



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case no: 2019/34782

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Signed: *RJ Moultrie* Date: 2 May 2024

In the matter between:

AUTO AND TRUCK TYRES (PTY) LTD

Applicant / Defendant

and

SYMES, MARYNA ESTELLE N.O.

First Respondent / Plaintiff

MEDUPE, TSHEPO N.O.

Second Respondent / Plaintiff

MOOLLAJIE, ABDURUMAN N.O.

Third Respondent / Plaintiff

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines.

MOULTRIE AJ

[1] The applicant in this matter seeks leave to amend its plea in an action instituted against it by the joint liquidators of a company that is being compulsorily wound

up under the Companies Act, 61 of 1973. It is convenient to refer to these parties as “the defendant”, “the plaintiffs” and “the company” respectively.¹

- [2] In the action, the plaintiffs allege that the company made certain payments to the defendant that constituted dispositions without value as contemplated in section 26(1)(b) of the Insolvency Act, 24 of 1936. Orders are sought setting aside the alleged dispositions and holding the defendant liable for the full amount of each of the pleaded payments.
- [3] The plaintiffs’ particulars of claim in the action do not expressly allege either the means by which the pleaded payments were made to the defendant or that the defendant actually received them or that it received any benefit thereby. Despite this, the plaintiffs have indicated in the course of pre-trial exchanges in the action (and it is apparent from the argument advanced on their behalf before me) that they intend at the trial to contend that it has become common cause between the parties as a result of certain “positive averments” made by the defendant in its plea and other documents not only that the pleaded payments were made to the defendant, and it alone; but also that the defendant, and it alone, received them – even if this is objectively “inaccurate or untrue”.
- [4] On the other hand, the defendant contends that the plaintiffs’ interpretation of its plea and the averments made on its behalf in the other documents is opportunistic and incorrect, and seeks to amend its plea so as to “clarify” its position, which is (i) that the pleaded payments were made by way of deposits into the trust banking account of attorneys who were not representing it alone,

¹ The plaintiffs allege that the court order pursuant to which the company is being wound up required that it is to be kept confidential and private and is not to be disclosed without the prior leave of the Master and/or the Commissioner of CIPC and/or this Court.

but were also representing two other parties; and (ii) that it did not receive the pleaded payments or any benefit therefrom. It also seeks to introduce what it characterises as a special plea of “mis-joinder / non-joinder” in which it identifies the parties to whom it contends the proceeds of the pleaded payments were “distributed” as being Messrs John Beaumont and Deon Auby.

- [5] The defendant’s notice of intention to amend was delivered on 7 February 2023, some two weeks before the trial of the action was due to commence on 21 February 2023. On 13 February 2023, the parties filed a joint trial practice note indicating that the trial was not ready to proceed, and an order was then granted by agreement postponing the trial *sine die* and reserving the wasted costs occasioned by the postponement for later determination.
- [6] The plaintiffs delivered their Rule 28(3) notice of objection on 20 February 2023. The defendant then launched this application on 7 March 2023. Since that was one day after the expiry of the 10-day period stipulated in Rule 28(4), the defendant seeks condonation. The explanation given for the slight delay is adequate and the plaintiffs do not oppose the request for condonation. Condonation will therefore be granted.
- [7] The plaintiffs’ Rule 28(3) notice of objection contends that the intended amendments are “*mala fide* and prejudicial to the rights of the plaintiffs”. Although the notice is not a model of drafting clarity, it appears to me that the objections fall into two broad categories. The first of these raises the issue for whether the facts about the pleaded payments that the plaintiff contends have become common cause have indeed become so. The second category relates to the defendant’s intention to withdraw an admission that it previously made

that the plaintiffs are the joint liquidators of the company, and that the order of compulsory winding up was preceded by a voluntary winding up.

IS IT COMMON CAUSE THAT THE PLEADED PAYMENTS WERE MADE TO THE DEFENDANT AND THAT IT RECEIVED THEM?

- [8] The proposed amendments relevant to the first category of the plaintiffs' objections are the intended introduction of the special plea and the proposed amendment of paragraph 8.3 of its plea (part of the defendant's response to paragraph 8 of the plaintiffs' particulars of claim) and paragraph 11 thereof (in response to paragraph 11 of the particulars of claim).
- [9] According to the plaintiffs, the result of granting the defendant leave to effect these amendments would be to allow it to "withdraw" or to introduce "a denial (or placing in dispute)" of two "positive averments" that the defendant has allegedly previously advanced:
- (a) that the payments pleaded by the plaintiff as constituting the alleged dispositions "were made to the defendant"; and
 - (b) that "the defendant received" those payments.
- [10] It is contended that these alleged averments constituted binding "statements of facts that are common cause", which consequently "became unnecessary for the plaintiffs to prove". The notice goes on to contend that "the defendant grossly misled the plaintiffs and the court by making the positive averments ... and "induced the plaintiffs to believe that the defendant received the payments" and "thereby lead [sic] the plaintiffs astray for three years to prejudice of the plaintiffs". Although the only prejudice expressly mentioned in the notice and

the answering affidavit is the postponement referred to above and that the amendment will result in the plaintiffs not knowing what case and defence the defendant is attempting to advance, their counsel also argued that the averments resulted in the plaintiffs not initially pursuing the parties that the defendant contends received the benefit of the pleaded payments, and that when they did so, those parties raised a special plea of prescription. In the circumstances, says the plaintiff, "the defendant attempts" by means of the proposed amendments "to obtain an unfair advantage over the plaintiffs in the current and/or probable future litigation" which "is not *bona fide*".

