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

Case No: **002598/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE 21 OCTOBER 2024

SIGNATURE:

In the matter between:

GEORGE DA SILVA RAMAHLO N.O

First Applicant

JEANETTE EVELYN CARR N.O

Second Applicant

and

SHERINE JANSEN N.O

First Respondent

(Acting in her capacity as the duly authorised executrix in the estate of the late Lombardus Antonie Elberts – Master's Ref: 002968/2022)

GINDINDA BHESHWABE (PTY) LTD

Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 21 October 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The first and second applicants, the duly nominated joint liquidators [liquidators] in the insolvent estate of Ainsworth Engineering (Pty) Ltd (in liquidation) [the company] seek an order to set aside a sale of shares agreement, the repayment of the purchase price for such shares from both the first respondent, the estate of late Lombardus Antonie Alberts [the deceased] and the second respondent [purchaser], and retransfer of the shares from the purchaser.

[2] The liquidators rely on section 341(1) of the Companies Act, 1973¹ [1973 Companies Act] and sections 29(1),² 30(1)³ and 31⁴ of the Insolvency Act, 1936 [Insolvency Act] for the relief they seek.

[3] The first respondent, the duly appointed executrix in the estate of the deceased has opposed the relief and too, raises a number of preliminary issues. The purchaser has failed to oppose the application.

[4] The first respondent's case is that the liquidators are not entitled to the relief they seek contending that this Court's lack of jurisdiction to entertain the

¹ Section 341(1) – “Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.”

² Section 29(1) – “Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeds the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.”

³ Section 30(1) – “If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the Court may set aside the disposition.”

⁴ Section 31 – “(1) After the sequestration of a debtor's estate the Court may set aside, any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the Court may adjudge, not exceeding the amount by which he would have benefitted by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.”

application and that the liquidators have incorrectly cited the executrix and on that basis, they have raised misjoinder as a point *in limine*. The liquidators in an attempt to remedy any misjoinder filed a rule 15 notice however, such procedural step too remains contentious, the first respondent's Counsel advancing in argument that such procedural step is not competent in the circumstances. This aspect will be dealt with later.

[5] Over and above the preliminary issues, the thrust of the first respondent's opposition on the merits is that the section 341(1) of the 1973 Companies Act is not applicable to the common cause facts and that the liquidators, due to their lack of knowledge of the facts pertaining to the purchase of the shares the finance thereof by the Industrial Corporation[IDC], they rely on evidence acquired during the insolvency enquiry which they contend is inadmissible evidence.⁵ The IDC is not a party to this application and no version from the purchaser has been placed before this Court. The liquidators failed to address and meet the inadmissibility challenge nor was the Court formally required to make a ruling at the commencement of the hearing. Notwithstanding, the application has been dealt with without reference and reliance on the extracts of the enquiry.

[6] The liquidators maintain that the common cause facts indeed trigger the applicability of the sections relied in terms of the 1973 Companies Act and Insolvency Act and that such facts, illustrate collusive dealings between the parties to the detriment of the *concurus creditorium*.

[7] The issue of this Court's lack of jurisdiction to entertain the application must be dealt with first in that, if this Court is not cloaked with the requisite jurisdiction, the application should simply be struck from the roll without dealing with any of the remaining issues whether preliminary or on the merits.

RELEVANT FACTS

⁵ **O'Shea NO v Van Zyl and Others NNO** 2012 (1) SA 90 (SCA); **Simmons NO V Gilbert Hamer & Co Ltd** 1963 (1) SA 897 (N).

[8] Prior to the company's liquidation, the deceased and Highveld Technical Services CC [HTS] were the registered shareholders. The deceased a director of both the company and HTS.

[9] On the 15 July 2018 the deceased and the purchaser entered into a sale of shares and cession of loan agreement in respect of both the company and HTS [sale of shares agreement].

[10] In terms of the sale of shares agreement the purchaser was to procure funding for an amount of R 15 million from the IDC. This obligation was a suspensive condition. From the facts it appears that the purchaser did procure funding in excess of R15 million involving finance for a number of transactions (property, acquisition of shares, working capital and capital expenditure). Such finance was acquired in the name of the company as the debtor. The deceased signed the loan undertaking on the 16 May 2018 for the company in his capacity as the shareholder and not as the authorised director, no resolution attached.

