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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **283/2018P**

In the matter between:

BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS **APPLICANT**

and

FORMER WAY TRADE AND INVEST (PTY) LTD **FIRST RESPONDENT**
t/a PREMIER SERVICE STATION

LEE BENTZ **SECOND RESPONDENT**

STEPHANIE JEAN VAN NIEKERK **THIRD RESPONDENT**

K SWART AND COMPANY **FOURTH RESPONDENT**

FIRSTRAND BANK LIMITED **FIFTH RESPONDENT**

ROWAN ASHLEY LONG N.O. **SIXTH RESPONDENT**

ZAHEER CASIM N.O. **SEVENTH RESPONDENT**

Coram: Mossop J

Heard: 12 May 2023

Delivered: 27 June 2023

ORDER

The following order is granted:

1. The applicant's application premised upon the mandament van spolie is dismissed with no order as to costs.
2. The applicant's alternative claim based upon the *condictio furtiva* is adjourned sine die and the costs are reserved.
3. The first respondent's counter application is adjourned sine die and the costs are reserved.
4. The sixth and seventh respondent's counter application is granted and:
 - (a) The fourth and fifth respondents are directed to pay all monies held by them in favour of the first respondent to the estate account of the first respondent controlled by the sixth and seventh respondents within 72 hours of the date of this order;
 - (b) There shall be no order as to costs.

JUDGMENT

Mossop J:

[1] As its trading name, 'All Fuels', suggests, the applicant is a wholesaler and supplier of all fuels, including petrol and diesel (individually referred to by their respective names and collectively referred to as 'fuel'). It is also a property owner. On its property located at 2[...] C[...] A[...] L[...] Street, Pietermaritzburg it constructed a service station. It leased that service station (the leased premises) to the first respondent from where it operated a Caltex service station. From the leased

premises, the first respondent sold fuel to the public, that fuel having been purchased by it from the applicant in terms of an agreement between the parties (the agreement).

[2] At its inglorious end, the relationship between the applicant on the one hand and the first respondent and its guiding minds, the second and third respondents, on the other could, perhaps, be described as being antagonistic. It appears that it was not initially so, but the relationship spoiled and decayed over time. This was ultimately manifested in multiple and protracted legal proceedings between them. A brief narration of this litigious history will assist in understanding the later conduct of the first to third respondents of which complaint is made by the applicant.

[3] It appears that a dispute first arose regarding the first respondent's obligation to purchase all its fuel from the applicant, as required in terms of the agreement. On 22 January 2018, Poyo-Dlwati J of this division resolved that issue in favour of the applicant, when she granted an order against the first respondent in terms of which she directed that it was to regard the agreement as being binding upon it and the first respondent was consequently obligated to purchase its fuel from the applicant who, in turn, was obligated to supply the same to the first respondent.

[4] A dispute then arose over the first respondent's occupation of the leased premises and the applicant instituted eviction proceedings against it, which were opposed. On 10 July 2018, D Pillay J of this division (Pillay J) found in favour of the applicant and ordered the first respondent to vacate the leased premises.¹ Three years then passed while the first respondent sought to appeal the decision of Pillay J to a succession of courts:

(a) The first appeal was to a full court of this division. It failed;

¹ Reported as *Bright Idea Projects 66 (Pty) Ltd v Former Way Trade and Invest (Pty) Ltd* [2018] ZAKZPHC 29; 2018 (6) SA 86 (KZP).

(b) Two attempts were then made to secure leave to appeal from the Supreme Court of Appeal. Both failed;² and

(c) The Constitutional Court was then also approached, but after hearing argument on 9 March 2021, this application also failed when leave to appeal was finally refused on 28 September 2021.³

[5] While these attempts by the first respondent to revisit the judgment of Pillay J were ongoing, during 2019 the applicant and the first respondent also referred certain issues between them to arbitration in terms of the Petroleum Products Act 120 of 1977. The arbitration was before Advocate Michael Kuper SC (Kuper SC) of the Johannesburg Bar. It is not necessary to explore these proceedings in any detail save to record that in those proceedings, the applicant, which was the respondent, identified 32 separate complaints about the way in which the first respondent had framed its statement of claim. When asked to consider these objections, Kuper SC upheld 18 of them and directed the first respondent to cure them by a specified date. By virtue of the events that thereafter occurred, of which more shortly, it appears that the arbitration proceedings in toto were abandoned by the first respondent and were never taken further and none of the complaints which were upheld by Kuper SC were cured by the first respondent.

