IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

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

Case no **4220/2022**

In the matter between:

ELRICH RUWAYNE SMITH N.O 1ST Appellant

ZIYAD SONPRA N.O. 2ND Appellant

(in their respective capacities as liquidators of **Golden Ribbon Trading 86 (Pty) Ltd** (in liquidation), Master of the High Court, Bloemfontein, reference no. **B62/2019**)

and

FREDERICH WILHELM ALEXANDER MAGNUS N.O. 1ST Respondent

MARIA MAGDALENA MAGNUS N.O 2ND Respondent

JOHANNES JACOBUS JOUBERT N.O 3RD Respondent

(In their capacities as the duly appointed Trustees for the

time being of the **MAGNUS BOERDERY TRUST, IT1547/2012**)

THE MASTER OF THE FREE STATE HIGH COURT,

BLOEMFONTEIN 4TH Respondent

Case number: **4221/2022**

In the matter between:

ELRICH RUWAYNE SMITH N.O. 1ST Appellant

ZIYAD SONPRA N.O. 2ND Appellant

(in their respective capacities as liquidators of **Golden Ribbon Trading 86 (Pty) Ltd** (in liquidation), Master of the High Court, Bloemfontein, reference no. **B62/2019**)

and

JACOBUS MATJAM JOOSTE 1ST Respondent

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

Case number: **4222/2022**

In the matter between:

ELRICH RUWAYNE SMITH N.O.	1ST Appellant
ZIYAD SONPRA N.O.	2ND Appellant

(In their respective capacities as liquidators of

GOLDEN RIBBON TRADING 86 (PTY) LTD

number: **B62/2019**)

and

JACOBUS FRANCOIS MALAN N.O.	1ST Respondent

(In his capacity as executor of the estate late

Jacobus Francois Malan)

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

CORAM: MHLAMBI, ADJP *et* LOUBSER, J *et* DANISO, J

JUDGMENT BY: MHLAMBI, ADJP

HEARD ON: 24 JANUARY 2025

DELIVERED ON: 20 MARCH 2025

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[1] These are three appeals with leave of the courts a quo against the whole judgments given by Reinders, J on 4 August 2023 in two applications under case numbers 4220/2022 and 4221/2022, and Daffue J on 26 October 2023 in the application under case number 4222/2023. The judgments under case numbers 4220/2022, 4221/2022, and 4222/2022 will be referred to as the Magnus, Jooste, and Malan judgments respectively. The appeals are heard together as the legal questions are similar and closely related to the facts. The primary issue in the appeals is whether the courts a quo erred in finding that the respondents had made out a proper case for validating the dispositions made to them under the proviso in section 341(2) of the Companies Act 61 of 1973.

[2] On 4 August 2023, the following orders were issued in the Magnus and Jooste applications:

"15.1 ***The application under case no 4220/2022:***

1. *The main application is dismissed.*
2. *It is declared that the payments on 26 July 2019 in the amount of R 490,360.00 and on 4 September 2019 in the amount of R 21,632.82 from applicants to the first, second and third respondents are ratified, confirmed and declared to be valid.*
3. *The applicants to pay the costs.*

15.2 ***The application under case no 4221/2022:***

1. *The main application is dismissed.*
2. *It is declared that the payment on 26 July 2019 in the amount of R 698,469.51 from applicants to the first respondent is ratified, confirmed and declared to be valid.*
3. *The applicants to pay the costs."*

[3] On 26 October 2023, the following order was issued in the Malan application:

"1. The applicants' application, being the main application, is dismissed.

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

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

[4] The relief sought in the main applications was that the payments made to the respondents under section 341(2) of the Companies Act 61 of 1973 are declared void, set aside, and repaid to the applicants.

[5]. I shall first deal with the appeals in the Magnus and Jooste judgments. The grounds of appeal in those judgments are that the court a quo erred:

"1. in failing to adjudicate the respondents' counter-application on the appellants' (qua the respondents in the counter-application) version based on the trite principle in Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) as the relief was sought in motion proceedings.

