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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2023-098436

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 20 January 2025

E van der Schyff

In the matter between:

AHMED CARRIM N.O.

First Applicant

MUSTAFA MOHAMED N.O.

Second Applicant

BP JEAN AVENUE CC (in liquidation)

Third Applicant

and

BP SOUTHERN AFRICA PROPRIETARY LIMITED

First Respondent

VEECO HOLDINGS PROPRIETARY LIMITED

Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

Van der Schyff J

Introduction¹

- [1] The applicants approached the opposed motion court for declaratory relief and asked that the court declare that the disposition made by the first respondent of the third applicants' business is a void disposition in terms of section 341(2) of the Companies Act 61 of 1973 ("Companies Act"), and an order that the first respondent pay an amount of R7000 000.00 being the amount received for the disposal of the company and a further amount of R5 800 000.00 for the balance of the total value of the third applicant's business, together with costs on an attorney and client scale.

The facts

- [2] During January 2020 the first respondent, BP Southern Africa (Pty) Ltd ("BP"), and BP Jean Avenue CC (now in liquidation) ("BP Jean Avenue"), entered into lease and franchise agreements which, among others, permitted BP Jean Avenue to run BP's petrol station and Pick n Pay Express Store at 2[...] J[...] Avenue, Centurion.
- [3] After Covid business was slow and BP Jean Avenue advertised the sale of its business, the closing date being 14 September 2021. This was with BP's knowledge and assistance. However, no sale was concluded. At the insolvency inquiry, Mr. Stephan Mutale, an employee of BP, testified that BP decided to proceed with the advertised sale after Mr. Harmse, BP Jean Avenue's sole member, abandoned BP Jean Avenue's business.
- [4] I pause to note that the applicants did not take the notion that Mr. Harmse abandoned BP Jean Avenue's business any further, or based their reliance on section 341(2) of the Companies Act on this alleged abandonment. The information is provided, as if in passing.

¹ I am indebted to counsel for the effective Joint Practice Note (JPN) and chronology table filed. Despite the filing of the JPN being prescribed in terms of the Consolidated Practice Directive parties often do not realise the value of an effective JPN to the presiding officer, and more often than not the JPN is regarded as a matter of form and not substance.

[5] BP Jean Avenue failed to pay BP the amounts due under the lease agreement, and on 24 May 2022, BP demanded payment of all amounts outstanding by 31 May 2022. In this letter of demand, BP informed BP Jean Avenue that it would have no alternative but to institute legal proceedings against it to recover the amount if it was not paid before 31 May 2022.

[6] On 30 May 2022, BP sent a further letter to BP Jean Avenue. BP reminded BP Jean Avenue of clause 36.1(e) of the lease agreement that provides that should the lessee

‘... fail to pay any amount due by it in terms of the Lease on due date and fail to remedy such breach within a period of 7 (seven) days after the dispatch of written notice by the Lessor calling for such payment ...

Then in any such event, the Lessor shall, without prejudice to its rights to damages or to any other claim of any nature whatsoever that the Lessor may have against the Lessee as a result thereof, be entitled, at its option, itself to remedy or procure the remedy of such breach and immediately recover the total costs incurred by the Lessor in doing so from the Lessee, or forthwith to cancel this Lease on written notice to the Lessee, or to vary the period of the Lease by making it terminable on 1(one) Month’s written notice.’

BP also informed BP Jean Avenue that if it did not receive a response, it would proceed with the sale of the business using the amount from the latest valuation. BP intended to use the proceeds of the sale to settle the outstanding debt and any amount owed to Pick n Pay.

[7] On 1 June 2022 BP Jean Avenue entered into voluntary liquidation.

[8] BP Jean Avenue failed to pay BP the amounts it had demanded. On 7 June 2022, BP exercised its alleged right to cancel the lease and the franchise agreements with BP Jean Avenue.

