



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 4990/2021

In the matter between:

ELRICH RUWAYNE SMITH NO

FIRST APPLICANT

ETHNE MARY VAN WYK NO

SECOND APPLICANT

[In their respective capacities as liquidators of
Trackstar Trading 140 (Pty) Ltd (in liquidation),
Master of the Free State High Court, Bloemfontein, reference
Number: B111/2019]

and

DANIËL THEODORUS VAN JAARSVELD

FIRST RESPONDENT

**THE MASTER OF THE FREE STATE HIGH
COURT, BLOEMFONTEIN**

SECOND RESPONDENT

Neutral citation: *Smith NO and Another v Van Jaarsveld and Another* (4990/2021)

[2025] ZAFSHC 189 (26 June 2025)

Coram: Ntanga AJ

Heard: 27 March 2025

Delivered: 26 June 2025

Summary: Civil procedure – liquidation of company – whether payment of invoices to the business rescue practitioner void in terms of s 341(2) read with s 348 of the Companies Act 61 of 1973 – whether payment to the business rescue practitioner was undue preference over other creditors.

ORDER

- 1 The payments made in the total sum of R387 287.23 made by Trackstar Trading 140 (Pty) Ltd (in liquidation) to the first respondent during the period of November 2019 to December 2019 are void as contemplated in section 341 (2) of the Companies Act and are set aside;
- 2 The first respondent is ordered to forthwith re-pay to the applicants the amount of R387 286.23 that was paid to the first respondent;
- 3 The first respondent is ordered to forthwith make payment of interest of the amount of R387 286.23 to the applicants calculated as follows:
 - 3.1 in respect of the amount of R150 121.59, interest thereon a *tempore morae* as from 29 November 2019 up until date of payment, both days inclusive;
 - 3.2 in respect of the amount of R236 164.64, interest thereon a *tempore morae* as from 4 December 2019 up until date of payment, both days inclusive;
- 4 The first respondents' counter application is dismissed with costs on a party and party scale including costs of counsel on scale C; and
- 5 The first respondent is ordered to pay the applicants' costs on a party and party scale including costs of counsel on scale C.

JUDGMENT

Ntanga AJ

Introduction

[1] The applicants instituted an action against the respondents for an order declaring payments in the total sum of R387 286.23 made by Trackstar Trading 140 (Pty) Ltd (in liquidation) (Trackstar) to the first respondent during the period of November 2019 to December 2019 to be void in terms of s 341(2) of the Companies Act 61 of 1973 (Companies Act) and set aside these payments. The applicants further seek an order for payment by first respondent to the applicants in the sum of R387 286.23 with interest.

[2] The applicants were appointed by the Master of the High Court as liquidators of Trackstar. The first respondent practices as a business rescue practitioner and is a former business rescue practitioner of Trackstar.

[3] The respondents filed a counter-application for an order dismissing the main application and a declaration in terms of s 341(2) of the Companies Act that the payments made by Trackstar to the first respondent in the sum of R150 121.59 and R236 204.52 made on November 29, 2022 and December 4, 2022 respectively as payment of the first respondent's outstanding business rescue fees and disbursements, were validly made.

Issues for determination

[4] This court is called upon to determine: (a) whether payment of the sum of R387 286.23 constituted disposition in terms of s 341(2) of the Companies Act; or (b) declare that payments to first respondent of the sum of R150 121.59 and R236 204.52 made on November 29, 2022 and December 4, 2022 respectively as payment of the first respondent's outstanding business rescue fees and disbursements, as validly made.

The applicants' case

[5] The applicants averred that, by operation of law, and in execution of their duties as liquidators, they are duty-bound to recover repayment of the sum of R387 286.20 from the first respondent. It was also submitted in the founding affidavit that, at initiation of these proceedings, no validation order was granted or sought by the first respondent in respect of the payments received by the first respondent from Trackstar. The applicants averred that this payment constituted a preference of the first respondent above other creditors of the liquidated estate and that the payment is void in law.

[6] The applicants argued that 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. It was further argued that the court should investigate whether the disposition was made to keep the company afloat, or augment its assets. The applicants submitted that 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.