[11] Furthermore, the plaintiffs contend that these proposed amendments (in particular the defendant's application for leave to insert paragraphs 2, 3 and 7 of the special plea), would introduce "contradictory factual versions" on the defendant's pleadings as to whether or not it accepts that it received the pleaded payments. It is also alleged that "further ambiguity and confusion" would arise from the intended amendments because they would allegedly result in the defendant's pleaded case contradicting the content of certain documents in its supplementary discovery as to the identities of the parties who did receive the payments.

[12] The defendant's proposed special plea reads as follows:

MIS-JOINDER / NON-JOINDER

1. The Plaintiffs instituted action against the Defendant alleging that payments made to the Defendant constitute dispositions of [the company's] property (the "dispositions") within the meaning of section 2 of the Insolvency Act 24 of 1936 (the "Act").
2. The Defendant has no knowledge regarding the allegations of the payments allegedly received by the Defendant.

3. All payments allegedly made to the Defendant were made in terms of the settlement agreement (Annexure "X") and were made by alternatively, at the instance and for and on behalf of Hylton Odendaal ("Hylton"), in discharge of all his obligations arising from and pursuant to the settlement agreement.
4. In terms of the settlement agreement "Creditors" are defined as collectively Auto and Truck [the Defendant], Rob Beaumont and John Deon Auby.
5. Payments made, were made into the trust account of DMO Attorneys, for and on behalf of the "creditors", whereafter the amounts were, in accordance with the instructions issued to DMO Attorneys, distributed to Rob Beaumont and John Deon Auby.
6. As such, there is a mis-joinder of the Defendant who at no stage received any payment and/or benefit as alleged by the Plaintiffs.
7. The Defendant has no knowledge of these payments as same was neither made to the Defendant nor received by the Defendant.

[13] Paragraph 8 of the plaintiffs' particulars of claim alleges that "During the period 3 April 2017 to 2 November 2018 [the company] made nineteen payments to the defendant in the aggregate amount of R1,330,000.00 ..." and proceeds to specify 19 payments of R70,000 on specified dates during the pleaded period. Paragraph 9 of the particulars of claim goes on to allege that "the payments constitute dispositions of [the company's] property ("the dispositions") within the meaning of section 2 of the Insolvency Act."

[14] The defendant's response to paragraph 8 of the particulars of claim is contained in paragraphs 7 and 8 of its plea which, together with the proposed amendments to paragraph 8 thereof, read as follows [proposed additions to the plea are recorded in curly brackets in bold and proposed excisions therefrom are "struck through" in bold, while the name of the company is replaced in

square brackets]:

7. Each of the allegations as contained in this paragraph are denied as if specifically traversed and the Plaintiffs' are put to the proof thereof.
8. In amplification of the said denial, the Defendant pleads as follows:
 - 8.1 On or about 20 March 2017, the Defendant, Rob Beaumont and John Deon Auby, on the one hand and Hylton Bernard Odendaal ("Hylton") and Nicola Jane Odendaal, on the other hand, entered into a settlement agreement ("the Settlement Agreement"), a copy of which is annexed hereto marked annexure "X", the content of which the Defendant prays be read as if specifically incorporated herein.
 - 8.2 Hylton was at all times the only director and shareholder of [the company] (in liquidation) ("[the company]"). **{Hylton held a director's and/or shareholder's loan within [the company].}**
 - 8.3 All payments **{made}** to the Defendant **{and/or Rob Beaumont and/or John Deon Auby}** were made **{into the trust account of DMO Attorneys}** pursuant to **{and in terms of}** the **{S}**settlement **{A}**agreement and were made by, alternatively at the instance and for and on behalf of{,} Hylton, in discharge of all his obligations arising from and pursuant to the settlement agreement.

[15] Paragraph 11 of the plaintiffs' particulars of claim states that "The dispositions fall to be set aside in terms of the provisions of Section 26(1)(b) of the Act."

[16] The defendant's response to this allegation is contained in paragraph 11 of its plea which, together with the proposed amendments thereto, reads as follows [again, proposed additions to the plea are recorded in curly brackets in bold

and proposed excisions therefrom are “struck through” in bold, while the name of the company is replaced in square brackets]:

11.{1.}The Defendant denies the content of this paragraph as if specifically traversed and puts the Plaintiffs' to the proof thereof.

{11.2. There exists no evidence of any disposition of any assets but only payments to a creditor (Hylton), which constitutes a reduction of an obligation which lies in the hands of [the company], such that it receives a benefit.

11.3. These payments were a repayment of a shareholder's loan and not a disposition for no value. [The company] received a direct benefit, in terms of which its obligations to Hylton were reduced.}

The necessity of a benefit having been received for liability under section 26(1)(b)

[17] It is convenient at this juncture to reiterate that the plaintiffs' objection to the proposed special plea and amendment of paragraphs 8.3 and 11 of the plea is based on the contention that the defendant has made two separate and distinct averments from which it may not now retreat by means of the proposed amendments. This is of central importance to my determination of this matter.