[11] In terms of the sale of shares agreement, the purchaser and not the company had to pay the deceased a total purchase price of R13 million. Such amount initially to be paid in two instalment. The payment of the purchase price was to be allocated firstly against the deceased's loan account and then to the payment for shares, although interchangeable by consent. The initial amount of R10 million to be paid on the 30 March 2018, being the effective date, and the balance of R3 million by the 15 July 2019. This did not occur. The first payment was only made in the amount of R 6.5 million on approximately, the 18 October 2018. The IDC recorded the authorised such payment on the 16 October 2018.

[12] An amount R7 million was allocated by the IDC in the loan agreement for the acquisition of shares in the company. The company register recorded that the purchaser acquired shares on the 29 August 2018, a date prior to any payment.

The executrix states under oath the R 6.5 million was for the shares and that the outstanding amount of R7 million is for the loan account and remains outstanding. Although this evidence is not borne out by the terms of the sale of

shares agreement, nor by evidence from the deceased's wife whom the executrix referred to, it is common cause that the first payment of R6.5 million was allocated to the purchase of the shares in the company.

[13] On the 5 October 2018 the company was placed under compulsory provisional winding up order. The heads of argument appear to suggest that this was the same day the application was presented to Court. The company was placed under final liquidation on the 26 November 2019.

PRELIMINARY ISSUES

Does the Court have jurisdiction to entertain this application?

[14] To dispose of the matter, this Court is not asked to give effect to the sale of shares agreement but, to set such agreement aside in terms of statutory provisions relied upon in the 1973 Companies and Insolvency Act and to restore the status *quo ante*. The liquidators rely on the following allegations to establish this Court's jurisdiction namely:

- 14.1. The company, at all material times, conducted its business in Johannesburg;
- 14.2. The executrix operates within the area of the Court's jurisdiction;
- 14.3. The second respondent submitted to this Court's jurisdiction by launching business rescue against the company in the Gauteng South Division;
- 14.4. The unlawful conduct of a director of the company ensuring that the second respondent acquired the shares in the company took place in the jurisdiction of this Court;

14.5. The partial payment of the shares was paid into a bank account of the deceased held in the jurisdiction of this Court.

[15] Considering these allegations against the relevant material common cause facts is required. Such facts are that:

15.1. The company's physical and registered address as indicated on the company documents, is 4[...] H[...] Street, Robertsham, Johannesburg, Gauteng Province;

15.2. The letter of executorship was issued by the Master of the High Court Nelspruit on the 8 September 2022, in which the Master duly appointed Sherine Jansen as nominee for ABSA Trust Limited as the executrix of the deceased's estate [executrix];

15.3. The executrix is seated and works at ABSA Trust (Pty) Ltd [ABSA Trust], 1[...] T[...] Street, Johannesburg, Gauteng Province;

15.4. The deceased's last known address is no [...] B[...] Street, Secunda, Mpumalanga Province;

15.5. The purchaser's cited physical address in the sale of shares agreement is no [...] S[...] Place, Pinetown Kwa-Zulu Natal Province;

15.6. IDC is situated as 1[...] F[...] Drive Sandown, Gauteng Province;

15.7. The sale of shares agreement was signed in July 2018 in both Secunda and in Durban;

15.8. The deceased's bank account was confirmed by ABSA and held at their Secunda branch.

[16] To unpack and consider the basis relied on by the liquidators to establish jurisdiction, attracts the necessity to consider jurisdiction generally as against the facts.

[17] Under the common law, jurisdiction is the power vested in a court to adjudicate upon, determine and dispose of a matter.⁶ The power is territorial and does not extend beyond the boundaries of or over the subjects or subject matter not associated with.⁷ The territorial jurisdiction of each division of the High Court is determined by a hybrid source, by the Constitution, the common law and by the High Court's inherent jurisdiction set out in the Superior Courts Act, 10 of 2013 [the Act].

[18] Section 21 of the Act determines that a division of the High Court "*has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all matters of which it may according to law take cognisance of...*". It appears that section 21 of the Act materially corresponds with its statutory predecessor, section 19(1) of the Supreme Court Act, 59 of 1959. As a result of which, our courts have considered and found that case law relating to section 19(1) of the Supreme Court Act will equally bind the determination and apply to section 21(1) of the Act.

[19] The determination of jurisdiction relating to the term "*in relation to all cases arising*" referred to in section 21(1), has been interpreted in a long line of cases with a result that a court's jurisdiction is determined by reference to the common law or any relevant statute.⁸

[20] The doctrine of effectiveness is a basic principle of jurisdiction under the common law.⁹ Effectiveness consideration goes to the heart of the ability of a

⁶ **Gallo Africa Limited and Others v Sting Music (Pty) Ltd and Others** 2010 (6) SA 329 (SCA) at par 6.