[7] The applicants further requested the court to enquire whether the first respondent was unaware of the filing of the application for winding-up or the fact that the company

was in financial difficulties. They argued further that little weight should be attached to the hardship which will be suffered by the first respondent if payment is not validated, and that the purpose of the subsection is to minimise hardship to the body of creditors generally and not individual creditors. The applicants argued that the payment should not be looked upon as an isolated transaction if, in fact, it forms part of a series of transactions. It was further argued by the applicants that, generally, a court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced, unless the liquidator consents accordingly and there is a benefit to the company or its creditors.

The first respondent's case

[8] The first respondent averred that, after the liquidation application was issued but before a provisional liquidation order was granted, Trackstar paid the business rescue fees and disbursements in the sum of R387 286.23 to the first respondent and subsequently, Trackstar was liquidated. The first respondent argued that the court has a wide discretion to validate payments which involves, consideration of a balance to be struck between the rights of the recipient of any payment on the one hand and the creditors of the estate on the other. This should be done to prevent inequitable result. The first respondent disputed the applicants' submission that payments made to him constituted preference above other creditors.

[9] In the counter-application, the first respondent set out the brief background and circumstances which led to Trackstar being placed under business rescue. This includes process followed by first respondent after appointment as Trackstar's business rescue practitioner as well as the business rescue plan which he set in operation. He summarised activities he undertook in execution of his duties as the business rescue plan practitioner of Trackstar, including monthly reports to creditors. He continued by setting out details of fee agreement for payment of his fees and averred that, unfortunately, during business rescue process, the company did not have cashflow to pay his fees on a weekly basis and he decided to render monthly invoices instead.

[10] It is common cause that first respondent, in his capacity as business rescue practitioner, opposed the liquidation application. He avers that, at the time, he held a firm

belief that business rescue proceedings would yield the best possible results for the company. The first respondent avers that, during preparation of the answering affidavit opposing the liquidation application, he gained knowledge of facts which indicated possible fraudulent conduct of Mr Du Preez in his dealings with Trackstar. Subsequently, he formed the opinion that the business rescue proceedings be converted into liquidation proceedings and, on 26 November 2019, he informed the creditors after which he withdrew the opposition of the liquidation application.

[11] It is common cause that the application to place Trackstar under final liquidation was launched on 17 October 2019 and that an order placing Trackstar under final liquidation was granted on 5 December 2019. The applicants were appointed as liquidators on 22 January 2020. The two payments were made to first respondent after the liquidation application was launched, but before the liquidation order was granted. The last payment was made on 4 December 2019, a day before the liquidation order was granted.

Legal framework and analysis

[12] Section 341(2) of the Companies Act provides that:

'Disposition and share transfers after winding-up void.

(1) . . .

(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.'

[13] The purpose of s 341(2) of the Companies Act is to protect the assets of a company facing possibility of winding-up from being dissipated prior to the commencement of winding-up which ought to be available to satisfy the claims of creditors and who are entitled to equal treatment, subject to preference ranking as prescribed by applicable law.¹ Regarding payments made during the period between the application for winding-up and granting of the order placing the company under final winding-up, the party seeking an order validating payment bears the onus to establish circumstances justifying such validation.²

¹ *Carrim N.O and Others v BP Southern Africa Proprietary Limited and Another* [2025] ZAGPPHC 42 para 20; see also *Muller N.O and Another v Cultigrain (Pty) Ltd* [2025] ZAWCHC 115.

² *Symes and Another v De Vries Attorneys Incorporated and Another* [2023] ZAGPJHC 777; see also *Lane NO v Olivier Transport* 1997 (1) SA 383 (C).

[14] Section 348 of the Companies Act provides that:

'Commencement of winding-up by Court -

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] When interpreting the meaning of s 348 of the Companies Act, the Court, in *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)*,³ stated that:

'The "commencement" of a winding up is, in terms of section 348, the date the application was filed or presented to court.'

When applying the provisions of s 348 of the Companies Act and case law, the effective date of winding up of Trackstar is 17 October 2019.

