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

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

Case no **4222/2022**

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
number: B62/2019)

and

JACOBUS FRANCOIS MALAN N.O. 1st Respondent
(In his capacity as executor of the estate late
Jacobus Francois Malan)

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

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CORAM: JP DAFFUE J

HEARD ON: 27 JULY 2023

DELIVERED ON: 26 OCTOBER 2023

ORDER

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1. The applicants' application, being the main application, is dismissed.
2. It is declared, in accordance with the provisions of section 341(2) of the Companies Act 61 of 1973, that the payment of R220 998.23 made by the business rescue practitioner on 26 July 2019 from the bank account of Golden

Ribbon Trading 86 (Pty) Ltd to Jac N Coetzer Inc for the benefit of Jacobus Francois Malan was validly made.

3. The applicants are ordered to pay the first respondent's costs of the opposed motion proceedings.

JUDGMENT

Introduction

[1] Two main issues require adjudication in this opposed application. First, whether payment made to a creditor by a business rescue practitioner of a company in business rescue after a liquidation application of that company had been lodged with the registrar of the court, shall be held to be void as provided for in s 341(2) of the Companies Act 61 of 1973 (the 1973 Companies Act). Second, and insofar as s 341(2) is applicable, whether the court should in exercising its discretion order otherwise. The creditor passed away in the meantime. The liquidators of the company in liquidation instituted application procedure against the executor of the deceased estate, seeking payment of the amount received by the creditor. After several legal skirmishes between the parties, this court eventually heard submissions on the merits of the disputes between them. The executor raised several defences and also claimed, in what may be referred to as a counter-application, that the aforesaid payment shall be validated in accordance with s 341(2).

The parties

[2] Messrs ER Smith and Z Sonpra, the liquidators of Golden Ribbon Trading 86 (Pty) Ltd (in liquidation) (Golden Ribbon), are the applicants in this application. Adv R van der Merwe appeared for the liquidators on instructions of Badenhorst Attorneys.

[3] Mr Jacobus Francois Malan in his capacity as executor of the estate of his father, the late Jacobus Francois Malan (the deceased), is cited as the first respondent and the Master of the High Court as the second respondent. The executor was represented by Adv AJR van Rhyn SC, instructed by Jac N Coetzer Attorneys. No

relief was sought against the Master who did not participate in the proceedings, save to belatedly file a report on 26 April 2023.[1]

[4] In order to avoid confusion, I shall herein after refer to the applicants as the liquidators and to the first respondent as the executor.

Sections 348 and 341(2) of the 1973 Companies Act

[5] It is appropriate to set out the following pieces of legislation for a better understanding of what is to follow. The 1973 Companies Act was repealed by the 2008 Companies Act, but chapter XIV of the previous Act continues to apply to the winding-up and liquidation of insolvent companies.[2] Sections 341 and 348 of the 1973 Companies Act fall within chapter XIV and are therefore applicable *in casu*. Section 348 contains a deeming provision pertaining to commencement of winding-up by a court and reads as follows:

'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.'

The reference to 'presentation to the Court' is to the lodging of the application with the registrar of the court. The date of commencement of the winding-up of a company is of considerable importance and affects many matters and particularly also the provisions of s 341.[3]

Section 341(2) reads 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 winding-up, shall be void unless the Court otherwise orders.'

The relief sought and the defences raised

[6] The liquidators sought the following relief in the notice of motion:

'1. The payments in the total amount of **R220 998.23** made by GOLDEN RIBBON TRADING 86 [IN LIQUIDATION] to the First Respondent in his capacity as the duly appointed Executor of Estate Late Jacobus Francois Malan, during the period 26 July 2019 to 4

[1] Record: pp 317 – 319.
[2] Item 9 of Schedule 5 of the 2008 Companies Act.
[3] Henochsberg on the Companies Act 71 of 2008 vol 2 APPI-94(16) & (17).