2. in finding as it did in paragraph 12 of its judgment that the respondents had 'preferent and secured' claims against the estate of Golden Ribbon 86 (Pty) Ltd [in liquidation] (Golden Ribbon) at the time when the payments to the respondents were made;

3. in finding, as it did in paragraph 12 of its judgment, that the payments made to the respondents by the Business Rescue Practitioner were bona fide;

4. in finding as it did at paragraph 12 of its judgment that the payments were made to the respondents 'to the advantage of the creditors as a whole';

5. In failing to attach sufficient weight to the common cause evidence in the Court a quo that the Business Rescue Practitioner, in continuing to *conduct farming activities in conflict with the Business Rescue Plan, generated a yield from such activities of R7 108 191, but also incurred expenses in the amount of R5 021 590.00 plus R2 039 931.00;*

6. *in failing to take into account that the actions of the Business Rescue Practitioner, in conflict with the Business Rescue Plan, resulted in the appellants having to institute legal proceedings to recover numerous void payments made to creditors in conflict with section 341(2) of the Companies Act, 61 of 1973, thereby causing further hardship to creditors in the form of costs and delays in the administration of the insolvent estate;*

7. *in finding as it did in paragraph 12 of its judgment that the Respondents had made out a case for the validation of the payments made to them under the proviso contained in section 341(2) of the Companies Act, 61 of 1973.*

8. *in dismissing the main applications with costs, and granting the counter-applications with costs."*

[6] Paragraph 12 of the Magnus and Jooste judgment reads as follows:

> *[12] "<u>In this case, the respondents ("landlords") at the time when payment was made had a preferred and secure claim. At the time it was acknowledged by everyone concerned, including FNB as well as the BRP</u>. It was the BRP, at the time statutorily acting on behalf of the present applicants, who made the payments. <u>I can come to no other conclusion than that the payments at the time was bona fide.</u> A letter at the time from respondents' attorneys indicated that they acted on behalf of clients (which included the relevant farmers herein) who have rented land to Golden Ribbon on which crops were planted and that <u>the farmers held a lien over the crops and that they exercised such a lien. The letter stated the claims of the farmers to be in the amount of R 1,409,827.24 and estimated crop income in respect of the farms with an income of R 7,515,576.00.</u> In the opposing affidavit the relevant respondents averred that the payments were made by the BRP in respect of legal and valid agreements with the BRP in the amount in respect of their secured claims. <u>It would appear to me that these payments were therefore made to the advantage of the creditors as a whole to obtain the proceeds of the crop</u>. <u>These allegations were not seriously placed in dispute by the applicants in reply.</u> In my view the above facts convince me that the present facts constitute facts where the disposition is*

one that should not be void in terms of s 341(2). It would in my view be improper to make payment by a business rescue practitioner and have a debtor give up his security and afterwards, when liquidation takes place, have him/her to pay such amount back."

[7] The court pointed out that it was common cause that the company, Golden Ribbon, was financially distressed as it was placed in business rescue on 10 August 2018. The appointed business rescue practitioner (the BRP) proceeded with the existing farm lease agreements with the relevant respondents. The company's liquidation application was issued on 17 July 2019. The provisional and final liquidation orders were granted on 10 October 2019 and 20 February 2020. The BRP made the payments claimed by the appellants, the applicants in the main applications, on 26 July and 4 September 2019, after the date of the petition on 17 July 2019. These payments are related to the harvest/lease agreements on the farms. Against this background, the appellants sought the repayment of the amounts to the estate.

[8] The court, following the decisions in *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others,*[1] *Pride Milling Co (Pty) Ltd v Bekker NO and Another*[2], *Eravin Construction CC v Bekker No and Others*[3] *and Lane NO v Olivier Transport*[4], correctly found that the dispositions resorted under the provisions of section 341 and should be void unless the court otherwise ordered. The court noted the guidelines for exercising discretion regarding section 341, summarised in Lane[5] at 385. A summary of those guidelines was stated as follows:

(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion.[6]

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

[1] 2023 (1) SA 398 (SCA).
[2] 2022 (2) SA 410 (SCA)
[3] 2016 (6) SA 589 (SCA).
[4] 1997 (1) SA 383 (C)
[5] Supra.
[6] Re Steane's (Bournemouth) *Ltd* [1950] 1 All ER 21 (Ch) at 25

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

(d) The Court must be free to act according to what it considers would be just and fair in each case.[7] -

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

(f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation.[8]

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets.[9] .

(h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive.[10]

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties.[11]

(j) Little weight should be attached to the hardship which the applicant will suffer if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally.[12]

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[7] Herrigel NO v Bon Roads Construction Co (Pty) Ltd 1980 (4) SA 669 (SWA); *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA) at 490 and 492 ([1970] 1 All ER 353 at 356 and 357.