⁷ **Ewing McDonald and Co. Ltd v M & M Products (Pty) Ltd** 1991 (1) SA 252 (A) at 256G-H.

⁸ **Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk** 1963 (2) SA 10 (T) at 17G; **Bisonboard Limited v K Braun Woodworking Machinery (Pty) Ltd** 1991 (1) SA 482 (A) at 486A-G.

⁹ **Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)** 1987 (4) SA 883 (A) at 839F.

Court to give an effective order. In addition to the doctrine of effectiveness, a *ratio jurisdictionis*, being a ground of jurisdiction is additionally required.¹⁰ The *ratio*, in turn, may for instance be domicile, contract, delict, and *ratione rei sitae*. It depends on the nature of the right or claim whether one ground or the other provides a ground for jurisdiction.

[21] In **Gallo Africa Ltd v Sting Music (Pty) Ltd**, the Supreme Court of Appeal was seized with a case concerning an *incola* defendant facing a copyright infringement claim arising in South Africa and in 19 other countries. The Court discussed jurisdiction generally, noting that:

“Section 19(1)(a) of the Supreme Court Act provides that a High Court has jurisdiction “over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance”. The section has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the Defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although effectiveness “lies at the root of jurisdiction” and is the rationale for jurisdiction, “it is not necessarily the criterion for its existence”. What is further required is a ratio jurisdictionis. The ratio, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough. As Forsyth (at 164) rightly said:

‘First there is the search for the appropriate ratio jurisdictionis; and then the court asks whether it can give an effective judgment. . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction.’”

¹⁰ See footnote 6, **Gallo Africa Limited** at par 10.

[22] Other than the doctrine of effectiveness and, in search of the appropriate *ratio jurisdictionis*, the liquidators although clumsily set out appear to rely on the *actor sequitur forum rei* of the executrix and the *ratio contractus*.¹¹ The first respondent attack on this Court's jurisdiction is confined to the irrelevance of the of *actor sequitur forum rei* of the executrix and that the sale of shares agreement was not signed in this Court's jurisdiction. The first respondent does not deal with, nor attack any of the other possibilities of *ratio contractus*, other than where the contract was concluded, raised by the liquidators.

The actor sequitur forum rei of the executrix

[23] In terms of section 13 of the Administration of Estates Act,¹² the only person entitled to deal with the property of a deceased person is one who has obtained authority from the State, acting through the Master. Claims by creditors against an estate of the deceased are normally enforced by filing a claim with the executor alternatively, by bringing an action against the estate, such action to be brought against the executor.

[24] The Letter of Executorship also signifies that the estate is being administered according to the legal and regulatory requirements of the local probate court. This ensures that the estate's affairs are conducted in a structured and lawful manner. In other words, by accepting Letters of Executorship or by procuring the Master's recognition, an executor submits in all matters relating to the State to the jurisdiction of the court to which the Master belongs or of the court to which the application for recognition was made.

[25] The first respondent on the common cause facts and on reliance of comments from "*Pollak on Jurisdiction*"¹³ contended that the domicile, residence or place of business of the executor is irrelevant and that the local probate court

¹¹ The Court, at 890E, quoted **Brooks v Maquassi Halls Ltd** 1914 CPD 371, where Kotzé J said at 376-7: "According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz: (1) *ratione domicilii*; (2) *ratione rei sitae*; (3) *ratione contractus*; that is, where the contract has either been entered into or has to be executed within the jurisdiction."

¹² Act 66 of 1965.

¹³ Pollak on Jurisdiction, 2nd Ed, David Pistorius, pg 1222.

possessing jurisdiction to entertain a claim in law, is Nelspruit and not this Division, Gauteng North. This Court agrees with the first respondent and the liquidators' reliance on the *actor sequitur forum rei* of the executrix is misplaced however, her place of business is a jurisdictional factor to be taken into account to when applying the common law doctrine of effectiveness.

The *ratione contractus*

[26] Of interest, both the sale of share agreement and the loan agreement signed by the deceased with IDC, contained consent to jurisdiction clauses. In the sale of shares agreement the deceased, the company and the purchaser consented to the jurisdiction of this Court. A consideration which neither party has raised nor considered. Be that as it may, returning to *ratione contractus*, the liquidators do not only rely on the place where the contract was concluded. In consequence, the first respondent's attack on this premise alone, takes their argument no further.