September 2019 are confirmed to be void in terms of section 341 (2) of the Companies Act, 61 of 1973 and are set-aside;

2. The First Respondent in his capacity as the duly appointed Executor of Estate Late Jacobus Francois Malan be ordered forthwith to make payment of the amount of **R220 998.23** to the Applicants.

3. That the First Respondent in his capacity as the duly appointed Executor of Estate Late Jacobus Francois Malan, be ordered forthwith to make payment of interest on the amount of **R220 998.23** at the prescribed rate of interest as from **26 July 2019** until date of payment, both days inclusive.

4. That the First Respondent in his capacity as the duly appointed Executor of Estate Late Jacobus Francois Malan be ordered to pay the cost of this Application.'

The liquidators should have been aware that only one payment was made – not more than one as paragraph 1 reads - and that the business rescue practitioner made the payment by transferring the amount, together with other amounts payable to other creditors of Golden Ribbon, they being clients of Jac N Coetzer Inc, electronically into the firm's trust account on 26 July 2019.

[7] The executor opposed the application on several grounds. He did not file a formal counter-application, but it is apparent from the application papers that he sought an order validating the aforesaid payment in accordance with the provisions of s 341(2). It will be shown that the parties accepted that a counter-application had in fact been launched. More about this later.

[8] The executor relied on the following four points *in limine* in opposing the liquidators' application:

a. the deceased's estate had been finalised and distributed to the heirs and legatees in circumstances where the applicants had failed to prove a claim against the deceased's estate; therefore, the claim should have been instituted against the beneficiaries of the estate in terms of the *condictio indebiti*;

b. the business rescue proceedings came to an end on 10 October 2019 when the company was provisionally wound-up as provided for in s 132(2)(a)(i) of the 2008 Companies Act, and in the same breath, the claim had become prescribed as the application was served more than three years since payment to the deceased on 26 July 2019;

c. non-joinder of the business rescue practitioner; and

d. disputes of fact, rendering motion procedure inappropriate.

History of the litigation

[9] On 10 August 2018 a notice of commencement of business rescue proceedings was filed with the CIPC on behalf of Golden Ribbon whereupon Mr JF van Tonder was appointed as business rescue practitioner on 21 August 2018. On 13 November 2018 Mr Van Tonder's business rescue plan was adopted by creditors.

[10] An application for the liquidation of Golden Ribbon was issued on 17 July 2019. A provisional liquidation order was granted on 10 October 2019 and a final order on 20 February 2020.

[11] On 26 July 2019, ie after the application was issued, the business rescue practitioner paid an amount of R220 998.23 from Golden Ribbon's bank account held with Absa Bank into the account of Jac N Coetzer Inc, the firm acting for the deceased at the time.

[12] The liquidators' application was issued on 2 September 2022. The executor filed a notice to oppose the application on 23 September 2022. No notice of a counter-application was given at any stage, save for what is stated hereunder. On 25 October 2022 the executor filed his answering affidavit, relying on the four points *in limine* referred to above. He attached a confirmatory affidavit by the attorney, Mr JN Coetzer, who provided some background as to why the aforesaid payment had been made. This version will be dealt with later herein, but it is apposite to quote what Mr Coetzer stated in paragraph 3.9: [4]

'It is hereby requested that the Honourable Court exercise its discretion to sanction such payments, if necessary'.

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[4] Record: Annexure JNC1 at pp 65 – 68 and p 68 in particular.

Mr Coetzer emphasised in paragraph 3.10 that the payment was done 'in the ordinary cause of business out of necessity and did not prefer one creditor above another as an undue preference.'

[13] The liquidators responded to the executor's answering affidavit under the heading: 'APPLICANTS' REPLYING AND ANSWERING AFFIDAVIT IN RESPECT OF FIRST RESPONDENT'S COUNTER-APPLICATION'.[5] Contrary to the liquidators' founding affidavit, consisting of nine pages only, this affidavit consists of 25 pages. Also, nine annexures were attached thereto, including a business rescue plan, as well as an amended plan. These documents were filed on 15 December 2022.