[8] Re Wiltshire Iron Co; Ex parte Pearson (1868) LR 3 Ch App 443 at 447.

[9] Herrigel's case *supra* at 679-80

[10] Wiltshire's case *supra* at 447.

[11] Re I Tellsa Furniture *(Pty) Ltd* (1984-85) 9 ACLR 869 (NSW).

[12] *Herrigel's* case *supra* at 680. J

(k) The payment should not be considered an isolated transaction if it formed part of a series of transactions.[13]

(l) Generally a Court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors.[14]

Parties' submissions

[9] The appellants contended that the respondents failed to discharge the onus on them. They merely cited the factors set out in *Lane v Olivier Transport* and *Pride Milling* without advancing cogent evidence supporting such factors in their counter–applications. The courts erred in finding that the respondents had discharged the onus of proving that an order was warranted sanctioning a departure from the statutorily ordained default position, i.e., the voidness of the disposition.

[10] The payments made and received by the respondents were not in good faith and not in the ordinary course of the Golden Ribbon's business. The respondents knew of the latter's pending liquidation application and that it was financially distressed. The Business Rescue Plan did not authorise the BRP to continue with the proposed turnaround strategy.

[11] The Magnus and Jooste Respondents were preferred over the other creditors because they were paid before any secured or preferent creditors, including FNB, that brought the liquidation application. The payments were not made in the ordinary course of business as the company's controlled winding down never occurred. The BRP paid amounts to the respondents without making provisions or ensuring that the providers of post-commencement finance were paid.

[13] *Herrigel's* case *supra* at 680.

[14] *Herrigel's* B *case supra* at 680

[12] The payments were not made to keep the company afloat or to benefit all creditors. As of 21 February 2019, the BRP acknowledged that Golden Ribbon could not be rescued and would have to be wound up in a business rescue. The non-validation of the payments would minimise the hardship to the body of creditors generally, as the repayment would increase the dividend payable to all creditors.

[13] The first respondent's counsel submitted that the BRP paid each respondent outstanding rentals while the company was under business rescue. The BRP planted crops on the leased land in January and February 2019 while implementing the adopted business rescue plan. In July 2019, he used a portion of the sale proceeds from the crops once harvested and sold, to pay the rent owed to the respondents. The proceeds of the harvested crops far exceeded the payment made by the practitioner to the respondents for outstanding rentals. This appeared from the reconciliation from the practitioner provided by the appellant liquidators, which showed that R 1 497 544.00 was paid for lease expenses. At the same time, the yield of the crops realised was over R 7 100 000.00. The proceeds from the crops exceeded the "*claim for the rental by far.*"

[14] The respondents contended that the appellants failed to point out any capricious exercise of the discretion, that it was exercised on a wrong principle, or that unbiased judgment was not brought to bear on the issue. The appellants did not deal with the nature of the exercise of the discretion and the test on appeal for interfering with the exercise of that discretion to validate the payments.

[15] The planting of crops for the season (February/July 2019) was contemplated and provided for in the adopted business rescue plan for the company. The income generated by the harvest from the season would be utilised to rescue the company. There can be no criticism of the practitioners planting crops for the new season. To achieve this, the practitioner needed to agree with the respondents, as lessors, on the rental to be paid for using the agricultural land.

Although an agreement had not been reached between the practitioner and the respondent lessors, the practitioner planted the crops on their lands.

[16] The courts *a quo* cannot be faulted in finding that payments by the practitioner on 26 July 2019 to each respondent, as lessors, were made in good faith, in the ordinary course of business, and for the benefit of the general body of the creditors. All those payments were dispositions to keep the company afloat or augment its assets.

The legal position

[17] The courts have the power to validate dispositions made between the presentment of the application for winding-up and the date upon which the final winding-up order is granted. Section 341 of the Companies Act 61 of 1973, which deals with void dispositions and share transfers after winding-up, provides that:

(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.

[18] A winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.[15]

[19] In *Pride Milling,* it was stated that as to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. This discretion is only exercisable with respect to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other

[15] Section 348 of the Companies Act 61 of 1973.

relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition.[16]

[20] The court went further to state that a discretion in the true sense proceeds from the premise that a court exercising such a discretion may properly come to different decisions, having regard to a wide range of equally permissible options available to it. Thus, a court exercising wide discretion should not fetter its own discretion by adopting an approach that brooks no departure except in exceptional circumstances. It must decide each case upon considering all the relevant features, without adopting a predisposition to or against granting security.