[16] In *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Diary (Pty) Ltd (in liquidation) and Others (Mazars Recovery)*,⁴ the Supreme Court of Appeal dealt with payments made to the business rescue practitioners in respect of their fees and remuneration, after an application to convert rescue proceedings to liquidation proceedings, but before the final winding-up order. The Court stated that:

'Section 341(2) dictates that every disposition made after the commencement of the winding-up is void, unless the court orders otherwise. Thus unless a creditor avails him or herself of the remedy provided in the proviso in s 341(2) (which the appellants chose not to do in this case), payments made after the commencement of the winding-up are void. However, a BRP is not remediless: First, and most obviously, a BRP may approach a court in terms of the proviso to s 341(2) to validate a payment. A court hearing such an application has a wide discretion. Second, and naturally, the BRP enjoys a preference in the ranking of creditors in the winding-up. That preference was considered in *Diener* – a BRP ranks after the costs of the liquidation, but before all other creditors. A BRP enjoys substantial preference.'⁵

[17] In *Pride Milling Company (Pty) Ltd v Bekker NO and Another (Pride Milling)*,⁶ which was followed in *Mazars Recovery*, the Court stated that:

³ *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)* [2014] ZAGPJHC 273; [2015] 1 All SA 324 (GJ); 2015 (6) SA 21 (GJ) para 2.

⁴ *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Diary (Pty) Ltd (in liquidation) and Others* [2022] ZASCA 135; 2023(1) SA 398 (SCA) (*Mazars Recovery*).

⁵ *Ibid* para 28.

⁶ *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2020] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) (*Pride Milling*) para 30.

'The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law i.e. the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.'

[18] In *Macneil Plastics (Pty) Ltd v Van den Heever NO and Others*,⁷ the Court considered payments made after commencement of liquidation proceedings were validated by the subsequent order placing the company in business rescue in terms of s 131(6) of the Companies Act 71 of 2008. In consideration of the facts of the case, the Court observed that the company was wound-up on 28 October 2015 and that it was unable to pay its debts on that date and thereafter. The company's inability to pay its debts, therefore, existed when it was wound up and when the payments in question were made. The Court found that the payments made by the company on 2 November 2015 therefore constituted a disposition of its property after the commencement of its winding-up within the meaning of s 341(2) of the Companies Act.⁸

[19] I have set out the chronology of events in the instant case. It is not in dispute that the application for placing Trackstar under final liquidation was launched before the payments to the first respondent were effected. The second payment was effected a day before the order placing Trackstar under final liquidation was granted. The first respondent was aware of liquidation proceedings as it initially participated by opposing the application and later withdrew its opposition after it gained knowledge of information that persuaded it that liquidation process may be the suitable way of dealing with the company's challenges.

[20] It appears that, at the time payments were effected, and notwithstanding that liquidation process had commenced, the first respondent believed that he was entitled to receive payment for his fees as a business rescue practitioner. It seems that first respondent formulated a view that payment of fees due to the business rescue

⁷ *Macneil Plastics (Pty) Ltd v Van den Heever NO and Others* [2024] ZASCA 181.

⁸ *Ibid* para 9.

practitioner is valid any time prior to the order placing the company under liquidation. This view is not supported by any authority.

[21] It was argued on behalf of the first respondent that the question is whether the business rescue practitioner acted *bona fide* and that it would have been *mala fide* if he paid himself without doing the work. There was no dispute raised on whether the first respondent performed his duties as a business rescue practitioner or not. What the applicants seek is for this court to make a finding that payments made to the first respondent are a disposition within the framework of s 341(2) of the Companies Act and that this is a void disposition. The issue to be determined is whether payments made to the first after commencement of winding-up proceedings, is a disposition within the scope and framework of s 341(2) of the Companies Act and void.

