 (the "Act") that the respective amounts of R 512,023,00 and R 698,469.51 be paid to the insolvent estate.

[6] S 341(2) of the Act provides "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 winding-up shall be void unless the Court otherwise orders." The provisions of s 348 of the Act ordains that the liquidation of any company is deemed to have commenced at the time of the presentation of the application for the winding-up to court. The respondents are of the view that the provisions of s 341(2) are not applicable as the company at the time was in business rescue and that the payments are to be considered to be post-commencement finance in terms of s 135(4) of the Companies Act 71 of 2008 (the "Companies Act 2008"). It is submitted that in terms of s 132 of the Companies Act 2008, the business rescue proceedings only terminated when the court granted such order on 10 October 2019. It is submitted that the provisions of s 341(2) were therefore not applicable on 26 July 2019 and 4 September 2019. It is for that reason that the provisional counter-claim was filed based on s 341(2).

[7] Recently in ***Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Diary (Pty)Ltd (in liquidation) and Others***[1] the Supreme Court of Appeal cited with approval the dicta in ***Pride Milling Company (Pty) Ltd v Bekker NO and Another***[2] where it was held as follows:

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[1] 2023 (1) SA 398 (SCA) At para [30]
[2] 2022 (2) SA 410 (SCA)

"[30] The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law i.e. the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.

[31] As to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. As already discussed, this discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding-up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition."

See also: ***Eravin Construction CC v Bekker NO and Others***[3]

[8] The purpose of 341(2) is to ensure that a company threatened with winding-up's property is not dissipated improperly prior to the commencement of the winding-up.

See: ***Lane v Olivier Transport***[4]

[9] Following the above authorities by the Supreme Court of Appeal have no doubt that the herein dispositions resort under the provisions of s 341 and shall be void unless the court otherwise orders.

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[3] 2016 (6) SA 589 (SCA)
[4] 1979 (1) SA 383 (C) at 385

[10] It needs mention that respondents *in limine* objected to the business rescue practitioner not being cited herein. The objection does not find favour with me. In my view the business rescue practitioner has no direct and substantial interest in the orders sought by the applicant and for that matter has no interest herein. In as far as I have not expressly done so, all the points *in limine* are dismissed.

[11] In my view s 341(2) as held in the ***Pride Milling*** judgment *supra* makes it clear that a court's discretion to validate void dispositions under s 341(2) is only exercisable in relation to payments made between the date of lodging of the application to wind-up and the granting of the provisional order.[5] The herein claimed payments constitutes such payments. Guidelines for the exercise of its discretion in terms of s 341 were summarised in ***Lane*** *supra* at 385, and I have duly taken note thereof.

[12] In *casu,* the respondents ("landlords") at the time when payment was made, had a preferent and secure claim. At the time it was acknowledged by everyone concerned, including FNB as well as the BRP. It was the BRP, at the time statutorily acting on behalf of the present applicants, who made the payments. I can come to no other conclusion than that the payments at the time was *bona fide*. A letter at the time from respondents' attorneys indicated that they acted on behalf of clients (which included the relevant farmers herein) who have rented land to Golden Ribbon on which crops were planted and that the farmers held a lien over the crops and that they exercised such a lien. The letter stated the claims of the farmers to be in the amount of R 1,409,827.24 and estimated crop income in respect of the farms with an income of R 7,515,576.00. In the opposing affidavit the relevant respondents averred that the payments were made by the BRP in respect of legal and valid agreements with the BRP in the amount in respect of their secured claims. It would appear to me that these payments were therefore made to the advantage of the creditors as a whole to obtain the proceeds of the crop. These allegations were not seriously placed in dispute by the applicants in reply. In my view the above facts convince me that the present facts constitute facts where the disposition is one that should not be

[5] At paras 24 and 31 thereof.

void in terms of s 341(2). It would in my view be improper to make payment by a business rescue practitioner and have a debtor give up his security and afterwards, when liquidation takes place, have him/her to pay such amount back.

[13] I am indebted to counsel for their comprehensive and informative heads argument and their contributions in court on hearing the matter.

[14] I therefore conclude that the main applications should be dismissed and orders granted in terms of the counter-applications. In my view the applicants should bear the costs.

[15] Wherefore I make the following orders:

15.1 **The application under case no 4220/2022:**

1. The main application is dismissed.

2. It is declared that the payments on 26 July 2019 in the amount of R 490,360.00 and on 4 September 2019 in the amount of R 21,632.82 from applicants to the first, second and third respondents are ratified, confirmed and declared to be valid.

3. The applicants to pay the costs.

15.2 **The application under case no 4221/2022:**

1. The main application is dismissed.

2. It is declared that the payment on 26 July 2019 in the amount of R 698,469.51 from applicants to the first respondent is ratified, confirmed and declared to be valid.

3. The applicants to pay the costs.

C REINDERS, J

On behalf of the applicant:	Adv R. van der Merwe Instructed by: Badenhorst Attorneys BLOEMFONTEIN
On behalf of the respondents:	Adv A. J. R. van Rhyn SC Instructed by: Jac N Coetzer Attorneys c/o Lovius Block Attorneys BLOEMFONTEIN