[21] An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.[17] When sanctioning a departure from the statutorily ordained default position, i.e., voidness of the disposition, a court must guard against a result that would undermine the underlying purpose of the provision.[18]

[22] *Mazars stated that a court hearing an application in terms of the proviso to section 341(2) to validate a payment* has a wide discretion. It referred to *Diener NO v Minister of Justice and Correctional Services and Others,*[19] where it was stated that *"For these reasons, I conclude that s 135(4) and s 143(5), whether taken individually or in tandem, do not create the 'super-preference' contended for on behalf of Diener. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-*

[16] Para 31.
[17] Para 23.
[18] Para 25.
[19] 2018 (2) SA 399 (SCA) para 49. Even though the case dealt with the practitioner's remuneration, the principle is applicable to the facts at hand.

commencement finance, whether those claims were secured or not, and of any other unsecured creditors."

[23] Section 135 concerns itself with post-commencement finance, and only in that context, whilst business rescue proceedings are in place, does it create a set of preferences.[20] Once a BRP decides that a company can no longer be saved, the purpose of business rescue ends. At that point, all relevant interests need to be considered in light of the applicable provisions of the 1973 and 2008 Acts and the Insolvency Act 24 of 1936.[21]

[24] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited,*[22] it was stated that:

"To decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply-rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply."

[25] The court stated further that a discretion in the true sense is found where the lower court has a wide range of equally permissible options. This type of discretion has been found to include matters of costs and damages. The lower court has an election of which option it will apply, and any option can never be said to be wrong as each is entirely permissible.

[26] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, a discretion in the loose sense means no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision.[23]

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[20] Mazars, supra, para 26.
[21] Mazars, supra, para 29.
[22] 2015 (5) SA 245 (CC) para 83.

[23] Para 86.

[27] Each case must be dealt with on its own facts and particular circumstances. It is therefore appropriate to have a peek at the background to assess and ascertain the discretion exercised.

Brief background (4220 and 4221/20221)

[28] On 30 October 2018 the Business Rescue Plan was published and adopted on 13 November 2018. On 06 December 2018 an amended Business Rescue Plan was distributed. The proposals for the financial recovery of the company were as follows:

"2.1 *Financial restructuring*

2.1.1 *That the constraints on working capital of the Company will be removed by converting the overdraft facility of FNB into a long-term loan with payments as prescribed over 10 years by a participating financial institution..*

2.1 2 *To ensure the security of the loan, it is proposed that Desert Wind Properties apply for the bond (amount to be advanced R9,461,097.01) using the farm Roodevloer (Valued at R 14,100,000) as security. Desert Wind Properties then provide a loan spread over 5 months (until May 2019) to the Company to progressively pay back the high interest-bearing overdraft and PCF finance.*

2.1.3 *From working capital and the yearly harvest income (starting in 2019) the Company will pay Desert Wind Properties the yearly bank bond instalments starting in October 2019, to coincide with the proceeds of the harvests.*

2. 1.4 *That short-term post commencement finance (min. R 1,500,000.00) will be made available to be used for input expenses of the 2018 / 2019 planting season. Repayment of the PCF will be done according to prescribed preferences first and in such a way that enough working capital is left over from the 2019 harvest of peanuts (beans) and maize that the next season can be started without any short-term debt.*

2.1.5 *The first dividend payable to creditors will commence in April 2020 after the harvest and be equal to 33% of the outstanding amount, The next year (2021) the remaining debt will be settled in two equal payments to ensure a 100% payback of the debt at the commencement of business rescue proceedings.*

Conditions

2.2.1 *It is also proposed that the negotiations with any willing and participating financier, regarding the overdraft conversion to a long-term-bond and securing of a short term*

PCF for the current planting season; to be completed within 90 days of adopting the business rescue plan.