[18] There is some superficial attraction in the plaintiffs' argument that a party's positive statement or admission that payments were in fact “made to” it also contains the implicit statement or admission that it “received” those payments. However, while that may indeed be the case in many instances, such an implication does not axiomatically follow in this particular application given the

very distinctive features of the factual matrix that applies to its determination (in particular the defendant's contention that the payments were made into the trust banking account of attorneys representing not only the defendant but also Beaumont and Auby), as well as the legal context in which the plaintiffs' claim is advanced.

[19] A clear distinction of principle is drawn in the context of claims under section 26(1)(b) of the Insolvency Act between the making of a payment constituting a disposition to the defendant and the receipt thereof by the defendant in the legally relevant sense. In *Van Wyk Van Heerden Attorneys v Gore*, a matter that bears striking factual similarities to the current one, the Supreme Court of Appeal held that the clear language of section 26(1)(b) "includes a pertinent reference to a benefit" and that, in order to apply to a "party to whom a disposition was made", that party must be "one who 'benefited by the disposition'." The Court also held that "the construction of the section does not allow for liability to attach to one who did not benefit by it ... [t]he plain language requires the disponent to have benefited".² The court's use of the phrase "to whom a disposition was made" (as well as the word "disponent") indicates that even if it were to be established that the defendant is a person "to whom the alleged disposition was made", that does not necessarily mean that it is also a person who has "benefited by" it.

[20] In reaching these conclusions, the SCA carefully excavated previous authoritative statements of South African law to the same effect,³ and explored

² *Van Wyk Van Heerden Attorneys v Gore and Another NNO* 2023 (1) SA 80 (SCA) para 32; Sharrock 'Insolvency' in *The Law of South Africa*, 2 ed. Vol. 11 Annual Cumulative Supplement 2023 (LexisNexis, 2023) para 270.

³ In particular, *Reynolds and Others NNO v Mercantile Bank Ltd* 2004 (5) SA 220 (SCA).

the underlying rationale for the section with reference to the approaches adopted in both English⁴ and Australian law⁵ (where the language of the relevant statutory provisions are not as explicit) and held that “section 26(1)(b) is clearly aimed at only the person who benefits from (or claims under) the disposition”.⁶ In the process, the SCA approved of “the purposive approach articulated so clearly” by the English Court of Appeal in *Hollicourt* to the effect that the reason why a bank (for example) would not be liable in respect of payments made by means of cheques drawn by a subsequently liquidated insolvent company in insolvent circumstances in favour of the bank’s customers is that “the policy promoted by” a provision such as section 26(1)(b) is one of “restitutionary liability”, as opposed to the imposition of liability solely because the disposition had been made to it in the applicable circumstances.⁷

[21] The SCA consequently held that “the relevant touchstone for liability” under section 26(1)(b), including in the context of payments made into the trust banking accounts of attorneys, is “the need for the person to whom the disposition is made for the purpose of s 26(1)(b) to have benefited from it”.⁸

[22] I would add that the SCA’s conclusions would seem to be bolstered by the language employed in section 33(1) of the Act, which provides that if a person “in return for [a] disposition ... liable to be set aside under section 26 ... has

⁴ *Bank of Ireland v Hollicourt (Contracts) Ltd* [2001] 1 All ER 289 (CA).

⁵ *Re Mel Bower’s Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 245.

⁶ *Van Wyk Van Heerden* (above) para 34.

⁷ *Hollicourt* (above) para 23. While the SCA’s approval of the concept of “restitutionary liability” potentially suggests to me that that liability under section 26(1)(b) only arises in respect the extent of a benefit actually received by the defendant as a result of the disposition made to it, and not necessarily in respect of the amount of the payment constituting the disposition, it is not strictly necessary for me to decide that issue in this application.

⁸ *Van Wyk Van Heerden* (above) para 36.

lost any right against another person, shall if he acted in good faith, not be obliged to restore any ... benefit received under such disposition, unless the [liquidator] has indemnified him ... for losing such right”.

- [23] While the differences between the factual matrices arising in the current matter and in *Van Wyk Van Heerden* are discussed further below, it suffices for current purposes to observe that the distinction sought to be drawn by the plaintiffs themselves between averments allegedly made by the defendant that the pleaded payments were “made to” it, on the one hand, and averments as to its receipt thereof, on the other hand, is not a distinction without a difference. For this reason, I proceed to consider the two alleged averments separately.

The defendant’s alleged averments that the pleaded payments were made to it

- [24] In the first two sentences of paragraph 64 of the founding affidavit in the application for leave to amend, the defendant’s deponent (one of its directors, Beaumont) denies that the pleaded payments were “made to the defendant”. According to Beaumont, the defendant’s position has always been that:

- (a) the defendant, together with Beaumont and Auby entered into a settlement agreement with Hylton Odendaal (a director of the company) and Nicola Odendaal in 2017, which recorded an indebtedness and created an obligation for payment by the latter parties in favour of the former; and
- (b) Odendaal effected payment, or caused payment to be effected in accordance with that obligation, and in discharge of that indebtedness.