[14] The application was set down for hearing on 2 March 2023 on which date Reinders J made the following order:

'1. The application with case number 4222/2022 launched by the first and second applicant against the first and second respondent is postponed to **13 APRIL 2023**;

2. The first respondent shall file his replying affidavit in respect of his <u>counterapplication</u> on or before 24 March 2023;

3. The heads of argument shall be filed in terms of the Practice Directives of this Court;

4. The first respondent shall pay the wasted costs occasioned by the postponement.' (my emphasis)

Although not clearly indicated in the order, I have been informed during argument that this order was made by agreement between the parties. Therefore, there can be no doubt that the liquidators accepted that a counter-application had been launched by the executor. Herein later I shall say more about this purported counter-application. On 31 March 2023 the executor filed a document under the following heading: 'REPLYING AFFIDAVIT AND COUNTER-APPLICATION'.[6] On the basis that the parties were *ad idem* that a counter-application existed, this document could only be the executor's replying affidavit in the counter-application proceedings.

[15] The matter was heard on 13 April 2023 by Ramdeyal AJ. Mr Van Rhyn sought a separation of issues in accordance with the provisions of rule 33(4) of the Uniform Rules of Court, submitting that only the points *in limine* should be argued. This

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[5] Record: pp 79 & 83.

[6] Record: pp 199 & 201.

application was, correctly so, dismissed on 28 April 2023. It is not necessary to deal with this issue any further.

[16] On 26 April 2023 the Master of the High Court filed a report[7] which I shall discuss later herein. On 25 May 2023 Mahlangu AJ postponed the application to 27 July 2023 and ordered the executor to file an affidavit in response to the Master's report on/or before 8 June 2023. The executor complied.[8] The matter was eventually allocated to me for adjudication on 27 July 2023.

Undisputed facts

[17] Over and above the litigation history set out under the previous heading, it is apposite to mention a number of undisputed facts. The liquidators did not mention a word in their founding affidavit of the business rescue proceedings and the fact that the relevant payment was made by the business rescue practitioner. As an afterthought they attached correspondence exchanged during April and May 2019 between the attorneys acting for the business rescue practitioner and certain farmers (including the deceased prior to his death). This was prior to the presentation of the liquidation application.[9]

[18] The deceased and business rescue practitioner entered into a written agreement of lease in terms whereof the deceased leased his farm Weltevreden to Golden Ribbon in business rescue for the period 1 September 2018 to 31 August 2019 at an annual rental of R222 000.00 plus VAT. Mr WHJ Viljoen, a shareholder and co-director of Golden Ribbon with his son with the same initials, signed a suretyship in his personal capacity for the payment of the rental. The liquidators did not deny the existence of the lease agreement, but merely stated that the executor had not 'raised a bona fide real dispute of fact' in relying on the agreement.[10]

[7] Record: pp 317 – 319.
[8] Record: pp 321 & 322.
[9] Annexures FA6 – FA8, record pp 31 – 42.
[10] Record: p 100, replying affidavit para 24.

[19] A business rescue plan as well as an amendment thereto was accepted by Golden Ribbon's creditors. In both plans the renting of several farms, including the deceased's farm, Weltevreden, in order to plant crop on the arable land was communicated to creditors.[11] On 21 February 2019 the business rescue practitioner circulated a status report, confirming that the conditions of the adopted report had not been met. Liquidation was on the cards, but the business rescue practitioner failed to commence with appropriate steps.[12] During this period the crops on the deceased's farm were ripening, ready to be harvested soon.

[20] In their letter of 30 April 2019 the business rescue practitioner's attorneys recorded the following in paragraph 11:

'In respect of the lease agreement entered with Malan subsequent to the commencement of the business rescue proceedings the rental is treated as post commencement finance ("PCF") alternatively as costs that are necessarily incurred in the running of the business and our client undertakes to effect payment of the rental with the first proceeds received from the harvest which is planned for the latter part of May 2019. Our client is further prepared to enter into an agreement confirming the aforesaid.'