[6] Finally, the applicant contended that the first respondent had defied the order granted by Poyo-Dlwati J and consequently brought contempt proceedings against it. This resulted, ultimately, in Govender AJ, on 22 April 2020, sustaining the applicant's complaint and finding the first respondent to be in contempt of the order. An application for leave to appeal this order was granted by Govender AJ and was set down for argument before the Supreme Court of Appeal on 16 November 2021. On 14 December 2021, this appeal went the same way as the first respondent's other appeals and was dismissed with costs.⁴

² Reported as *Former Way Trade and Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2020] ZASCA 118.

³ Reported as *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited and another* [2021] ZACC 33; 2021 (12) BCLR 1388 (CC).

⁴ Reported as *Former Way Trade and Invest (Pty) Ltd t/a Premier Service Station and another v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZASCA 175.

[7] During the interregnum between the granting of Pillay J's order and the attempts by the first respondent to appeal that order, and as a consequence of the order granted by Poyo-Dlwati J, it was more or less business as usual between the applicant and the first respondent. Fuel was ordered by the first respondent from the applicant and paid for by it utilising the payment mechanism agreed on between the parties. This mechanism was payment by way of debit order. Throughout the duration of their business relationship, spanning approximately six years, it appears that the first respondent permitted a debit order to operate in favour of the applicant on its bank account, held with the fifth respondent, to make payment of the various amounts for which it became indebted to the applicant for from month to month.

[8] Over the five-week period commencing on 30 August 2021 and terminating on 2 October 2021 (the period), the first respondent ordered on 11 separate dates some 228 244 litres of petrol from the applicant with a value of R3 686 597.20 and on eight dates it ordered some 130 275 litres of diesel with a value of R1 588 289.60 from the applicant.

[9] The orders for fuel were placed in writing with the applicant by the first respondent and electronically submitted to it by the first respondent. Before delivery occurred, the applicant would generate a written tax invoice in respect of each order received, recording the quantity of fuel ordered and the cost thereof. When the fuel was delivered, a written delivery note would be completed stating the quantity of fuel actually pumped into the first respondent's holding tanks and would be signed for by a representative of the first respondent.

[10] Invoices were also delivered to the first respondent by the applicant over the period for the monthly rental charges raised by it in respect of the leased premises. Over the period, the first respondent paid an amount of R340 229.85 to the applicant in respect of its rental obligations.

[11] Over the period, the first respondent consequently paid to the applicant the total amount of R5 615 116.65, made up of the following amounts:

(a) Petrol - R3 686 597.20;

(b) Diesel - R1 588 289.60; and

(c) Rental - R340 229.85.

[12] These amounts were all paid electronically by the first respondent making use of the debit order system in place and, in due course, all of the payments made by the first respondent cleared in the applicant's bank account held at the Standard Bank of South Africa Limited (Standard Bank).

[13] As stated previously, the first respondent's attempts to appeal Pillay J's judgment came to an end with the Constitutional Court's refusal of leave to appeal on 28 September 2021. The consequence of such refusal was that Pillay J's judgment remained preserved and undisturbed and the first respondent was obliged to comply with its terms. This, finally, was acknowledged and accepted by the first respondent and it therefore agreed to vacate the leased premises by close of business on Tuesday, 5 October 2021. The first respondent adhered to this deadline and duly vacated the leased premises.

[14] Eleven days after the Constitutional Court dismissed its application for leave to appeal, and four days after vacating the leased premises, on Saturday, 9 October 2021, the first respondent caused the amount of R5 389 148.01 to be extracted from the applicant's bank account with Standard Bank (the first reversal) and five days later, on Thursday, 14 October 2021, it extracted a further amount of R225 968.64 from the same bank account (the second reversal). The sum of these two amounts was R5 615 116.65, the precise amount of the payments made by the first respondent to the applicant over the period for its purchases of fuel and its rental payments.