2.2.2 *Failing to renew any of the two the conditions (PCF or the conversion of the overdraft) as set out in this business rescue plan by the 90-day deadline, it is proposed that the business rescue proceedings change to a controlled rescue to ensure all creditors receive a better return than in liquidation from which concurrent creditors may expect 2,59 c/Rand and secured creditors 21.38 c/Rand.*

2.3 *Benefits for creditors*

2.3.1 *In the proposed turnaround scenario all claims of creditors, whether secured or unsecured, will be paid in full over a period starting from 2020 until 2021 from the proceeds of the stabilised and ongoing operations of the Company.*

2.3.2 *Failing to meet the conditions set out above all payments to the creditors during the controlled wind down period will be compromised and will be completed during 2019 from the sale of movable and fixed property."*

[29] On 13 February 2019, the 90 days in the adopted Business Rescue Plan for converting Golden Ribbon's existing overdraft facility to a long-term loan and acquiring post-commencement finance lapsed. On 21 February 2019, the BRP published a status report confirming that the 90-day period had lapsed without the conditions being met. That business rescue would convert to a controlled rescue that would result in a better return for the creditors than an immediate liquidation of the company, i.e. the selling of the assets and distributing the dividends to the different classes of creditors as set out in the business rescue plan.

[30] On 29 April 2019, the BRP published a further Business Rescue Plan status report stating that due to the unfortunate late rains, the income projections from the harvest would only be realized later than the 90 days stated in the Business Rescue Plan. He would seek the approval of the creditors to extend the period beyond May to ensure the income from the harvest could be used for the creditors' dividends. At this stage, there was friction between Golden Ribbon's directors and the BRP as the former called for his resignation.

[31] On 14 May 2019, the respondents' attorneys addressed a letter to the BRP communicating that the respondents supported the Business Rescue Plan, that they would be paid all outstanding rentals out of the first proceeds realized from the harvests, and that the respondents would supervise the removal of the crops planted on their land. The outstanding rentals to each respondent were R 490 360.00 for Magnus Boerdery, R 698 469.51 for Jooste, and R 220 998.23 for Malan. These amounts were paid on 26 July 2019.

[32] On 04 June 2019, the BRP sent a notice convening a special creditors' meeting for 14 June 2019 to vote on an extension of the 90 days provided for in the Business Rescue Plan to 21 July 2019 to enable the crops to be harvested. On 11 June 2019, the BRP cancelled the scheduled special creditors' meeting as the First National Bank (FNB) indicated it would be applying to liquidate Golden Ribbon. On 17 July 2019, FNB launched the application for the winding of Golden Ribbon. On 25 July 2019, the BRP published a status report notifying the affected parties of the pending FNB liquidation application and that all the litigating parties agreed that harvesting the grain crops needed to continue for the benefit of all the creditors. The following amounts of R 490 360.00, R 698 469.51 and R 220 998.23 were paid to the respondents on 26 July 2019.

[33] On 26 and 29 August 2019, correspondence between the BRP and Magnus was exchanged for the payment of R 21 632.82 concerning the lease. The amount was paid on 04 September 2019. On 10 October 2019, an order was granted to terminate the business rescue and wind up the company.

Discussion

[34] The respondents held the view that the BRP conducted the affairs of the company until 10 October 2019, the earliest date of the liquidation.[24] The payments from the proceeds of the crops exceeded the rental substantially, with the result that the Trust's preferred claim had to be paid in full with interest without any obligation of contributing to the cost of liquidation, which had to be

[24] Paragraphs 20.2 and 20.3 of the AA.

paid out of the free residue in the liquidation proceedings.[25] The BRP regarded the payment to the first respondent as post-commencement finance, as provided for in section 135 of the Companies Act 71 of 2008.[26] The first respondent was "*a super secured and preferred creditor.*"[27] It was fair and equitable that the landlords were paid for the amounts owed.[28]

[35] The basis of the counter-application was that the proceeds of the crops were more than R 7 600 000.00, to the benefit of all creditors, and far exceeded the rentals and production costs. It would be unfair to force the trust to repay whilst the company and the creditors had already benefitted from the proceeds of the crops.[29] The willingness of the respondents to proceed with the lease agreement for the planting of the crops was not to secure an advantage for themselves but for the advantage of all the creditors in the company's business rescue.[30] The BRP was positive and confident that the business rescue proceedings might succeed and secure a better dividend for the company and creditors.[31]

[36] It is crystal clear from a perusal of the authorities that section 341(2) seeks to prevent a company being wound up from dissipating its assets and thereby frustrating the claims of its creditors. A court will refuse to validate a disposition by the company after the winding up has commenced unless the liquidator has consented and there is a benefit to the company or its creditors. It is common cause that the respondents were aware that the company was in financial difficulties and that a winding-up application was lodged before the payments were made.