In paragraph 13 the business rescue practitioner made it clear that he was prepared to treat the rental as PCF, affording the deceased a preferential claim.

[21] Mr Badenhorst, the liquidators' attorney, acted for Golden Ribbons and its director, Mr WHJ Viljoen (herein after referred to as the late Mr Viljoen as he also passed on since then) at all relevant times during the business rescue proceedings. The executor's version that the late Mr Viljoen, Mr Badenhorst and the major creditor, First National Bank, were fully aware of and consented to the farming operations embarked upon on Weltevreden must be accepted as common cause.[13]

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[11] Record: pp 116 – 163, particularly para 3.2.5 of annexure RA2 on p 121 and para 3.2.5 of annexure RA3 on p 150.

[12] Record: paras 5. 9 – 5.14, pp 88 – 90.

[13] Record: p 222; para 11.6 of the replying affidavit in the counter-application, read with annexure ABC21 on p290, being a letter of Mr Badenhorst to the business rescue practitioner dated 3 April 2019.

[22] The proceeds of the crops, being the security of the deceased landlord, exceeded the claim for rental by far.[14] In respect of the deceased's farm, Weltevreden, the proceeds were predicted to be about R1.2m, compared to rental due of R222 000.00.

[23] *Ex facie* the amended first and final liquidation and distribution account in the estate of Golden Ribbon in liquidation[15] Mr Badenhorst played a significant role in *inter alia* selling assets on behalf of the liquidators. He is also the attorney for the Viljoens who proved claims against the liquidated company's estate. The Viljoens, *ie* the estate of the late Mr Viljoen and/or his heirs, will benefit if the liquidators' claim against the executor is successful.

[24] As long ago as 14 September 2021 the executor obtained approval to advertise the deceased's first and final liquidation and distribution account which has lain for inspection without objection. Creditors have been paid and distribution to the heirs have taken place as well as transfers of the immovable properties to legatees.[16] The administration of the deceased estate has been wound up in terms of s 35(12) of the Administration of Estates Act 66 of 1965.[17]

Procedural aspects pertaining to the counter-application

[25] The rules are made for the court and not the other way around. Notwithstanding this, it is necessary to consider the procedural aspects. Rule 6(7) reads as follows:
'(7) (a) Any party to any application proceedings may bring a counterapplication or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event rule 10 shall apply mutatis mutandis.
(b) The periods prescribed with regard to applications shall apply mutatis mutandis to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.'

[14] Record: pp 221, para 11.5, read with the status report of the business rescue practitioner dated 29 April 2019 attached by the liquidators as exhibit RA5, pp 167/8.
[15] Record: pp 300 – 313.
[16] Record: pp 203 – 211; pp 235 – 257.
[17] See Master's report on pp 317 – 319, read with the executor's affidavit in response at pp 325 – 340.

[26] It is trite that counter-applications are subject to the general principles applicable to applications, although a counter-application does not have to be served in accordance with the provisions of rule 4. The notice of counter-application does not have to be in the form of a notice of motion, but the respondent must set out the relief claimed in the counter-application. Usually, the evidence pleaded in the answering affidavit also serves to support the relief claimed in the counter-application.

[27] Notwithstanding the executor's non-compliance with all formalities required by rule 6(7), the liquidators accepted that the executor had filed a counter-application. Therefore, it would be wrong to be too technical and find against the respondent for non-compliance with rule 6(7). Both counsel dealt extensively in their written heads of argument and oral submissions with the executor's purported counter-application. There can be no prejudice if it is adjudicated on the basis presented to the court. Fairness and the interests of justice dictate that this counter-application be considered and adjudicated upon.

Legal principles pertaining to s 341(2)

[28] I quoted s 341(2) above. I deal with my evaluation of the evidence and legal principles under the next heading. It is pointed out at this stage already that, in principle, the liquidators' entitlement to payment in terms of this subsection cannot be seriously doubted. It is now appropriate to deal with relevant authority. In *Eravin Construction CC v Bekker N.O and Others*[18] the Supreme Court of Appeal held as follows:

'The question to be answered in this case is thus when the debt was owed. That must be answered in the first instance with reference to s 341(2) of the old Act. It states expressly that a disposition in the terms contemplated by it 'shall be void'. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.'