[15] When the applicant discovered the fact of the first reversal on 9 October 2021, its attorneys wrote to the fourth respondent on the first working day following the discovery and demanded that the money taken from its bank account be preserved by the fourth respondent pending the bringing of an application to the high court. At the date of this letter the second reversal had not yet occurred. Five days later, the

applicant's attorneys sought similar undertakings in respect of the second reversal. The fourth respondent subsequently, and not without some additional posturing by both the second respondent and the fourth respondent itself, placed the amount of R5 389 148.01 in an interest bearing trust account with the fourth respondent pending the determination of these proceedings. The balance of the funds in the amount of R225 968.64 remain in the first respondent's bank account with the fifth respondent and have also been preserved by the fifth respondent. The position was not ideal as far as the applicant was concerned, but the situation was thus stabilised in a reasonably tolerable fashion.

[16] The applicant then launched this application as an urgent application on Monday, 18 October 2021. It was opposed by the first, second, third and fourth respondents. On Wednesday, 20 October 2021, the matter came before Henriques J, who issued an order that, inter alia, required the fourth and fifth respondents to preserve the funds that they respectively held on behalf of the first respondent. The first, second and third respondents delivered their answering affidavit to the application on Monday, 25 October 2021. The answering affidavit served both to refute the applicant's claim and as the basis for a counter application brought by the first respondent.

[17] Three months later, on Monday, 24 January 2022, the second and third respondents then effected a creditor's voluntary winding up of the first respondent. The necessary documentation was completed and forwarded to the Companies and Intellectual Property Commission (CIPC). The voluntary liquidation was registered by CIPC on Monday, 31 January 2022. One of the documents that was completed by the first respondent to bring about this state of affairs was a CM100 document, being the statement of affairs of the first respondent. In that document, tellingly, the first respondent recorded that it had no cash in the bank and had no cash in hand. The CM100 document accordingly made no attempt to account for the R5 615 116.65 held nominally for the first respondent's benefit collectively by the fourth and fifth respondents at the time of the voluntary liquidation.

[18] As a consequence of the winding up of the first respondent, the sixth and seventh respondents were appointed as provisional, and then final, liquidators of the first respondent.

[19] The final act in the drama was then revealed: the second and third respondents upped sticks and left South Africa. Their current whereabouts are uncertain, but it appears that they may be in the United Kingdom. This is apparently the reason why the arbitration proceedings before Kuper SC have not proceed further: the second and third respondents are simply not here anymore to give instructions to their legal representatives and to conduct such proceedings to finality. On Wednesday, 3 May 2023, just over a week before this matter was argued, the fourth respondent withdrew as the legal representative of the second and third respondents for want of instructions and undertook to abide the decision of the court insofar as it was also a respondent in the matter. There was, accordingly, no appearance for the second and third respondents when the matter was called on Friday, 12 May 2023.

[20] Those then are the facts. There are now three applications before me arising out of those facts:

(a) The applicant's application principally seeks relief in terms of the mandament van spolie (the mandament). What is alleged to have been despoiled is the money extracted from its bank account by the first respondent. In the alternative, the applicant seeks a judgment against the first respondent based upon the *condictio furtiva* in the same amount in respect of which the despoilment is claimed, and it seeks an order against the fourth and fifth respondents that they pay over the funds that they hold on behalf of the first respondent to the applicant;

(b) The first respondent in its counter application (the first counter application) seeks judgment against the applicant in the amount of:

(i) approximately R3,2 million, being the amount by which it alleges that it was overcharged by the applicant in respect of the purchase of various quantities of petrol and diesel;

(ii) approximately R690 000 in respect of 'wrongful rental charges' charged by the applicant to the first respondent; and

(iii) approximately R620 000 in respect of 'wrongful invoicing which failed to adjust literage for temperature compensation' charged for by the applicant;

The first counter application is opposed by the applicant; and

(c) The sixth and seventh respondents have brought their own counter application (the second counter application) in which they allege that the funds extracted from the applicant's bank account and which are now held by the fourth and fifth respondents are, in fact, assets that belong to the first respondent's insolvent estate. They therefore claim that they are entitled, indeed obliged, to take possession and control of those funds and they seek an order that the fourth and fifth respondents pay all monies held by them on behalf of the first respondent to them. The applicant is then invited to prove its claim to those funds.