[22] The applicants argued that, whilst knowing existence of the liquidation application and applicable legislation, the first respondent decided to make payment to himself. The applicants submitted that the default position is that the payment made to the first respondent is void, arguing that the issue is whether the payment was made in the ordinary course of business. It is trite that liquidation commences at the time of launching the liquidation application. As at the time payment was effected to the first respondent, the wheels of liquidation process were set in motion. Having stated the default position regarding commencement of liquidation process, my view is that the default position regarding provisions of s 341(2) of the Companies Act should prevail in relation to payments made to the first respondent. My finding is that these payments made to the first respondent are a disposition as contemplated in s 341(2) of the Companies Act and that they are void. The Court, in *De Wet & Others v Opis Advisory (Pty) Limited & Others*,⁹ followed the decision of *Eravin Construction CC v Bekker NO and Others*¹⁰ where the Court stated that:

‘The question to be answered in this case is thus when the debt was owed. That must be answered in the first instance with reference to s 341(2) of the old Act. It states expressly that a disposition in the terms contemplated by it ‘shall be void’. The recipient has no right, this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.’

⁹ *De Wet & Others v Opis Advisory (Pty) Limited & Others* [2024] ZAGPJHC 1769 para 13.

¹⁰ *Eravin Construction CC v Bekker NO and Others* 2016 (6) SA 589 (SCA) para 21.

[23] Having made a ruling that payments made to the first respondent are a disposition as contemplated in terms of s 341(2) of the Companies Act, the first respondent is not without remedy. Firstly, he has an option to approach the court for validation of the payments made to him. Secondly, the first respondent's claim as a business rescue practitioner ranks in priority before the claims of all other secured and unsecured creditors.

[24] It was argued, on behalf of first respondent, that it serves no purpose for the liquidator to claim payment from the business rescue practitioner and pay it back. The issue is not about convenience to either of the parties but application of the existing legal position. The court has a discretion to determine whether the payments should be validated as contemplated in s 341(2) of the Companies Act. The first respondent has elected to approach this court for an order validating payments made to it and filed a counter application. In *Pride Milling*, the Court followed the decision of *Lane NO v Olivier Transport*,¹¹ where the court listed factors to be taken into consideration when exercising the court's discretion as follows:

'The question which arose for decision in the *Herrigel* case, and which arises in this case is the circumstances under which the discretion is to be exercised, if the discretion is to be exercised at all. I set out hereunder a summary of the guidelines for the exercise of the discretion, namely:

- (a) The discretion should be controlled only by the general principles which apply to every kind of judiciary discretion.
- (b) Each case must be dealt with on its own facts and particular circumstances.
- (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.
- (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.
- (g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets.

¹¹ *Lane NO v Olivier Transport* 1997 (1) SA 383 (C) at 386B-387B.

- (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.
- (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.
- (j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally.
- (k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions.
- (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.'

[25] I was referred to a decision of the full bench of this division in the matter of *Smith N.O and Another v Magnus N.O and Others; Smith NNO and Another v Jooste and Another; Smith NNO and Another v Malan NO and Another (Appeals)*,¹² where the court considered a consolidated appeal and the primary issue for consideration was 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 s 341(2) of the Companies Act. The court stated that:

'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 liquidators 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.'¹³

[26] Regarding exercise of a court's discretion in validating payments, the court stated that '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

¹² *Smith NNO and Another v Magnus NNO and Others; Smith NNO and Another v Jooste and Another; Smith NNO and Another v Malan NO and Another (Appeals)* [2025] ZAFSHC 73.

¹³ *Ibid* para 36.

means no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision'.¹⁴

[27] The court restated the principle that the object of s 341(2) of the Companies Act 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*. Following the decision in *Lane*, the court stated that:

'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.'¹⁵

[28] The court, in the matter of *Smith N.O and Another v Magnus N.O and Others; Smith NNO and Another v Jooste and Another; Smith NNO and Another v Malan NO and Another* overturned the court *a quo*'s decisions and found that the court *a quo* erred in dismissing the appellants' main application and granting the relief sought in s 341(2) of the Companies Act to validate the payments made to the respondents. The court set aside the court *a quo*'s decision and replaced the decision with a declaration that payments made to the respondents are void as contemplated in s 341(2) of the Companies Act. The court also dismissed the counter applications.