In *Pride Milling Company (Pty) Ltd v Bekker N.O. and Another*[19] *(Pride Milling)* the court articulated the legal position in the following words:

[18] (20736/2014) [2016] ZASCA 30; 2016 (6) SA 589 (SCA) (23 March 2016) at para 21.

[19] (393/2020) [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) (30 September 2021) para 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, ie 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.' (my emphasis)

[29] In *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* (*Mazars*)[20] the Supreme Court of Appeal considered s 341(2) again. Ponnan JA, writing for the majority, opined as follows:

'[28] Section 341(2) dictates that every disposition made after the commencement of the winding-up is void, unless the court orders otherwise. Thus, unless a creditor avails him- or herself of the remedy provided in the proviso in s 341(2) (which the appellants chose not to do in this case), payments made after the commencement of the winding-up are void. However, a BRP is not remediless: First, and most obviously, a BRP may approach a court in terms of the proviso to s 341(2) to validate a payment. A court hearing such an application has a wide discretion. Second, and naturally, the BRP enjoys a preference in the ranking of creditors in the winding-up. That preference was considered in *Diener* - a BRP ranks after the costs of the liquidation, but before all other creditors. A BRP thus enjoys a substantial preference.

[29] These remedies cater entirely for any undue hardship (if such exists) that the appellants rely upon. The exercise of the court's discretion under the proviso in s 341(2) serves to balance all relevant interests. Thus, in a situation where a BRP may have raised excessive fees, a court can either refuse to validate the payments or may validate them in part. .....'

[30] It is evident from the *dicta* quoted in the previous paragraphs that creditors may avail themselves to the remedy provided in the proviso in s 341(2) in order to validate payments. It is reiterated that the available remedy caters entirely for any undue hardship if such exists, whilst the exercise of a court's discretion under the proviso serves to balance all relevant interests. The warning sounded in *Gainsford N.O and Others v Tanzer Transport (Pty) Ltd, In re; Gainsford N.O and Others v Tanzer Transport (Pty) Limited*[21] must be adhered to. The Supreme Court of Appeal dealt

[20] (526/2021) [2022] ZASCA 135; 2023 (1) SA 398 (SCA) (13 October 2022) at paras 28 & 29, but see also paras 30 & 31.

[21] (076/2013) [2014] ZASCA 32; 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA) (28 March 2014) at para 27.

with an argument that a disposition made in good faith in the ordinary course of business should be declared valid in the following terms:

'... The court will only order otherwise in terms of this section in limited circumstances. To have the defence proferred by Tanzer upheld in general terms would have the effect of avoiding the objects of the Act in that it would undoubtedly prefer one creditor above another.'

[31] Bearing in mind that the court has a wide discretion as confirmed by Ponnan JA in *Mazars*, being the latest authority in place, it will be apposite to consider the guidelines provided in *Lane N.O v Olivier Transport* referred to with approval by the Supreme Court of Appeal in *Pride Milling:*[22]

'(a) ...

(b) Each case must be dealt with on its own facts and particular circumstances.

(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.

(d) The Court must be free to act according to what it considers would be just and fair in each case.

(e) The Court, in assessing the matter, must attempt to strike some balance between what is fair *vis-à-vis* the applicant as well as what is fair vis-à-vis the creditors of the company in liquidation.

(f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation.

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets.

(h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive.

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties.

(j) Little weight should be attached to the hardship which will be suffered by the applicant (here the first respondent) if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally.

[22] 1997 (1) SA 383 (C) at pp 386 – 7, approved in *Pride Milling supra* at para 24.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions.