[21] Before considering each of these applications it would be prudent to dwell for a moment on certain banking concepts. A proper understanding of these concepts may significantly affect the outcome of the various applications.

[22] I consider first the concept of a debit order. A debit order is constituted by a debtor giving a creditor a mandate to present an amount for payment due to it by the debtor to the debtor's bankers and to receive payment of the amount so presented. The debtor thus does not have to do anything, other than to give the creditor permission to present its claim for payment to the debtor's bankers.⁵

[23] The second concept to consider is who owns money in a bank account. It is now, and has been for some time, settled law that once money is paid into a bank account, that money belongs to the bank and is possessed by it. The English case of

⁵ *Spar Group Limited v Absa Bank Limited* [2020] ZAGPJHC 259 para 51.

Foley v Hill,⁶ is one of the earliest cases to consider the nature of the relationship between a bank and its client. Specifically, on the issue of the ownership of money deposited with a bank, the House of Lords stated as follows:

‘Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable on the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.’⁷ (References and footnotes omitted.)

[24] In a South African context, in *Trustees, Estate Whitehead v Dumas*,⁸ Cachalia JA stated that:

‘Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of commixtio, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made. The account-holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of that amount from the bank, arising from their bank-customer relationship. This is also so where, as in this case, no money in its physical form is in issue, and the payment by one bank to another, on

⁶ *Foley v Hill* 1843-60 All ER Reprint 16; 9 ER 1002; (1848) 2 HLC 28.

⁷ Ibid at 36-37. Followed in South Africa in amongst others *R v Stanbridge* 1959 (3) SA 274 (C).

⁸ *Trustees, Estate Whitehead v Dumas and another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) para 13.

a client's instruction, is no more than an entry in the receiving bank's account. The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions. Where the depositor is not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the account-holder's concurrence.' (Footnotes omitted.)

[25] With that understanding of these concepts in mind, I turn now to consider each of the applications.

[26] The applicant submits that it was in peaceful and undisturbed possession of the funds paid to it by the first respondent after those funds had cleared and before the first respondent caused them to be reversed out of its bank account. It therefore requires the repayment to it of the amount extracted by the first respondent from its bank account, *ante omnia*.

[27] Two requirements must be met in order to obtain the remedy offered by the mandament. Firstly, 'the party seeking the remedy must, at the time of the dispossession, have been in possession of the property'. Secondly, 'the dispossessor must have wrongfully deprived [the party seeking the remedy of possession] without their consent'.⁹

[28] The first consideration must therefore be whether the applicant possessed the funds allegedly despoiled. Mr Ramdhani SC, who appears for the applicant, appeared to adopt the view that it was beyond question that this was the case. The matter is, I fear, not that simple and not that certain.

[29] The mandament is in its very essence a possessory remedy: indeed, it is the only possessory remedy in our law.¹⁰ Possession may be considered as being a 'combination of a factual situation and of a mental state consisting in the factual

⁹ *Monteiro and another v Diedricks* [2021] ZASCA 15; 2021 (3) SA 482 (SCA) para 17.

¹⁰ *Mans v Marais* 1932 CPD 352 at 356; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A).

control or detention of a thing (*corpus*) coupled with the will to possess the thing'.¹¹

The mandament is:

'not concerned with the protection or restoration of *rights* at all. Its aim is to restore the factual possession of which the spoliatus has been unlawfully deprived.'¹²

[30] In assessing whether the mandament applies to the facts of a given situation, the concepts of possession and the right to ownership, or any other right to the property in question, are detached one from the other and only the question of possession is considered. The mandament thus:

'... decides no rights of ownership; it secures only that if such decision be required, it shall be given by a court of law, and not affected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and no worse position than he was in before the spoliation.'¹³