[37] The court a quo found that when the payments were made, the respondents had preferent and secure claims acknowledged by everyone concerned, including the FNB and the BRP. Consequently, the court a quo could come to

[25] Paragraph 23.2 of the AA.
[26] Para 23.1 of the AA.
[27] Para 26.4 of the AA.
[28] Paragraph 23.3 of the AA.
[29] Paras 33.9 33.10.
[30] Para 33.11.
[31] Para 33.12.

no other conclusion than that the payments were, at the time, bona fide. This approach is incorrect and a misstatement of the law. When the payments were made, the FNB had already notified and filed the liquidation application. At the time of the presentation to the court of the application for the winding-up of the company, the respondents' claims did not enjoy any preference. The claims had to rank with the other claims in the free residue account. The payments at the time were not bona fide.

[38] It is noteworthy that when the rental payments of 26 July 2019 were made, the BRP confirmed in a letter that his attorneys had warned the respondents of the risks linked to the payments in light of the liquidation application.[32] These payments could never have been made in the ordinary course of business, save to prefer one creditor to another.

[39] The court was influenced by the respondents' attorney's letter, stating that they had a lien over the crops planted on their land and wished to exercise it. The court accepted that the respondents' claims were R1 409 827.24, and the estimated crop income was R7 515 576.00. The BRP's payment of the claims "*appeared*" to the court to be made to the whole of the creditors' advantage to obtain the crop's proceeds. These facts convinced the court to validate the dispositions. In the court's view, it would be improper for a debtor to give up his security and have him repay the amount paid to him by the BRP when liquidation occurs. The authorities mentioned above do not support this view.

[40] The court failed to consider the appellants' answering and replying affidavits, stating that the crop income did not exceed the expenses and that the respondents were preferred more than the other creditors as they were excluded from the responsibility of paying the liquidation costs.

[41] In response to the counter-application, the appellants pointed out that the payments to the respondents were made out of the deemed date of liquidation. The agreement with the BRP was of no consequence as the respondent's

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[32] Annexure "FA 9" to the Founding Affidavit.

claims had to be dealt with according to the provisions of the Insolvency Act. They conveyed that the BRP's continued cultivation of the crops was not following the approved business rescue plan, and the controlled wind-down of the company did not occur. Consequently, the BRP incurred expenses and liabilities for the company over seven million rands. The court, therefore, erred in finding that the appellants failed to dispute the allegations that the crop income exceeded the rental in their reply.

[42] It was pointed out in *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (In Liquidation)*[33] that s341(2) does not empower the court to validate an unlawful, invalid, or otherwise unauthorized transaction. The disposition must be initially lawful and valid for the court to intervene in s341(2). The court held that the purpose of s341 (2) is to address the anomaly that occurs due to the retrospective invalidation of dispositions by a company that were initially lawful and valid.

The Malan Judgment

[43] The court a quo agreed with the outcome of the Magnus and Jooste judgment.[34] The court found that Mr Badenhorst, the liquidators' attorney, acted for Golden Ribbons and its director, the late Mr WHJ Viljoen, at all relevant times during the business rescue proceedings. The executor's version, the respondent in this appeal, that the late Mr Viljoen, Mr Badenhorst, and the major creditor, First National Bank, were fully aware of and consented to the farming operations embarked upon on Weltevreden must be accepted as common cause and that the proceeds of the crops, being the security of the deceased landlord, exceeded the claim for rental by far. The proceeds from the deceased's farm, Weltevreden, were predicted to be about R1.2m, compared to the rental due of R222 000.00.

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[33] [2015] 1All SA 324 (GJ).

[34] Paragraph 46 of the judgment.