[27] The sale of shares agreement concerns, *inter alia*, the purchase and transfer of shares of a company. The company is situated in the jurisdiction of this Court. The consent to jurisdiction clauses now apparent. However considering the *ratione contractus*, the concept attracts a consideration as the nature of a 'share' and what is meant by 'transfer' to determine where effect was given to such agreement.

[28] A "*share*"¹⁴ means one of the units into which the proprietary interest in the company is divided. It is movable property. In terms of common law, in

Randfontein Estate Limited v The Master,¹⁵ with reference to shares, the court held that:

"They are simply rights of action – jura in personam – entitling the owner to a certain interest in the company, its assets and its dividends. As between

¹⁴ Section 1 of the Companies Act 71 of 2008.

¹⁵ 1909 TS 978 at 981 followed in **De Leef Family Trust and Others v Commissioner for Inland Revenue** 1993 (3) SA 345 (A) 356.

those in whose names they are registered in the books of the company, and any other person with whom the registered holder deals, they may be freely assigned, even though the original registration remains unaltered. And that it is the ordinary way in which such shares are dealt with; they pass from hand to hand and form the subject of many transactions without the original registration in the books of the company being disturbed.”

[29] See also the matter of **Borland’s Trustee v Steel Brothers & Co Ltd**¹⁶ in which the court stated that:

“A share is the interest of a shareholder in a company, measured by a sum of money, for the purpose of liability in the first place and interest in the second place, but also consisting of a series of mutual covenants entered into by all the shareholders inter se ...”.

[30] In the context of common law, it appears to be an interest and therefore incorporeal. The 2008 Companies Act further stipulates that a person acquires the rights associated with particular security when that person becomes a shareholder.¹⁷ The share certificate a tangible document evidencing the legal relationship existing between the company and the shareholder. The place where the share register is situated and where the register is kept, the *lex situs* of the share.¹⁸ This consideration a jurisdictional factor in the consideration of *ratione rei gestae*.

[31] As to what is meant by the ‘transfer’ of a share, Cameron JA in **Smuts v Boovens; Markplaas and Smuts v Booyens**,¹⁹ reaffirmed that a transfer in the full and technical sense of the word embraces the series of steps that include the conclusion of an agreement of transfer, the execution of the agreement and the registration of transfer.

¹⁶ 1948 (1) KB 116 (CA) at 288.

¹⁷ Section 37(9)(a)(i) of the 2008 Companies Act.

¹⁸ **Randfontein Estates Gold Mining Co. Ltd v Custodian of Enemy Property** 1923 AD 576, 580-583.

¹⁹ **Smuts v Booyens; Markplaas and Smuts v Booyens** [2001] ZASCA 57.

[32] Applying the above to the facts, the legal obligations in terms of the sale of shares agreement warranting fulfilment commenced when the suspensive condition was fulfilled. The suspensive condition obligated the purchase to procure a loan and/or financing from IDC in an amount of R15 million. This condition was fulfilled.

[33] IDC effected a partial payment of the purchase price, at the insistence of the purchaser by direct payment to the deceased in the sum of R6 5 million.

[34] The share register was amended to reflect the purchaser as the 100% shareholder in the company and the physical delivery of the share certificate to Mr Siyabonga Perfect Meyiwa [Meyiwa], a director of the purchaser and the company, took place according to the first respondent when Mr Van Tonder of IMS Auditing (Pty) Ltd [IMS] handed it to Meyiwa. According to Mr Van Tonder's confirmatory affidavit, he was the deceased's auditor since April 2013 until his passing.

[35] Curiously, Mr Van Tonder does not cite himself in full in his confirmatory affidavit. Mr Van Tonder conveniently does not state where IMS is situated and where the physical transfer of the share instrument took place. Having regard to the fact that the company's physical and registered address is in Johannesburg and, without evidence to the contrary provided by Mr Van Tonder, this Court accepts that the *lex situs* of the company documents, including the share register were at all material times kept and amended at the registered address of the company. At the time Meyiwa collected the share instruments in September 2018, no payment for them had been made. Mr Van Tonder does not deal with that aspect either. Considering all the material facts relating to the execution of the sale of share agreement, the *ratione contractus* established.

[36] Applying the doctrine of effectiveness, placing weight on the consent to jurisdiction clause in the sale of shares agreement, accepting that the liquidators have established a *ratione contractus* on a basis not challenged by the first respondents and that *ratione rei gestae* of the company is situated in this Court's jurisdiction, this Court is satisfied that it does possess the requisite jurisdiction to entertain the application.