[31] The mandament in its purest form initially applied only to the dispossession of corporeal assets, whether moveable or immovable. The restriction of the mandament only applying to corporeal assets no longer prevails, as it is now accepted that the deprivation of so-called 'quasi possession' of some forms of incorporeal rights also has a home in the mandament. Incorporeal things are things which can neither be handled nor touched, and consist in a right, such as inheritances, servitudes, debts, actions, and revenues.¹⁴ A bank account is a further example of such an incorporeal asset.¹⁵

[32] How incorporeal assets came to be included in the mandament is explained by Jones AJA in *Telkom SA Ltd v Xsinet (Pty) Ltd*,¹⁶ where he noted that:

¹¹ *Blendrite (Pty) Ltd and another v Moonisami and Another* [2021] ZASCA 77; 2021 (5) SA 61 (SCA) para 5, quoting with approval from 27 *Lawsa* 2 ed para 70.

¹² *Zulu v Minister of Works, KwaZulu, and others* 1992 (1) SA 181 (D) at 187G-H.

¹³ *Mans v Marie* 1932 CPD 352 at 356. Followed in amongst others *Jigger Properties CC v Maynard NO and others* [2017] ZAKZPHC 9; 2017 (4) SA 569 (KZP).

¹⁴ *Ex Parte the Master of the Supreme Court* 1906 TS 563 at 566.

¹⁵ *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at 673D-G.

¹⁶ *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) para 9.

‘Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has “quasi-possession” of it, when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, *inter alia*, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of “quasi-possession” has passed into our law. This is all firmly established.’

[33] As incorporeal rights cannot be physically possessed, possession thereof is assessed by reference to the exercising of the right attached to quasi possession of the incorporeal property. A refusal to allow a person to exercise the right will consequently amount to a dispossession of such right. However, in spoliation proceedings the applicant need not prove that he has the right: what is relevant is whether or not the applicant has exercised, rather than owned, the right.

[34] The inclusion of incorporeal rights in the mandament does not apply, however, to quasi possession of all incorporeal rights. In *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO*,¹⁷ Malan AJA stated that:

‘The mandement van spolie does not have a “catch-all function” to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of *quasi-possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its *quasi-possessio* is deserving of protection by the mandement . . . That explains why possession of “mere” personal rights (or their exercise) is not protected by the

¹⁷ *FirstRand Ltd t/a Rand Merchant Bank and another v Scholtz NO and others* [2006] ZASCA 99; 2008 (2) SA 503 (SCA) para 13.

mandament. The right held in *quasi-possession* must be a “gebruiksreg” or an incident of the possession or control of the property.’ (Footnotes omitted.)

[35] In my view, the applicant never possessed the money taken from its bank account. The money standing to its credit in its bank account belonged to its bankers and was possessed by those bankers, not the applicant. All that the applicant possessed was a personal right to the money deposited in its bank account. As was stated in *Firststrand*, mere personal rights are not protected by the mandament and only rights to use or occupy property or incidents of occupation will warrant protection by a spoliation order.¹⁸ That its right is a personal right is acknowledged, perhaps unwittingly, by the applicant itself. In its full heads of argument, the applicant makes reference to a work¹⁹ in which a chapter dealing with payment systems was partially referred to as follows:

‘In the case of a credit transfer it is said that the debtor (originator) “pushes” the funds from his account to the account of the creditor (beneficiary) resulting in the debiting of the originator’s account and the beneficiary obtaining a personal right against his bank to credit his account.’

[36] A further difficulty for the applicant is that it appears to me that what is claimed by it is specific performance of its contractual rights with the first respondent. In *Wille’s Principles of South African Law*,²⁰ the following is stated:

‘Protection for non-servitugal rights appears to be confined to those rights that flow from or are incidental to possession of corporeal property. . . . Where the non-servitugal right of use is separate from applicant’s possession of corporeal property it is almost inevitably a contractual right which is not protected by the mandament van spolie.’ (Footnotes omitted.)

¹⁸ See also *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and another* [2008] ZASCA 153; 2009 (4) SA 337 (SCA) para 9; *Microsure (Pty) Ltd and others v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N); and *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA).

¹⁹ R Sharrock (managing editor) *The Law of Banking and Payment in South Africa* (2016) para 7.3.2.

²⁰ F du Bois (general editor) *Wille’s Principles of South African Law* 9 ed (2007) at 458-459.