[25] Beaumont states that these payments “were made to DMO Attorneys and not to the defendant”, emphasising that the alleged settlement agreement stipulates that Odendaal’s indebtedness to the defendant, Beaumont and Auby (who were defined as “the creditors”) was to be discharged by way of one lump sum payment and subsequent monthly payments into the “designated account”, which was in turn defined as “the Trust Account of DMO Attorneys”. I note that the alleged settlement agreement (which is attached to Beaumont’s affidavit and which the defendant specifically prays in paragraph 8.1 of its plea should “be read as if specifically incorporated herein”) stipulates that the “settlement amount” was the sum of R3 million, that the lump sum payment was R1 million, and that the subsequent monthly payments were to be in amounts of R70,000 each, commencing from 3 April 2017.

[26] In substantiation of this allegation, Beaumont attaches a document bearing the heading:

Transaction History

for Daly Maqubela Oliphant Incorporated

for HYLTON ODENDAAL (AT 4246) / AUTO AND TRUCK TYRES (PTY) LTD (CNT1815)

for 03 Apr 2017 – 01 Dec 2018

and purporting to record 20 separate “received direct deposits”, each in the amount of R70,000.

[27] Notably, the document records 19 of these deposits as having been received by DMO Attorneys on the same dates as the pleaded payments. For the purposes of the determination of this application, I am bound to accept that it is common cause that these 19 deposits (to which I shall refer to where necessary

as “the alleged settlement payments”)⁹ are the very same “payments” as the pleaded payments that the plaintiffs allege constituted dispositions to the defendant without value. While the defendant assiduously avoided saying so in its founding affidavit, this is the effect of paragraphs 33, 34, 38, 54 and 57 of the plaintiffs’ answering affidavit and the defendant ultimately accepted this, as is apparent from paragraphs 8, 10, 20, 21, 24 and especially paragraph 37.2 of the replying affidavit, in which Beaumont plainly states the following:

I cannot state it any more clearly, Auby and I were recipients of payments, payments made pursuant to the settlement agreement entered into. Despite these payments having been made by [the company] (as contended by the respondents), [the company] benefitted from these payments, [the company] having been indebted to Hylton Odendaal.

[28] Beaumont’s contends that, if indeed the alleged settlement payments were paid into the trust banking account of DMO Attorneys as he alleges, that would mean that they were not (even partly) “made to” the defendant. I am not prepared to make that finding for the purposes of the current application. On Beaumont’s own version, the defendant was one of the creditors under the alleged settlement agreement, and the whole tenor of his affidavit makes it clear that the defendant, together with Beaumont and Auby, was one of DMO Attorneys’ clients at the time that the settlement agreement was allegedly concluded and the alleged settlement payments were made. The heading of the transaction history document also expressly refers to the defendant as being a client of

⁹ It must be emphasised that this terminology is employed purely for convenience, and should not be understood to indicate any factual finding on my part there were two separate and distinct “sets” of payments.

DMO Attorneys.¹⁰ What is more, the alleged settlement agreement expressly states Odendaal's indebtedness to the creditors (i.e. jointly, including the defendant) thereunder would be "discharged by way of payment into" DMO Attorneys' trust banking account. In other words, on the defendant's version, DMO Attorneys was the payment agent for all of the creditors. I thus proceed on the basis that the alleged settlement payments (which must be accepted for current purposes as being the same as the pleaded payments) were at least partly "made ... to the defendant".

[29] In the circumstances, I conclude that the defendant should not be granted leave to amend its pleadings in a manner that seeks to contend that the pleaded payments were not at least partly "made to" it. To do so would contradict the factual averments that the defendant makes in its own papers.

[30] In the circumstances, leave to introduce paragraph 7 of the proposed special plea, which not only seeks to allege that the defendant has no knowledge of the pleaded payments at all, but also that they were not made (even partly) to the defendant, must be refused.

[31] I am, however, unable to agree with the plaintiffs' argument that the references in paragraph 8.3 of the defendant's plea to "all payments to the defendant" and the references in paragraph 10 thereof to "the payments" and "each payment" constitute either unequivocal averments or admissions made by necessary

¹⁰ I do not go so far as to accept, simply on the basis of the heading of the transaction document and the subject line of the letter of 26 September 2019 (referred to below) that either Beaumont or Auby was not a client of DMO Attorneys or that they "were acting exclusively on the instruction of the defendant", as the plaintiffs allege in paragraph 38 of the answering affidavit. Indeed, in paragraph 54 they only contend that the letter gave the impression that the defendant was DMO Attorneys' "principal" client.

implication,¹¹ that any portion of the pleaded payments were made to the defendant. Apart from the fact that paragraph 7 of the plea contains an express general denial of paragraph 8 of the particulars of claim (as was the case in *Biddulph*), the use of the indefinite article “all” in the phrase “all payments to the defendant” in paragraph 8.3 of the plea¹² indicates that this is not inevitably or necessarily a reference to the pleaded payments (or even to any portion thereof), but that it might refer to other payments (or some portion thereof) made to the defendant pursuant to the alleged settlement agreement.¹³ And while the “payments” referred to in paragraph 10 of the defendant’s plea do indeed appear to refer to the pleaded payments, none of them is alleged in paragraph 10 to have been made “to the defendant”. In the circumstances, no contradiction arises between the proposed amendments and the defendant’s existing pleadings.