(l) …'

Evaluation of the evidence and submissions by the parties

[32] I indicated to the parties at the onset during oral argument that I did not intend to adjudicate the executor's points *in limine* separately, but together with my evaluation of the evidence. The liquidators did not file a claim against the deceased estate in terms of the Administration of Estates Act 66 of 1965. However, the legislature did not intend to deprive creditors of their common law right to sue deceased estates. Consequently, the liquidators were not precluded from instituting these proceedings for the recovery of the debt allegedly owed by the deceased. This principle was authoritatively restated by the Supreme Court of Appeal in *Nedbank v Steyn*.[23]

[33] Mr Van Rhyn submitted that the first point *in limine* pertaining to s 35(12) of the Administration of Estates Act presented an impossible hurdle for the liquidators to overcome. He referred to numerous authorities in this regard. Mr Van der Merwe submitted that the executor could not hide behind s 35(12) in order to escape liability. Relying on Meyerowitz,[24] he submitted that a creditor who lodges a claim after the executor has distributed the assets of the estate is not without a remedy, but still entitled to participate in the distribution of any further assets which have not been distributed yet, or which may later be discovered. This may be so – as confirmed long ago in *Estate Stanford v Kruger*[25] - but in this instance there is no suggestion that any further assets may be discovered for distribution to heirs or liquidated for the benefit of creditors.

[34] The undisputed facts show that, long before the filing of the present application, the first and final liquidation and distribution account in the deceased estate was accepted by the Master of the High Court. Consequently, creditors were paid and distributions were done to the heirs, including transfers of immovable properties to the

[23] (20085/2014) [2015] ZASCA 30; [2015] 2 All SA 671 (SCA); 2016 (2) SA 416 (SCA) (25 March 2015) paras 6 & 11.
[24] Cilliers, Meyerowitz on Administration of Estates and Their Taxation, 2023 ed para 16.4.
[25] 1942 TPD 243.

legatees in terms of the provisions of s 35(12). The liquidators' version that the Master had not discharged the executor from his duties[26] as such is irrelevant. As a result, Mr Van Rhyn submitted that the liquidators had no claim against the executor, but might claim any amount allegedly due from the beneficiaries of the deceased estate in terms of the *condictio indebiti*. Such a course is available to them as confirmed by the authorities and accepted by *Meyerowitz*.

[35] In *Visser v Schmidt NO*[27] a special plea of *plene administravit*[28] was upheld by the trial court. The full bench dismissed the special plea on appeal, but ordered that 'any judgment obtained against defendant upon the resumption of the trial may be executed only against such further asset or assets belonging to the estate represented by the defendant which has or have not prior to date of judgment been duly distributed by the executor in terms of a liquidation and distribution account approved by the Master.' This judgment does not support the liquidators insofar as there is no suggestion that further deceased estate assets will be found for distribution to heirs or to be liquidated for the benefit of creditors. I am prepared to accept the cogency and validity of Mr Van Rhyn's submission that s 35(12) of the Administration of Estates Act presented an impossible hurdle for the liquidators to overcome. Even if I am wrong in this regard, I remain vested with a discretion as is evident from the authorities quoted above.

[36] The second point *in limine* dealt with the payment by the business rescue practitioner on 26 July 2019 in respect of rent due. Mr Van Rhyn submitted, relying on s 132(2)(a)(ii) of the 2008 Companies Act, that the business rescue proceedings were still *in esse* at the time of payment. These proceedings, so he submitted, had been terminated on 10 October 2019 only, *ie* on the day when the provisional liquidation order was granted. I do not agree with Mr Van Rhyn's submission. The legislature specifically provided for the continued application of liquidation proceedings in chapter

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[26] Record: p 104, replying affidavit para 38, read with annexure RA9, together with para 5 of the Master's report, p 318. The executor dealt with the issue in detail in his replying affidavit to the counter-application in support of what he already testified to earlier in the answering affidavit at para 17, p 59; see further para 6 pp 203 – 211, confirmed by Mr Coetzer, the attorney that handled the estate, at pp 258 – 260, as well as the affidavits of the executor and Mr Coetzer in response to the Master's report at pp 325 – 339.