[37] This is clearly not an instance where servitural rights are of application. At the centre of the dispute is the agreement for the supply of fuel in which there is a formula to be applied to determine the costs of those products. As we shall see, the first respondent claims in the first counter application that the applicant did not adhere to the agreement and the formula, and it therefore reversed the payments that it had made to the applicant over the period as it had allegedly been over charged. The payments that the applicant received, and which were subsequently reversed, therefore had their origin in a contract between the applicant and the first respondent.²¹ The applicant, in turn, claims that it has complied with its contractual obligations in that it supplied substantial quantities of fuel to the first respondent and requires the funds already paid to it for such fuel to be reinstated. That seems to me to be a demand for specific performance of its contract with the first respondent.

[38] The mandament is an ancient remedy. Yet there is a scarcity of cases that relate to it applying to monies held in a bank account. That in itself is significant. None were referred to in either counsel's heads of argument. I have found but a single case that deals with the issue. There may be more but I have not found them. The case that I found is *Corporate Premium Cleaning CC v Van Baalen*.²² In that matter, a member of a close corporation had withdrawn an amount of money from the close corporation's bank account without permission, claiming that it was due to him. The judgment is brief, covering only some two pages, and the learned judge appears to have approached the matter on the basis that the member was not in possession of the funds before he withdrew them from the bank account, therefore the close corporation must have possessed them. There was no consideration of whether the close corporation actually possessed the funds held to its credit in its bank account that were withdrawn. Had such an investigation been conducted by the learned judge, he may well have concluded that the holder of a bank account does not, in fact, possess the funds standing to its credit. I am accordingly not persuaded that this decision should be followed by me.

²¹ *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and others* 2021 (6) SA 309 (WCC) para 26.

²² *Corporate Premium Cleaning CC v Van Baalen* [2014] ZAGPPHC 774.

[39] The applicant's principal relief based on the mandament must accordingly be refused.

[40] Considering the applicant's alternative claim based upon the *condictio furtiva*, it is so that such a claim may be brought to vindicate stolen money.²³ The *condictio furtiva* may, for example, be used to vindicate the proceeds of a stolen cheque.²⁴ It is a remedy that the owner of a thing, or someone with an interest in it,²⁵ has against a thief and his or her heirs for damages.²⁶ It does not lie 'against a subsequent possessor, whether his or her possession is bona fide or mala fide, or against an accomplice'.²⁷ It is generally regarded as being a delictual action and the *rei vindicatio* and the *condictio furtiva* are viewed as being alternative remedies to each other.²⁸

[41] Whilst the applicant has claimed principally to have been despoiled, it goes further and strongly and forcefully submits that the first respondent and its guiding minds have committed theft, alternatively fraud, against it. This is denied by the first respondent and it refutes those allegations with reference to facts that it alleges in the first counter application. I can, however, only share that view once I have heard the first counter application as the first respondent contends that there is a reasonable and lawful reason for its conduct. As will appear hereafter, I have not heard argument on the first counter application and I am therefore constrained in the circumstances to adjourn the applicant's alternative relief sine die and reserve all questions of costs.

[42] As regards the first counter claim, it was instituted by the first respondent prior to the commencement of its voluntary liquidation. Section 359 of the Companies Act 61 of 1973 (the Act) reads as follows:

²³ *Commercial Industrial Domestic Electrical Contractors (Pty) Ltd v Van der Merwe and another* [2017] ZAGPPHC 1096 para 4.

²⁴ LTC Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 88.

²⁵ *Clifford v Farinha* 1988 (4) SA 315 (W).

²⁶ *Krueger v Navratil* 1952 (4) SA 405 (SWA) at 408; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 151E-152B; *Minister van Verdediging v Van Wyk en andere* 1976 (1) SA 397 (T) at 400C; *Crots v Pretorius* [2010] ZASCA 107; 2010 (6) SA 512 (SCA) para 3.

²⁷ *Crane Route Municipality v Claasen and others* [2009] ZAECGHC 19 para 23. See also *Minister van Verdediging v Van Wyk en andere* 1976 (1) SA 397 (T) at 400E-F and 402A-G.