The defendant’s alleged averments that it received the pleaded payments

[32] The plaintiffs next objection is to the defendant’s proposed introduction of a special plea disputing that it has any “knowledge regarding the [plaintiffs’] allegations” that it received the pleaded payments;¹⁴ that “it at no stage

¹¹ *AA Mutual Insurance Association Ltd v Biddulph* 1976 1 SA 725 (A) at 735: where the court approved the statement that “an admission does not entail the admission of anything which cannot fairly be regarded as an inevitable consequence or a necessary implication.”

¹² The proposed amendment seeks to add the word “made” between the words “payments” and “to”, but I cannot see that this results in any substantive change to the meaning of the pleading.

¹³ For example (i) the twentieth payment to DMO Attorneys identified in the document; (ii) the amount of R600,000 in respect of which the defendant, Beaumont and Auby jointly obtained an order for payment against Hylton and Nicola Odendaal on 29 October 2019; or (ii) the lump sum payment of R1 million which may be deduced as having been paid (by whom and to whom is not known) in terms of the alleged settlement agreement, given that this is the remaining portion of the “settlement amount” of R3 million.

¹⁴ Paragraph 2 of the proposed special plea. As noted above, no express allegation is made to this effect in the particulars of claim.

received” the pleaded payments “and/or benefit” therefrom “as alleged by the plaintiffs”;¹⁵ and alleging that “payments were made into the trust account of DMO Attorneys ... whereafter the amounts were in accordance with the instructions issued to DMO Attorneys, distributed to ... Beaumont and ... Auby”.¹⁶

[33] The plaintiffs’ notice of objection refers to two occasions prior to the delivery of the notice of intention to amend upon which the defendant allegedly made positive averments that it received the pleaded payments. These are allegedly contained in (i) paragraph 8.3 of the plea; and (ii) paragraphs 7.3, 8 and 9.2 of the annexure to a third-party notice that the defendant served on the plaintiffs after the close of pleadings in October 2020.

[34] This contention is hotly disputed in the defendant’s founding affidavit in this application. Beaumont states that “from the outset, the defendant has denied receiving the payments as claimed by the plaintiffs”.

[35] Importantly, the plaintiffs only allege in the notice of objection that the defendant made “positive averments” that it received the pleaded payments. They do not go so far as to contend that it pleaded any formal admission that this was the case, or that the defendant “benefited by” them, which the courts in both *Reynolds* and *Van Wyk Van Heerden* recognised to be a requirement for liability under section 26(1)(b). This is of course unsurprising given the absence of any express allegation in the particulars of claim that the defendant received the pleaded payments or benefited by them.

¹⁵ Paragraph 6 of the proposed special plea. Again, the particulars of claim do not contain any express allegation of either receipt or benefit.

¹⁶ Paragraph 5 of the proposed special plea.

[36] I have already concluded above that neither paragraph 8.3 of the plea nor its proposed amendment contains or would contain an implied averment that the pleaded payments were (even partly) made to the defendant, as opposed to an averment that other payments made under the alleged settlement agreement were (at least partly) made to it. I have also found that neither paragraph 10 of the plea nor paragraph 3 of the proposed special plea give rise to the necessary implication that the pleaded payments were made to the defendant. But even if these paragraphs of the plea and proposed special plea could be interpreted in that manner, both *Reynolds* and *Van Wyk Van Heerden* are authority for the proposition that the mere fact that a payment constituting a disposition was made to a “disponee” does not necessarily mean that it was received by that disponee – especially in the relevant sense of a benefit actually received. As such the plaintiffs’ contention that the proposed special plea and amendment of paragraph 8.3 would introduce “contradictory factual versions” on the defendant’s pleadings as to whether or not it received the pleaded payments (or indeed any portion thereof) is misplaced.

[37] As to the third-party notice and annexure, while I accept that paragraph 9.2 of the annexure included a positive averment that the defendant received the pleaded payments,¹⁷ it cannot be regarded as ever having been formally advanced in view of the defendant’s admission that it did not obtain the leave

¹⁷ Paragraph 7.3 of the annexure, on the other hand, was simply a recitation of paragraph 8.3 of the plea in its original form prior to its previous amendment and (since that amendment resulted in no change that is materially relevant to my determination of this issue), the plaintiffs’ reliance thereon is misplaced. Paragraph 8 of the annexure is also unavailing. This paragraph not only refers merely to unidentified payments as having been made by or for Odendaal to an unidentified person (i.e. not necessarily the defendant), this “allegation” was expressly stated to be advanced on the basis of a “representation” made by the putative third parties. It is stretching credulity to contend that this could ever constitute a “positive averment” by the defendant that the pleaded payments were received, and I do not accept that it does.