[44] Having found that the payment was a disposition falling within the purview of s 341(2), the only issue to be determined was whether the payment should be validated. In arriving at its conclusion, the court stated the following:

*"[42] It is apparent that not much is in dispute. I set out the history of the litigation and the undisputed facts above. It is now my task to exercise a discretion based on the facts presented to me and after considering the parties' submissions, the legislation and authorities quoted. In doing so I accept that the court has a wide discretion as confirmed by Ponnan JA in Mazars quoted above. It is also apposite to consider the guidelines provided in Lane NO v Oliver Transport quoted earlier. I accept that it is impossible to lay down general rules and that a court should be slow to make orders that avoid the objects of the legislature as contained in legislation, to wit **s 341(2)** in this instance. Having said this, a balance must be struck when considering the rights of the executor in casu on the one hand and the creditors of Golden Ribbon on the other. Fairness, good faith and an honest intention should be of paramount importance. An inequitable result should, if at all possible, be prevented.*

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

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

[45] In the exercise of my discretion I have special regard to the role Mr Badenshorst has played, first of all in executing the late Mr Viljoen's mandate, and the role that he is now playing as the attorney for the liquidators, the role played by the late Mr Viljoen and perhaps also his son with the same initials, they being the only directors of Golden Ribbon at the time. The deceased's farm was utilised to generate profit for the Viljoens' company. In my view good faith and an honest intention are apparent from the manner in which the business rescue practitioner and the deceased acted throughout. A balance should be struck between the rights of Golden Ribbon's creditors and that of the executor in these particular circumstances. Justice and fairness require that the executor shall not be ordered to pay back that which has been received. The payment by the business rescue practitioner in the amount of R222 998.23 shall be validated." (my emphasis)

[45] It is unclear why the court stated that the BRP followed an incorrect business procedure in the business rescue proceedings as it refrained from discussing the aspect. It is indeed so that the planting of the crops would have benefitted the creditors as envisaged by the approved business rescue plan. The crops were planted in January and were not ripe as of 13 or 21 February 2019 when the initial 90 days lapsed, and the BRP advised the creditors that the conditions were not met. The general body of creditors did not approve any amended business rescue plan until the BRP paid the respondent in July 2019. This payment was unauthorised. The BRP knew he did not have all the creditors' support; the company was financially distressed; the winding-up application was filed, and the payment was made when a *concursus creditorum* was deemed to have come about.

[46] It would appear as if the court's focus on exercising its discretion was on the legitimacy of the lease agreement that the crops yielded substantial proceeds that far exceeded the rental and that the deceased's farm generated profit for Viljoen's company, Golden Ribbon. This approach lost track of the underlying principle that the object of s 341(2) is to prevent the improper alienation and dissipation of the company's assets while the winding-up application is pending and to ensure that its creditors are paid *pari passu.*

[47] It is clear from the judgment that the court had misgivings about how the BRP handled the business rescue proceedings. It is also clear that the BRP did not have the support of the general body of creditors, hence the unapproved

amended business rescue plan. The BRP is responsible for implementing the adopted business plan. [35]He must not unilaterally amend the plan. Any material amendments should be done after consultation with the creditors and other affected persons. He must then prepare and publish the amendments and allow the creditors to vote on the amendments. In the present circumstances, he failed to do so. As correctly pointed out by the appellants, he was, as of 13 February 2019, on a frolic of his own. He failed to implement the adopted plan.

[48] The exercise and scope of the court's discretion is illustrated in *Lane.*[36]The scope for the discretion is itself a clue to the limitation; it is exercised in favour of that ensnared creditor only if, by so doing, the general body of creditors is not disadvantaged by a diminution of assets to divvy up among them.[37]

Conclusion

[49] For this judgment, I proceeded from the premise that a valid counter-application was filed in the Malan application. Considering that the payments were not bona fide and not made in the ordinary course of business but to secure an advantage to a particular creditor in the winding-up, I find that the courts *a quo* erred in dismissing the appellants' main applications and granting the relief envisaged in section 341(2) of the Companies Act 61 of 1973, to validate the payments made to the respondents.

[50] I therefore make the following order:

Order:

1. The appeals are upheld with costs, inclusive of the costs of the applications for leave to appeal;

2. The orders of the Courts *a quo* are set aside and replaced with the following orders:

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[35] Section 140(1)(d) Act 71/2008.
[36] Supra.
[37] Engen, supra.

2.1 the payments made to the Respondents are void as contemplated in section 341 (2) of the Companies Act;

2.2 the Respondents' counter applications are dismissed with costs,

2.3 the Respondents are ordered to re-pay the amounts that were paid to the Respondents by the business rescue practitioner and

2.4 the respondents are ordered to pay the application costs.

[redacted]

MHLAMBI, J

I concur,

[redacted]

LOUBSER, J

I concur,

[redacted]

DANISO, J

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