²⁸ *Conradie v Jones* 1917 OPD 112 at 119.

'(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –

(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

[43] Thus, upon registration of a special resolution by a company that it be wound up voluntarily, all civil proceedings against the company are suspended until the appointment of a liquidator. The reference in this section to a 'liquidator' is a reference to a final liquidator.²⁹ It has been held that:

'The purpose of this section is to prevent a newly-appointed liquidator from being embarrassed by an action before he has had an opportunity of considering the matter, and to prevent costs being incurred by the institution of proceedings between

²⁹ *Strydom NO v MGN Construction (Pty) Ltd and another: In re Haljen (Pty) Ltd (in liquidation)* 1983 (1) SA 799 (D) at 806B-807H; *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (in liquidation)* [2009] ZASCA 103; 2010 (2) SA 517 (SCA) para 2.

the time when the winding-up order has been made and the liquidator has been appointed.’³⁰

The liquidator is thus given a window of opportunity to consider and assess the nature and validity of the claim and whether to dispute or settle or acknowledge it.³¹

[44] The sixth and seventh respondents have fairly and correctly acknowledged that the applicant has complied with its obligations in terms of section 359(2)(a) of the Act and has given them the required notice. However, they have said nothing about the first counter application brought at the instance of the first respondent. The sixth respondent states in his replying affidavit in the second counter application that at the time of deposing to that affidavit, he and the seventh respondent were still in the process of investigating the affairs of the first respondent and, further, that:

‘I must categorically state that I accept neither the Applicant’s version (as it has failed to furnish me with the mandate forms) nor, at this stage, do I accept the First to Third Respondent’s version as it is quite clearly hotly disputed by the Applicant.’

And then the sixth respondent states:

‘Again, I emphasise that I do not contend that the dispute is valid or not, I am simply not in a position to make that election at this time.’

[45] The wording of the Act appears to place no obligation on a liquidator to make an election to continue with litigation commenced by the company in liquidation within any specified time period after assuming office. The first counter application is thus still alive and is not to be regarded as having been abandoned. But I heard no argument on it from counsel for the first respondent in liquidation. It is now the counter application of the insolvent estate following the voluntary liquidation of the first respondent.

³⁰ *Baskin v Levey and others*, NNO 1967 (3) SA 121 (W) at 123G-H.

³¹ *Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd and another* 1987 (4) SA 894 (A) at 910H-I.

[46] The first counter application is set out in some detail by the first respondent and is replete with numerous annexures upon which reliance is placed. The thrust of the first counter application is that it is alleged that the applicant itself took payment in the amount of R5 615 116.65 out of the first respondent's bank account without the permission of the first respondent. The first respondent thus lawfully countermanded the payment of that amount and obtained the repayment of that amount. The basis for this countermanding was that the amounts that the applicant helped itself to from the first respondent's bank account were in inflated amounts. The first respondent appears, however, to concede that the applicant could use the debit order payment system to obtain payment of amounts in respect of which the first respondent was lawfully and correctly invoiced. Because the invoicing was incorrect, the applicant was not entitled to payment in the total amount of R5 615 116.65. The explanation why the applicant's invoicing is incorrect then is set out in dense, complicated reasoning.

[47] In setting out the basis for the first counter application I obviously express no views as to its merits by virtue of the fact that I heard no argument on it at all, primarily because of the position adopted by the sixth and seventh respondents. It would, in my view, be wise in the circumstances, to also simply adjourn the first counter application sine die and reserve costs until the sixth and seventh respondents have come to a firm view on its merits.

[48] That brings me to the second counter application. Given the nature of bank transactions as previously discussed, the essential question to be addressed here is whether the first respondent acquired a personal right to the funds when they were retransferred into its bank account. If it did, then those funds accrued to the first respondent's estate upon its liquidation. If the first respondent did not acquire such a personal right, then neither did its estate and the funds remain the property of the bank and the counter application must perish.