[29] The respondents argued that there is a distinction between the authorities referred as there was no counter application in the *Mazars Recovery* judgment. The first respondent referred to the provisions of s143 (5) of the Companies Act which provides that the business rescue practitioner's claim will rank in priority before the claims of all other secured and unsecured creditors. The first respondent argued that business rescue supervision of a company, once commenced, only ends when a court sets aside a resolution by the board of a company or when a court orders the company to be placed in liquidation, in accordance with the provisions of s 132(2)(a) of the Companies Act of 2008. The first respondent further argued that, for that, he is still entitled to remuneration. This court's duty is to determine whether such remuneration fall within the framework of s 321(2) of the Companies Act as a disposition and if so, whether such a disposition is void.

¹⁴ Ibid para 26.

¹⁵ Ibid para 48.

[30] Regarding provisions of s 143 of the Companies Act, the Court, in *Mazars Recovery*, followed the decision of *Diener N.O. v Minister of Justice and Correctional Services and Others*,¹⁶ where the Supreme Court of appeal stated that:

'Section 143 is also not concerned with liquidation. Instead, it regulates the BRP's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP's are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP's claim for unpaid remuneration, which ranks "in priority before the claims of all other secured and unsecured creditors". The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg's commentary, referred to in paragraph 37 above, seen in proper perspective is consonant with that conclusion.'

[31] I have set out the chronology of facts and facts in common cause above. I now must exercise a discretion based on the facts presented on paper and oral submissions. After considering the parties' submissions, the legislation and case law herein referred, it is trite that the court has a wide discretion, as confirmed by case law referred to herein above. I have considered the guidelines referred to herein above. As pointed out, there is no general rule and courts are cautioned to be slow in making orders that will contradict the intention of the legislature as ordained in s 341(2) of the Companies Act. I have a duty to balance the interests of both the applicants and first respondent as well as the general body of the creditors to achieve equitable results.

[32] To sum up the chronology of events, the application for liquidation was launched on 17 October 2019, an order placing Trackstar under final liquidation was granted on 5 December 2019. The two payments to first respondent were made after the liquidation application was launched, but before the liquidation order was granted. The last payment was made on 4 December 2019, a day before the liquidation order was granted. The first respondent was aware of the liquidation application when payments were made to him. The payment to the first respondent was undue preference over other creditors of the

¹⁶ *Diener N.O. v Minister of Justice and Correctional Services and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) para 43.

company. In my view, and considering these facts, I do not think this court will be justified to validate the void disposition.

[33] Having regard to the facts and case law set out above including a decision of the full bench of this division, I am not persuaded that I should exercise the discretion vested in me to validate the void disposition and I decline to do so. The counter-application must therefore fail.

Costs

[34] The general rule is that the successful party should be granted costs. This rule should not be departed from unless there are grounds for doing so. I see no reason to depart from this rule. The first respondent should therefore pay the applicants' costs.

Order

[35] In the circumstances, I make the following order:

- 1 The payments made in the total sum of R387 287.23 made by Trackstar Trading 140 (Pty) Ltd (in liquidation) to the first respondent during the period of November 2019 to December 2019 are void as contemplated in section 341(2) of the Companies Act 61 of 1973 and are set aside;
- 2 The first respondent is ordered to forthwith re-pay to the applicants the amount of R387 286.23 that was paid to the first respondent;
- 3 The first respondent is ordered to forthwith make payment of interest of the amount of R387 286.23 to the applicants calculated as follows:
 - 3.1 in respect of the amount of R150 121.59, interest thereon a *tempore morae* as from 29 November 2019 up until date of payment, both days inclusive;
 - 3.2 in respect of the amount of R236 164.64, interest thereon a *tempore morae* as from 4 December 2019 up until date of payment, both days inclusive;
- 4 The first respondents' counter application is dismissed with costs on a party and party scale including costs of counsel on scale C; and
- 5 The first respondent is ordered to pay the applicants' costs on a party and party scale including costs of counsel on scale C.


 NTANGA AJ

Appearances

For the applicants: P Zietsman SC
Instructed by: Phatshoanehenny Attorneys, Bloemfontein

For the first respondent: PJJ Zietsman SC
Instructed by: Tintingers Incorporated, Pretoria
c/o Honey Attorneys, Bloemfontein.