of the court to serve the notice after the close of pleadings, as required by Rule 13(3)(b). In the absence of such leave, it is “basically in draft form,”¹⁸ and is not a pleading. In the circumstances, the document is “*dehors* the pleadings”, does not constitute a formal statement in the course of litigation, and does not pose any obstacle to the amendment sought.¹⁹ Even if it had been indeed formally advanced in a pleading, the amendment or removal of this averment would not have been subject to the same limitations that apply in relation to the withdrawal of an admission: a positive averment in a pleading may be readily withdrawn,²⁰ especially where it has not been admitted by the other party.²¹ At best for the plaintiffs, the averment in question could potentially form the evidential basis of a replication.²²

[38] Furthermore, any “ambiguity and confusion” that may arise as a result of the content of documents in the defendant’s supplementary discovery as to the identities of the parties who did in fact receive the pleaded payments contradicting the defendant’s amended pleaded case is simply a matter for evidence, and is not a basis upon which to refuse the amendment.

[39] In their answering affidavit, the plaintiffs seek to rely on three further documents in which the defendant allegedly averred that it received the pleaded payments, namely:

¹⁸ *Pitsiladi v Absa Bank* 2007 (4) SA 478 (SE) para 12.

¹⁹ *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F; *Black Mountain Mining (Pty) Ltd v Commissioner for the South African Revenue Service* 2021 JDR 3319 (GJ) para 59.

²⁰ *Wild Sea Construction* (above) at 452G–H.

²¹ *Absa Bank Ltd v Ms T van Rie t/a Amazing and Others* [2010] ZAGPJHC 185 para 15; *X v Commissioner for the South African Revenue Service* [2019] ZATC 12 para 48.

²² *Black Mountain Mining* (above) para 66.

- (a) paragraphs 16 and 25 of the founding affidavit deposed to by the defendant's attorney in an application for security for costs launched in November 2019, as well as two annexures thereto (i.e. the transaction history document referred to above and a letter despatched by DMO Attorneys to the plaintiffs' attorneys on 26 September 2019);
- (b) a response delivered by the defendant on 28 August 2020 to a rule 35(3) and (6) notice served by the plaintiffs; and
- (c) paragraph 7 of a response furnished by the defendant on 2 August 2021 to an enquiry made by the plaintiffs in the course of pre-trial procedures.

[40] None of these documents was referred to in the notice of objection itself and for that reason alone, not objection based on them cannot be entertained.²³ In any event, the paragraphs of the founding affidavit in the security for costs application sought to be relied upon did not contain any averment of receipt by the defendant – only an allegation that the alleged settlement payments were “effected ... to” the defendant and Auby by means of the transfers into DMO Attorneys’ trust banking account identified in the transaction history document referred to above. The statement by DMO Attorneys in the letter of 26 September 2019 to the effect that the payments under the alleged settlement agreement were “paid to our clients” was made “*dehors* the pleadings” (indeed,

²³ *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE) at 1157E – 1158C; *Botha and Others v Premier For Eastern Cape Province and Others* 2003 JDR 0207 (Tkh) p 10; *Potters Mill Inv 14 (Pty) Ltd v Abe Swersky & Assoc* 2016 (5) SA 202 (WCC) para 29; *Tricks Wrought Iron Services (Pty) Ltd v Vhembe District Municipality* 2020 JDR 2877 (GP) para 9; *Kidrogen RF (Pty) Ltd v Nordien and others* 2023 JDR 0260 (WCC) para 20.

even before the action was instituted), and may thus readily be “withdrawn” – though it might of course form the evidential basis of a replication).²⁴ In any event, this statement does not necessarily imply that any payment was made to (let alone received by) the defendant, given that it appears from paragraph 2 of the letter that the “clients” in question might have been Beaumont and/or Auby. The defendant’s response to the plaintiffs’ Rule 35(3) and (6) request (to the effect that the defendant’s bank statements were not relevant to the action at the time, and that the defendant admits the dates and amounts of the pleaded payments) contains no implied averment or admission of receipt of those payments. As for paragraph 7 of the written response of 2 August 2021, all that the defendant admitted to was “the benefit in the form of contractual rights reflected in the Settlement Agreement”, which does not necessarily constitute an admission that it received any part of the pleaded payments or that it actually “benefited by” them.

[41] The only remaining issue to determine in this regard is whether the defendant’s contention in this application that the pleaded payments were deposited into the trust banking account of DMO Attorneys could itself give rise to the necessary implication that the pleaded payments were received by the defendant, or that it benefited therefrom.

[42] In my view, such a conclusion is not sustainable when the relevant legal principles are applied to the factual matrix before me.

[43] In *Van Wyk Van Heerden*, the SCA held that when attorneys operate on their trust banking accounts they do so as principals and not in a representative

²⁴ See paragraph [37] above, and the authorities cited there.

capacity as they alone (and “no other party”) are entitled to instruct the bank on how to deal with the credit balances in such accounts. This is the case notwithstanding that such balances may be “held on behalf of particular clients” and “the attorney is obliged to give effect to instructions of clients concerning the credit balance held for them”, and even though the rights of attorneys, their creditors and the banks themselves are circumscribed and curtailed by specific legislation.²⁵

[44] But the mere fact that the attorneys in *Van Wyk Van Heerden* had received payments into their trust banking account that constituted dispositions liable to be set aside under section 26(1)(b) could not, without more, provide an answer to the question of whether they were liable for those dispositions. Although the Court was only concerned with the question whether the attorneys could be held liable for a disposition paid into their trust bank account, and not whether the client could be held liable (as in the current matter), the approach adopted by the SCA to determine whether the attorneys could indeed be liable was to enquire whether they had “benefited by” the payment, failing they would not be liable.