[49] Cachalia JA dealt with this issue in *Whitehead* where he stated the following: 'Where, as in this case, A causes the transfer of money from his bank account to the account of B, no personal rights are transferred from A to B; what occurs is that A's personal claim to the funds that he held against his bank is extinguished upon the

transfer and a new personal right is created between B and his bank. Ownership of the money - insofar as money in specie is involved - is transferred from the transferring bank to the collecting bank, which must account to B in accordance with their bank-customer contractual relationship. This is so even where A was induced to enter into an agreement through B's fraudulent misrepresentation. In that case A will have a claim for delictual damages against B to compensate him for his loss but will not be able to claim a retransfer of the credit from the bank. And if B is subsequently sequestrated the claim will lie against B's estate because an insolvent's personal right to credit falls into his estate upon sequestration.³² (Footnotes omitted.)

[50] It may very well be that the first respondent committed fraud or theft in extracting the funds from the applicant's bank account. It is also possible that the first respondent made some form of misrepresentation to motivate for the reversal of its payments. I am not able to find that as a fact presently, given the fact that the first counter application has not been argued. In any event, it is worth acknowledging that fraud is not lightly to be inferred.³³ With the assistance of its bankers, the fifth respondent, the first respondent invoked a procedure to reverse its prior payments to the applicant. The retransferred money thus became the property of the fifth respondent when it was paid into the first respondent's account held with it. While the first respondent's conduct may be suspicious, and subject to criticism, I cannot conceive of the fifth respondent in those circumstances not acquiring an obligation to account to the first respondent.

[51] In *Nissan South Africa (Pty) Ltd v Marnitz*³⁴ and *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and others*,³⁵ it was held that payments made in error and moneys taken in circumstances that were nothing short of theft respectively, deprived such payment to the receiving bank of any legal effect. The bank nonetheless acquired ownership of the funds but not the obligation to account to its client. But the distinguishing feature of both those cases from the present one is

³² *Trustees, Estate Whitehead v Dumas and another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) para 15.

³³ *Loomcraft Fabrics CC v Nedbank Ltd and another* 1996 (1) SA 812 (A) at 817G.

³⁴ *Nissan South Africa (Pty) Ltd v Marnitz NO and others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA).

³⁵ *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and another* 1994 (1) SA 205 (N).

that they dealt with theft or fraud outside a contractual context. In this matter, the obverse is true: the reversed payment was entirely contractual in its origin. A fraud may have been perpetrated to acquire its reversal, but the *causa* for the payment was contractual in its nature. As Cachalia JA noted in *Whitehead*:

‘. . . it is immaterial that the payment was solicited through Whitehead’s misrepresentation and fraud.’³⁶

[52] The first respondent acquired a personal right to the countermanded funds when they were received by the fifth respondent. A large portion of the funds extracted from the applicant’s bank account was then transferred to the trust account of the fourth respondent, leaving a small balance, relatively speaking, in the first respondent’s bank account. There was thus a credit balance in the first respondent’s favour with the fifth respondent and a credit balance in its favour in the trust account of the fourth respondent. Cachalia JA stated in *Whitehead* that the right to credit is an asset that falls within an insolvent estate. I see no reason why that reasoning should be departed from in this instance.

[53] I accordingly uphold the second counter application, but not without some degree of sympathy for the applicant in so doing. This will be reflected in the costs orders that I intend making as it seems to me that this is an instance where the old idiom concerning someone being played like a fiddle is properly of application. The decision that I have come to does not mean the end of the road for the applicant: on the contrary, it is now entitled to prove its claim against the insolvent estate of the first respondent to the satisfaction of the sixth and seventh respondents.

[54] I accordingly grant the following order:

1. The applicant’s application premised upon the mandament van spolie is dismissed with no order as to costs.

³⁶ *Trustees, Estate Whitehead v Dumas and another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) para 23.

2. The applicant's alternative claim based upon the *condictio furtiva* is adjourned sine die and the costs are reserved.

3. The first respondent's counter application is adjourned sine die and the costs are reserved.

4. The sixth and seventh respondent's counter application is granted and:

(a) The fourth and fifth respondents are directed to pay all monies held by them in favour of the first respondent to the estate account of the first respondent controlled by the sixth and seventh respondents within 72 hours of the date of this order;

(b) There shall be no order as to costs.

MOSSOP J

APPEARANCES

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Date of Hearing : 12 May 2023

Date of Judgment : 27 June 2023