MISJOINDER

[37] It is common cause that the executrix appointed in the deceased estate is a nominee of ABSA Trust and that the name of Ms Chauke too was cited as the nominee of ABSA Trust when it appeared in the statutory advertisement in the Government Gazette. The facts appearing in the Government Gazette did not accord with the duly issued Master's letter of authority.

[38] Having said that, and as mentioned, the liquidators on the 15 August 2023 filed a rule 15 notice informing the first respondent of their intention to substitute the name of the nominee Ms Chauke with Sherine Jansen as the nominee executrix. They cited Ms Chauke in the papers on the strength of the information appearing in Government Gazette.

[39] The first respondent now argues that rule 15 notice does not assist the liquidators as the executrix, duly cited by the liquidators, had not undergone a change in status, the very purpose of rule 15. They argue that the letter of executorship issued by the Master is clear and, that it was Sherine Jansen who was appointed as nominee for ABSA Trust. They argue further, that statutorily, Ms Chauke was never authorised to accept such an appointment and as such, no change of status occurred. In raising this argument, the first respondent is silent on how this statutory mishap in the Government Gazette occurred. Silent on how it affected any other claims lodged by creditors and whether it was subsequently ever administratively corrected. The misjoinder point was raised by Sherine Jansen yet, her evidence is silent on these issues.

[40] Against this backdrop, the rule 15 notice filed by the liquidators clearly set out the grounds they relied on and why they sought substitution and resorted to filing the rule 15 notice. The liquidators too, addressed the aspect of prejudice and informed the first respondent in August 2023 of the procedural steps they could take in terms of sub-rule (4). This of course in addition to other procedural objections they could have raised. The first respondent remained procedurally

inactive until the date of the hearing when the misjoinder point included and attack on the procedural soundness of the rule 15 notice.

[41] The liquidators in argument submitted that the substitution was sound and necessitated by the first respondent's own mishap. That Ms Chauke was merely cited as a nominee of ABSA Trust and any substitution of a nominee, did not a *de facto* introduce a new *persona* before Court. They contended that even if the Court should find that a substitution of a person's name in nominee is a 'new party', such substitution was a *bona fide* attempt by them to place the correct nominee for ABSA Trust before the Court. Furthermore, that such procedural step should be seen together with the circumstances that, it was the first respondent who herself, when actioning her administrative function regulated by statute, incorrectly did not cite her details as the executrix nominee but caused the details of Ms Chauke to come to the knowledge of all the creditors *via* the Government Gazette notice.

[42] The Court possesses inherent jurisdiction other than that provided in the uniform rules itself to condone any non-compliance and to regulate its own process to ensure the judicial administration of justice is done.²⁰ The rules are made for the Court and not the Court for the rules. ABSA Trust has remained a party and its nominee merely corrected. The substitution, albeit correction, does not affect the ambit of the claim the deceased estate had to meet nor has the first respondent raised any prejudice, nor formally filed an objection to the rule 15 notice, nor brought a substantive application in terms of rule 15(4).

[43] It is imperative that the correct party is before Court and the dispute fully ventilated. In consequence, the misjoinder point must fail.

[44] Now to the merits.

SECTION 341(1) RELIEF

²⁰ **Eke v Parsons** [2015] ZACC 20 at para [25].

[45] It is trite that section 341 of the Companies Act continues to apply, this aspect is not in dispute and as such section 341 of the Companies Act falls under chapter 14 of the Companies Act of 2008.

[46] Section 341 of the Companies Act states as follows:

“341. Dispositions and share transfers after winding up void

- (1) Every transfer of shares of a company being wound up or alteration in the status of its members affected after the commencement of the winding up without the sanction of the liquidator, shall be void.*
- (2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding up, shall be void unless the court otherwise orders.”*

[47] Section 341 clearly distinguishes between the transfer of shares and the disposition of a company's property. The liquidators' claim is based on section 341(1) of the 1973 Companies Act. The thrust of the first respondent's defence is that section 341(1) does not apply to a transfer of share transaction between third parties, as in this case, but only to a transfer where a company sales or transfers its shares. For this proposition they rely on the interpretation of sub paragraph 1, in particular by placing emphasis on the phrase “-transfer of shares of the company may be void.”, thereby not making reference to “*Every*” from the wording and the interpretation. The first respondent does not rely on any authority for this proposition but, on commentary on the Companies Act by Blackman, Jooste and Everingham.²¹ The first respondent Counsel incorrectly referred to page 49 in his heads of argument which only makes reference to section 341(2), the subsection dealing with a company's disposition of its property. Section 341(1) is dealt with on pages 46-48 in the same volume and does not support the first respondent's

²¹ Volume 3 Chapter XIV page 14-47.

proposition. In fact, reference therein by the authors to the Vermeulen matter²² which deals with the transfer of a company's shares between two shareholders. The Court in the Vermeulen matter, did not comment on such a narrow interpretation as relied on by the first respondents, but dealt with the principle of the operation of the antedating of the commencement of the winding up in terms of section 348 of the 1973 Companies Act.