[27] 2001 JDR 0091 (T) at p 28.

[28] Such a plea may be raised to prevent a creditor from participating in or laying claim to assets of a deceased estate that have been duly distributed to heirs or legatees.

IV of the 1973 Companies Act pertaining to insolvent companies. When the 2008 Companies Act was promulgated, the legislature would have been fully aware of the provisions of *inter alia* ss 341(2) and 348 of the 1973 Companies Act and the effect thereof. These remained unaltered. The Supreme Court of Appeal confirmed the principle in *Mazars*.[29]

[37] Mr Van Rhyn also relied on s 135 of the 2008 Companies Act, submitting that the rent owed to the deceased should be regarded as Post Commencement Finance (PCF). Consequently, the business rescue practitioner was fully within his rights to settle the claim for rent as he did. This payment, as submitted, was made before the business rescue proceedings were terminated on 10 October 2019 and the provisions of ss 341(2) and 348 did not apply. I already dismissed the latter portion of the argument above. The liquidators vehemently disputed the alleged entitlement to rely on s 135. They submitted that the business rescue practitioner continued to incur costs to the detriment of the body of creditors and in conflict with an adopted business plan. According to them the business rescue practitioner continued farming on the deceased's farm whilst the plan did not provide for that. In any event, so they submitted, the payment to the deceased was made in conflict with the ranking of creditors who provided PCF as contemplated in s 135.

[38] I do not deem it necessary to deal in any detail with the submissions pertaining to non-compliance with the amended business rescue plan or PCF in light of the evaluation preferred hereunder, save to make one comment. Both the original and amended business plans dealt with the renting of Weltevreden in order to plant crop on the arable land and the business rescue practitioner informed all creditors in his status reports – particularly the one of 29 April 2019 – of the crops on the various properties, including the farm Weltevreden, and the good harvest forecast for Golden Ribbon. All interested parties, including First National Bank, the major creditor, the attorney, Mr Badenhorst and his client at the time, the late Mr Viljoen, were aware of the crops on Weltevreden.

[29] Ponnan JA's *dicta* in *Mazars* are quoted in para 29 above.

[39] It is evident that the business rescue practitioner was aware of First National Bank's intention to proceed with liquidation proceedings against Golden Ribbon. He should have been aware also of the fact that the liquidation application was filed with the registrar prior to making payment to the deceased. I repeat that the authorities are clear: the payment was a disposition falling within the purview of s 341(2). Having said this, the only issue to be determined is whether the payment should be validated.

[40] Before I finally consider validation of payment, I deem it appropriate to briefly deal with the further points raised by Mr Van Rhyn. He also submitted that the applicants' cause of action had become prescribed insofar as the present application had been served on the executor long after the expiry of the three-year prescription period, which according to him, expired on 25 July 2022. Although the commencement of winding-up of Golden Ribbon is deemed to have taken place on 17 July 2019 in accordance with s 348 of the 1973 Companies Act, the deeming provision only applies in the event of the company eventually being placed in final liquidation. This occurred on 20 February 2020 only. Section 13 of the Prescription Act 68 of 1969 pertaining to the interruption of prescription must also be considered. The application was served on 13 September 2022. Although Mr Van Rhyn made submissions about prescription in his heads of argument, he did not advance this during oral argument. Insofar as this aspect has not been argued, I do not deem it necessary to adjudicate thereon, especially bearing in mind the exercise of my discretion that will become clear soon.

[41] The third point *in limine*, dealing with the failure to cite the business rescue practitioner as a party in these proceedings, is a red herring and needs no further consideration. No relief is sought against him and he has no interest in the outcome of the application. The fourth point *in limine* pertaining to the alleged disputes of fact does not have to be considered as a point *in limine*.