- [9] I pause to note that clause 36.2 of the lease agreement provides that should BP Jean Avenue be provisionally or finally sequestrated, BP is, without prejudice to its rights to damages or to any other claim whatsoever, entitled to cancel the Lease Agreement on written notice. A similar provision is contained in the franchise agreement.
- [10] On 4 October 2022, BP concluded lease and franchise agreements with the second respondent (“Veeco Holdings”), in terms of which Veeco Holdings was permitted to run BP’s petrol station and a Pick n Pay Express store at 2[...] J[...] Avenue, Centurion. The applicants contend that BP sold BP Jean Avenue’s business to Veeco Holdings. They relied extensively on the evidence presented during the insolvency inquiry by BP’s Mr. Mutule, that BP Jean Avenue’s business was sold.

The parties’ submissions

- [11] The applicants submit that BP sold BP Jean Avenue’s business to Veeco Holdings after it cancelled the lease and franchise agreements with BP Jean Avenue and when it concluded lease and franchise agreements with Veeco Holdings. This sale, the applicants submit, is a disposition of BP Jean Avenue’s property that is void in terms of section 341(2) of the Companies Act.²
- [12] BP submits that the Supreme Court of Appeal held in *Ellerine Brothers (Pty) Ltd v McCarthy Limited*³ that a contract with an entity in liquidation can be cancelled if the relevant party had a right of cancellation. BP claims that it had a right of cancellation and validly cancelled the lease- and franchise agreements with BP Jean Avenue. BP submits that it did not dispose of any rights or assets of BP Jean Avenue when it concluded lease- and franchise agreements with Veeco Holdings.

² The applicants state in the founding affidavit: ‘From the above it is clear that the business of the third applicant [BP Jean Avenue], was disposed of **by** the first respondent [BP] and to the second respondent [Veeco Holdings].’

³ 2014 (4) SA 22 (SCA).

The applicants have not established a basis to sustain their claim of R12 800 000.00

The scope of the relief sought

[13] The parties identified the following issues in the Joint Practice Note as issues for determination:

- i. Was BP entitled to cancel the lease and franchise agreements with BP Jean Avenue after the latter entered liquidation?
- ii. Was there a disposition of BP Jean Avenue CC's business?
- iii. Should the court find that there was a disposition, should such disposition be set aside in terms of section 341(2) of the Companies Act, and should BP pay the applicants the amounts it received from the disposal?
- iv. The issue of costs.

[14] In determining the issues for consideration, a court is guided by the relief sought by the applicant, the case made out in the founding papers, and the respondent's answer.

[15] The applicants state in the founding affidavit that they seek the setting aside of the unlawful disposition of BP Jean Avenue's business in terms of section 341(2) of the Companies Act, alternatively in terms of section 29, and further alternatively, section 30 of the Insolvency Act 24 of 1936 ("Insolvency Act"). However, the applicants subsequently stated:

'In light of the unassailable case of the applicants for the setting aside of the disposition of the third applicant's business, the sole asset of the insolvent estate, in terms of section 341(2) of the Companies Act, the applicants will only persist with the claim in the aforesaid section.'

- [16] Since the applicants rely solely on section 341(2) of the Companies Act for the relief sought, the first issue to determine is whether the jurisdictional factors for bringing the application within the scope of section 341(2) of the Companies Act are met.

Section 341(2) of the Companies Act

- [17] Section 341 of the Companies Act provides as follows:

‘Dispositions and share transfers after winding-up. – (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) 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.’ [My emphasis]

- [18] In reading the applicants’ heads of argument, I noted that the scope of section 341(2) of the Companies Act is not accurately portrayed. In paragraph 1.6 of the heads, the following is stated:

‘Section 341(2) of the Act, provides that every disposition of property of a company wound-up and unable to pay its debts made after the commencement of winding-up shall be void, unless the Court orders otherwise.’

- [19] The applicants failed to note the important qualification contained in section 341(2) of the Companies Act. It is not the disposition of a company’s property in general that is affected by section 341(2) of the Companies Act but dispositions *by* the company.