[48] The Court cannot reconcile itself with the first respondent's argument as advanced. Section 341(1) refers to every transfer of shares of a company and does not state that it is confined to the transfers of shares by a company. The transfer of share transaction relied on by the liquidators too, altered the status of the members and as such, the Court accepts that the application of section 341(1) can be entertained. On this basis, the Court then deals with the thrust of the liquidators' argument.²³

[49] Applying section 341(1), begs the question, on the common cause and undisputed facts, whether the "*transfer*" of the shares took place after the commencement of the winding up. On the granting of the final order for winding up, the winding-up of the company is deemed to have commenced at the time of the presentation to Court when filed with the Registrar²⁴. In other words, antedating does not operate until there has been a winding up.

[50] A final winding up order was obtained on the 18 November 2020. In consequence the deeming antedating provision of section 348 operates. The share register reflected that the purchaser as owner on the 29 August 2018. Irrespective of such ownership, the sale of shares agreement records the intent of the purchaser to comply with and perform fully in terms of the agreement²⁵. To comply with and perform fully includes payment of the purchase price of the shares as intended. It is common cause that the payment of R6.5 million was for the shares in the company and paid to the deceased after the date of liquidation. In consequence the sale of share agreement is void in terms of section 341(1) of

²² **Vermeulen and Another v Bauermeister and Another** 1982(4) SA 159,

²³ **Lotz v Knipe and Others** [2019] ZAFSHC 135.

²⁴ Section 348 of the 1973 Companies Act.

²⁵ **Smuts v Booyens; Markplaas and Smuts v Booyens** [2001] ZASCA 57.

the 1973 Companies Act. Whether the liquidators move for a declarator or for an order setting the sale of shares agreement aside, it is void and must be dealt with.

SECTIONS 29, 30, 31 OF THE INSOLVENCY ACT

[51] The liquidators contend that these sections apply giving credence to the relief they seek. The first respondent in answer simply denies the applicability stating that the reliance is vague and not supported by facts. The first respondent does not set out its defence nor state why such facts do not support the liquidators' reliance thereon.

[52] However, section 29 speaks of the debtor's disposition, in other words the company's disposition. The liquidators rely on the disposition of the shares owned by the deceased and reliance hereof as pleaded must fail. The same must be said for section 30(1).

[53] In the present set of facts although the liquidators may correctly argue collusion, such collusion did not result in the disposition of the company's property but the property of the deceased at the expense of the company. The facts pleaded, are inconsistent with the provision of the Insolvency Act relied on and must fail.

COSTS

[54] There is no reason why the costs should not follow the result. The purchaser did not oppose the application and no cost order should be sought against it.

[55] The following order:

1. The sale of shares and loan agreement entered into between Ainsworth Engineering (Pty) Ltd (duly represented by Siyabonga Perfect Meyiwa), Highveld Services CC (duly represented by the late Lambertus Antonie Alberts) and the Second Respondent (duly

represented by Siyabonga Perfect Meyiwa) in July 2018 is void and is set-aside;

2. The First Respondent is ordered to repay the amount of R6 500.000.00 (six million five hundred thousand rand) to the Applicants within 10 days from date of this order.
3. In the event that the First Respondent fails to make payment of the said amount referred to in prayer 2 hereof, the First Respondent will be liable for interest on the overdue amount at the prescribed interest rate calculated from date of this order to date of full payment thereof.
4. The Second Respondent is ordered to cause the transfer of the shares it holds in Ainsworth (Pty) Ltd (in liquidation) ["the shares"] to the Applicants within 10 days from date of this order.
5. In the event that the Second Respondent fails to or cannot comply with prayer 4 hereof, the Sheriff is authorised to take all the necessary steps to and to sign all necessary documents in order to affect the transfer of the share to the Applicant.
6. The First Respondents is ordered, to pay the costs of this application, taxed on scale C.

**L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Date of judgment: 21 October 2024