[45] Furthermore, while it is possible that an attorney’s trust banking account could be found in appropriate circumstances to have operated as a “mere conduit” for receipt of a disposition made to the client, the answer as to whether that is indeed true in a given case will depend on precisely how the attorney deals with the receipt. While attorneys will be regarded as mere conduits for a particular

²⁵ *Van Wyk Van Heerden* (above) paras 12 to 23.

client if they in fact pay the proceeds thereof out to that client,²⁶ or if they pay the proceeds thereof to third parties on the instructions of that client,²⁷ the client is only liable because such conduct has the result of benefiting that particular client, and not merely because the attorney received payment on the client's behalf into its trust banking account. In the words of the SCA, "the same enquiry governs" the issue, namely "who benefited" from the receipts into the attorney's trust banking account?²⁸

[46] This is illustrated by cases dealing with situations where attorneys dealt with receipts in a manner that benefited them, for example, by wrongly misappropriating the proceeds of the payment to themselves in breach of their instructions, or using such proceeds to pay their own personal creditors,²⁹ or by appropriating the proceeds to their own fees and disbursements (even when this is in accordance with the client's instructions).³⁰ In those cases, the attorneys themselves may be found to be liable.

[47] In other words, the mere fact that a payment constituting a disposition is made into an attorney's trust banking account on behalf of a client does not necessarily mean that the attorney is merely a conduit for that client, or that the client has received the disposition, or any benefit thereby. Something more would be required before that conclusion may be drawn. Although this would not necessarily have to be payment by the attorney of money, either to the client or to some third party in a manner that benefited the client, the client must

²⁶ *Ibid.* paras 24 and 25, referring to and *M v Murray NO 2020 (6) SA 55 (SCA)* paras 30 – 31.

²⁷ *Ibid.* paras 37 – 39.

²⁸ *Ibid.* para 40.

²⁹ See, for example, *De Villiers NO v Kaplan* 1960 (4) SA 476 (C).

³⁰ *Van Wyk Van Heerden* (above) paras 40 and 41.

actually have received the benefit of the payment received into the attorney's trust banking account.

[48] In the current matter, while it is of course possible that it may be established at the trial that the defendant did indeed benefit to some extent from the making of the pleaded payments to DMO Attorneys or that DMO was acting as a mere conduit for the defendant, the facts that I have accepted to be established on the basis of the evidence before me are not a sufficient basis upon which to reach that conclusion in this application. And this is especially not the case in respect of the entire amount of every pleaded payment, given that I cannot go so far in this application as to find that the payments were "made to" DMO Attorneys on behalf of the defendant alone.

[49] While I accept for current purposes that DMO Attorneys were acting on behalf of all three of the "creditors" under the alleged settlement agreement when the pleaded payments were received into their trust banking account, the only evidence before me as to how they dealt with those receipts is Beaumont's statement that they "were distributed to Auby and me", and not to the defendant. In substantiation of this, Beaumont emphasises that the defendant was only one amongst the three creditors, and attaches various documents that he describes as "proof of payments". While many of these documents are illegible to me on CaseLines, I note that some of them do clearly purport to reflect payments made by DMO Attorneys to Beaumont and an entity identified as "Premier Logistics" during the period May 2017 to November 2018 in sums of either R70,000 or R35,000. None of the legible documents indicate any payment to Auby or the defendant.

[50] Critically, there is no evidence before me as to:

- (a) whether there was any agreement or arrangement between the creditors under the alleged settlement agreement (and DMO attorneys) *inter se* governing their respective rights and obligations in relation to payments received by DMO Attorneys pursuant to the agreement;
- (b) who issued “the instructions to DMO Attorneys” alleged in paragraph 5 of the proposed special plea that “the amounts” should be “distributed to ... Beaumont and ... Auby”;
- (c) whether the defendant issued those alleged instructions, or was party to issuing them; or
- (d) what instructions, if any, the defendant itself gave to DMO Attorneys, and whether they acted in accordance with those instructions.³¹

[51] In other words, in the specific and somewhat extraordinary circumstances of the current application and the evidence before me, I am unable to conclude that it is axiomatically the case that the pleaded payments made into DMO Attorneys’ trust banking account resulted in the defendant receiving those payments or actually “benefiting by” them.

[52] I conclude that no portion of the proposed special plea or amendments should be refused on the grounds that the defendant is improperly seeking to introduce

³¹ Since the plaintiffs did not plead receipt of the payments by the defendant or that it received any benefit thereby, and since there was thus no question of a withdrawal of a pleaded admission to this effect in the notice of objection, the defendant was under no obligation in this application to furnish these details, or any details of payments or benefits that it might in fact have received.

an allegation that it did not receive the pleaded payments, or that it did not receive any benefit thereby, as I find that it has not made any binding positive or implied averment to the contrary. In the circumstances, the plaintiffs' allegations that they relied to their prejudice on the documents referred are irrelevant to the current application.