- [20] The purpose of section 341(2) is to ensure that the property of a company threatened with winding-up is not improperly dissipated prior to the commencement of the company's winding-up to be available for satisfaction of the claims of its creditors on a footing of equality of treatment subject only to any security preference which any creditor may enjoy under the Insolvency Act.⁴
- [21] By considering the issue for determination as whether the alleged sale of BP Jean Avenue's business 'was a disposition', instead of adding the important qualifier 'by the company', the applicants misdirected themselves.
- [22] It is trite that an applicant must make out its case in the founding papers. The applicants contend that the disposal of BP Jean Avenue's business 'as it was done **by the first respondent (BP)** in the absence of the joint liquidators' (my emphasis) is a disposition of BP Jean Avenue's asset. It was done, the applicants aver, to prefer BP as a creditor to the prejudice of the remaining creditors of the insolvent estate.
- [23] It is not the applicants' case that BP Jean Avenue arranged in any manner for the property concerned, its business, or the goodwill of its business to be disposed of or made available to any of its creditors in satisfaction or part satisfaction of its claims. BP Jean Avenue did not alienate, or transfer any property or rights to property in favour of BP. The loss of its business, or the goodwill of the business, is a consequence of the agreements being cancelled. The cancellation was a unilateral act by BP, which contends that it acquired and had the right to cancel the agreements.
- [24] On the case advanced in the founding papers, and having regard to the definition of the term 'disposition', I fail to see how it can be said that BP Jean Avenue disposed of any property, even if one accepts for purposes of the argument that the subsequent conclusion of a lease and franchise agreement with Veecoo Holdings constituted the sale of BP Jean Avenue's business. Even if the applicants

⁴ A. Kunst, P. Delport and Q Vorster '*Henochoberg on the Companies Act 61 of 1973*' June 2011- SA 133 LexisNexis.

are correct in their assumption that the subsequent contractual arrangements between BP and Veeco Holdings essentially amounted to a sale of BP Jean Avenue's business, such sale was not at the behest of or by BP Jean Avenue, or on BP Jean Avenue's instruction.

[25] Since the applicants stated that they persist only with the claim in terms of section 341(2) of the Companies Act, the applicants' failure to aver and prove that BP Jean Avenue disposed of its property is dispositive of the declaratory relief sought since the applicants failed to prove the jurisdictional factors of section 341(2) of the Companies Act.

[26] The applicants did not seek an order that the cancellation of the lease and franchise agreements was unlawful and to have such cancellation set aside. The parties identified the question of whether BP was entitled to cancel the lease and franchise agreements in the Joint Practice Note as an issue to be determined. However, the applicants' counsel advocated in the heads of argument that the applicants are of the view that the question of whether the BP was entitled to cancel the lease and franchise agreements is irrelevant in light of the question of whether the 'sale of the third applicant's business' was a disposition. BP, on the other hand, held the view that BP Jean Avenue is incorrect in their view that the lawfulness of the cancellation is irrelevant. BP regarded this issue as dispositive of the dispute as it held the view that the issue of a dispossession does not arise if the cancellation was valid.

[27] Due to the conclusion reached above that section 341(2) of the Companies Act can only find application where a disposition was made by the company being wound up, the issue of the validity of cancellation does not arise. Expressing any view on the issue regarding the validity of the cancellation of the franchise and lease agreements would not be beneficial as it does not have any impact on the outcome of the application as the applicants structured it.

Costs

[28] In considering an appropriate costs order, it was significant that the respondents did not raise the issue that the applicants did not contend that the alleged disposition was by the third applicant, BP Jean Avenue, and the consequences thereof. As a result, each party should carry its own costs.

ORDER

In the result, the following order is granted:

- 1. The application is dismissed.**
- 2. Each party is to carry their own costs.**

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicants:	Adv. J. Hershensohn SC
With:	Adv. R. de Leeuw
Instructed by:	Barnard & Patel Inc.
For the first respondent:	Adv. A. Govendor
With:	Adv. J. Davis
Instructed by:	Edward Nathan Sonnenbergs Inc.
Date of the hearing:	19 November 2024
Date of judgment:	20 January 2025