[42] It is apparent that not much is in dispute. I set out the history of the litigation and the undisputed facts above. It is now my task to exercise a discretion based on the facts presented to me and after considering the parties' submissions, the legislation and authorities quoted. In doing so I accept that the court has a wide discretion as confirmed by Ponnan JA in *Mazars* quoted above. It is also apposite to consider the guidelines provided in *Lane NO v Oliver Transport* quoted earlier. I accept

that it is impossible to lay down general rules and that a court should be slow to make orders that avoid the objects of the legislature as contained in legislation, to wit s 341(2) in this instance. Having said this, a balance must be struck when considering the rights of the executor *in casu* on the one hand and the creditors of Golden Ribbon on the other. Fairness, good faith and an honest intention should be of paramount importance. An inequitable result should, if at all possible, be prevented.

[43] I am satisfied that the opportunity granted to the business rescue practitioner to rent the deceased's farm, Weltevreden, as well as farms of other people and entities in order to produce a harvest was to the advantage of Golden Ribbon and its creditors. I also bear in mind, with reference to the amended first and final liquidation and distribution account of Golden Ribbon referred to earlier, that several of the creditors who proved claims against the insolvent company are Viljoens, all apparently related to the late Mr WHJ Viljoen. There can be little doubt that the Viljoens will benefit to the prejudice of the deceased estate of Mr Malan if the aforesaid payment is not validated.

[44] The business rescue practitioner did not benefit from the payment as was the case in *Mazars* and *Diener*, referred to in *Mazars*. He merely paid the deceased what he believed was due to him if one considers the correspondence referred to herein. Although an incorrect procedure might have been adopted by the business rescue practitioner during the business rescue proceedings, an aspect that I do not have to consider for purposes hereof, the evidence which I am prepared to accept points in one direction only. The late Mr Viljoen, his attorney (and now also the liquidators' attorney), Mr Badenhorst, First National Bank as major creditor and the business rescue practitioner believed that it was in the interest of Golden Ribbon and its body of creditors to enter into the lease agreement in respect of Weltevreden and to produce crops on the farm. There is no doubt in my mind that this is not a case of skulduggery or a dishonest business rescue practitioner who conspired with a creditor to snatch an unfair advantage over the company's body of creditors.

[45] In the exercise of my discretion I have special regard to the role Mr Badenshorst has played, first of all in executing the late Mr Viljoen's mandate, and the role that he is now playing as the attorney for the liquidators, the role played by the late Mr Viljoen and perhaps also his son with the same initials, they being the only directors of Golden

Ribbon at the time. The deceased's farm was utilised to generate profit for the Viljoens' company. In my view good faith and an honest intention are apparent from the manner in which the business rescue practitioner and the deceased acted throughout. A balance should be struck between the rights of Golden Ribbon's creditors and that of the executor in these particular circumstances. Justice and fairness require that the executor shall not be ordered to pay back that which has been received. The payment by the business rescue practitioner in the amount of R222 998.23 shall be validated.

[46] During the preparation of this judgment I became aware of the judgment in *Smith NO and another v Magnus NO and Others* by Reinders J.[30] The liquidators in this application also featured as applicants in that application. They unsuccessfully sought similar relief in those matters against other parties. I agree with the outcome of that judgment.

Conclusion

[47] Insofar as the payment to the late Mr Malan should be validated, the effect thereof is that the main application should be dismissed and the relief sought in the counter-application be granted. The general principle applicable to awards of costs should be followed, *ie* the liquidators as the unsuccessful parties shall be ordered to pay the first respondent's costs of the opposed motion proceedings.

Order

[48] The following order is issued:

1. The applicants' application, being the main application, is dismissed.
2. It is declared, in accordance with the provisions of section 341(2) of the Companies Act 61 of 1973, that the payment of R220 998.23 made by the business rescue practitioner on 26 July 2019 from the bank account of Golden Ribbon Trading 86 (Pty) Ltd to Jac N Coetzer Inc for the benefit of Jacobus Francois Malan was validly made.

[30] (4220/2022; 4221/2022) [2023] ZAFSHC 307 (4 August 2023).

3. The applicants are ordered to pay the first respondent's costs of the opposed motion proceedings.

[redacted]

JP DAFFUE J

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