Conclusion on this category of objections

[53] In view of the findings I have made in paragraphs [29], [31] and [52] above, there is no basis why the remaining amendments sought in paragraphs 1, 5 and 6 of the defendant's notice of intention to amend should be refused, save in respect of paragraph 7 of the proposed special plea, in view of the conclusion reached in paragraph [30] above.

[54] Lest this judgment be misunderstood, I should emphasise that no finally determinative finding of fact is made here for the purposes of the action (i) that the pleaded payments (or any part thereof) were in fact made to the defendant; (ii) that the defendant in fact did not receive the pleaded payments (or any part thereof); or (iii) that the defendant did not in fact benefit thereby. Final determination of those issues, should they arise, is the province of the trial court.

WITHDRAWAL OF PRE-TRIAL ADMISSION OF PARAGRAPH 4 OF THE PARTICULARS OF CLAIM

[55] The second category of objections raised in the plaintiffs' notice of objection relates to the intended amendment (by means of paragraph 2 of the notice of amendment) of paragraph 3 of the defendant's plea. This in turn addresses

paragraph 4 of the particulars of claim, in which the plaintiffs allege that they are the joint liquidators of the company, which was voluntarily wound up pursuant to a special resolution registered by the Companies and Intellectual Property Commissioner and attaches a letter confirming the registration of the special resolution.

[56] The plaintiffs object to this amendment on the basis that it “withdraws facts that were admitted and made common cause” in the course of pre-trial procedures during June 2021.

[57] In my view, this objection is well-founded. In response to the plaintiffs’ enquiry whether the defendant persisted with its denial of the content of paragraph 4 of the particulars of claim, the defendant stated that “[t]he allegations in paragraph ... 4 of the particulars of claim are no longer disputed, the Defendant having been informed by the Plaintiff’s attorneys that the allegations are accurate”.

[58] Admissions of fact made at a pre-trial conference constitute sufficient proof of those facts, and if a party elects to limit the ambit of his case in this way, that election is binding unless special circumstances exist why this should not be the case.³² Such an admission has the same effect as an amendment of the pleading itself³³ and as such it seems to me that the ordinary rules relating to the withdrawal of admissions apply: an amendment cannot be had merely for the asking, and in such cases the Court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was

³² *Filta-Matix (Pty) Ltd v Freudenberg* 1998 (1) SA 606 (SCA) at 614A-D.

³³ *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 881H-882A.

made as well as the reasons why the party now seeks to withdraw it.³⁴

[59] The defendants have made no attempt whatsoever to furnish any information at all as to the circumstances in which the admission was made or of the reason why it seeks to withdraw it by means of the proposed amendment.³⁵ There is no suggestion that it was erroneously made as a result of some mistake of fact or law,³⁶ or that while it was deliberately made, new facts have come to the defendant's attention.³⁷

[60] There is thus no basis for me to consider that this proposed amendment is *bona fide*, and the application for leave to effect it falls to be dismissed.

THE REMAINING PROPOSED AMENDMENTS

[61] The plaintiffs' Rule 28(3) notice identified no basis for any objection to the amendments sought in paragraphs 3 and 4 of the notice of intention to amend (i.e. the proposed amendment of paragraphs 4 and 8.2 of the defendant's plea). As such, no objection to these amendments can be entertained,³⁸ and leave to effect them will be allowed.

CONCLUSION, COSTS AND ORDER

[62] Although the defendant has been successful, it seeks an indulgence and it

³⁴ *Bellairs v Hodnett & another* 1978 (1) SA 1109 (A) at 1150G-H.

³⁵ In any event, even assuming that the defendants had not made the pre-trial admission or that it did not have the effect of an amendment, an amendment is not to be had merely for the asking, and I am at a loss to understand why it is sought, as it seems to me that the only substantive change that it would make to the defendant's plea would be to make a partial admission.

³⁶ cf. *Northern Mounted Rifles v O'Callahan* 1909 TS 174 at 178; *Morant v Roos & another* 1911 TPD 1092; and *Rishton v Rishton* 1912 TPD 718 at 720.

³⁷ cf. *Young v Land Values Ltd* 1924 WLD 216 at 218.

³⁸ See footnote 23 (above).

appears that the delivery of its notice of amendment resulted in significant disruption in the conduct of the action. I am of thus of the view that neither party should be awarded its costs. No costs order will be made.

[63] The following order is granted:

1. The late delivery of the application for leave to amend is condoned.
2. The defendant's application for leave to insert paragraph 7 of the special plea and to amend paragraph 3 of its plea in accordance with paragraph 1 and 2 of its notice of intention to amend dated 7 February 2023 is refused.
3. The defendant is granted leave to amend its plea in accordance with the remainder of its notice of intention to amend dated 7 February 2023.

RJ Moultrie

RJ MOULTRIE AJ

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

FINAL SUBMISSIONS: 24 November 2023

JUDGMENT: 2 May 2024

APPEARANCES

For the applicants: KA Slabbert instructed by DMO Attorneys

For the respondent: WG Pretorius instructed by Brooks & Braatvedt Inc.