

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 34782/19 and 2023-03612

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

8/8/2025
DATE

SIGNATURE

In the matter between:

SYMES N.O, MARYNA ESTELLE

First Applicant

MEDUPE N.O, TSEPO

Second Applicant

MOOLLAJIE N.O, ABDURUMAN

Third Applicant

*[In their capacity as Joint Liquidators
of Over-All Express (Pty) Ltd (in liquidation)]*

and

AUTO AND TRUCK TYRES (PTY) LTD

First Respondent

JOHN ROBERT CHARLES BEAUMONT

Second Respondent

JOHN DEON AUBY

Third Respondent

**MJB ROAD FREIGHT (PTY) LIMITED
t/a PREMIER LOGISTICS SOLUTIONS**

Fourth Respondent

DALY MAQUBELA OLIPHANT INCORPORATED

Fifth Respondent

IN RE:

In the matter between:

Case No: 34782/2019

SYMES N.O, MARYNA ESTELLE

First Plaintiff

MEDUPE N.O, TSEPO

Second Plaintiff

MOOLLAJIE N.O, ABDURUMAN

Third Plaintiff

*[In their capacity as Joint Liquidators
of Over-All Express (Pty) Ltd (in liquidation)]*

and

AUTO AND TRUCK TYRES (PTY) LTD

Defendant

AND

In the matter between:

Case No: 2023-038612

SYMES N.O, MARYNA ESTELLE

First Plaintiff

MEDUPE N.O, TSEPO

Second Plaintiff

MOOLLAJIE N.O, ABDURUMAN

Third Plaintiff

*[In their capacity as Joint Liquidators
of Over-All Express (Pty) Ltd (in liquidation)]*

and

AUTO AND TRUCK TYRES (PTY) LTD

First Defendant

JOHN ROBERT CHARLES BEAUMONT

Second Defendant

JOHN DEON AUBY

Third Defendant

MJB ROAD FREIGHT (PTY) LIMITED
t/a PREMIER LOGISTICS SOLUTIONS

Fourth Defendant

DALY MAQUBELA OLIPHANT INCORPORATED

Fifth Defendant

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 14h00 on 8 August 2025.*

JUDGMENT

JE SMIT AJ

- [1] This is an application for the consolidation of two actions instituted by the joint liquidators of Over-All Road Express (Pty) Limited (in liquidation) (ORE).
- [2] ORE was liquidated by special resolution registered with the Companies and Intellectual Property Commissioner (CIPC) on 5 December 2018. On 24 April 2019, the voluntary liquidation was converted into a compulsory liquidation by order of Court.
- [3] The first action was instituted in or about October 2019 under case number 34782/19. The defendant is Auto and Truck Tyres (Pty) Limited (*Auto*).
- [4] The second action was instituted in or about April 2023 under case number 2023-038612. The defendants are John Robert Charles Beaumont (*Beaumont*), John Deon Auby (*Auby*), MJB Road Freight (Pty) Limited t/a Premier Logistics Solutions (*Premier*) and Daly Maqubela Oliphant Incorporated (*DMO*).
- [5] For the sake of convenience, the applicants will be referred to as the plaintiffs and the respondents as the defendants.
- [6] In both actions, the plaintiffs claim from the defendants the setting aside of certain payments made by ORE, in terms of s26(1)(b) of the Insolvency Act 24 of 1936 (*the Insolvency Act*).
- [7] It is uncontroversial that, save for a payment of 4 July 2018 in the amount of R70,000.00, the plaintiffs' claims against the defendants concern the exact same payments made by ORE.
- [8] In the first action, Auto amended its plea after an opposed application for leave to amend was granted. Auto contended that it was Beaumont and Auby who received the payments, not Auto.
- [9] According to the plaintiffs, this resulted in the institution of the second action against Beaumont, Auby, Premier and DMO. The plaintiffs claim therein is in the alternative and should it be found that Auto did not receive, or benefit from, the payments from ORE.

[10] DMO are the attorneys who represent all the defendants and received the payments from ORE on behalf of the defendants, or some of them. On the pleadings, amounts were paid by DMO to one or more of the defendants and an amount was retained by DMO, said to be for fees.

[11] S26 of the Insolvency Act provides a statutory remedy to trustees of insolvent estates and liquidators of liquidated companies and close corporations, to claim the setting aside of dispositions made without value. The section reads:

“Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, and the person claiming under or benefitted by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities: Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.”

[12] Evidently, all the payments referred to in the two actions were made within two years of the liquidation of ORE. The plaintiffs therefore claim the relief in terms of s26(1)(b) of the Insolvency Act.

[13] The be successful with a claim to set aside dispositions in terms of s26(1)(b) of the Insolvency Act, the following aspects must be proved (a) a disposition within the meaning of s 2 of the Insolvency Act; (b) by an insolvent; (c) not made for value; (d) within two years of liquidation; and (e) the person claiming under or benefitted by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities (*Van Wyk van Heerden Attorneys v Gore and Another NNO* 2023 (1) SA 80 (SCA) at [3] to [4]).

[14] In the amended special plea of Auto in the first action, Auto contends that:

- “3. All payments allegedly made to [Auto] were made in terms of the settlement agreement (**Annexure “X”**) and were made by alternatively, at the instance and for and on behalf of Hylton Odendaal (“**Hylton**”), in discharge of all his obligations arising from and pursuant to the settlement agreement.
- 4. In terms of the settlement agreement “Creditors” are defined as collectively [Auto], [Beaumont] and [Auby].

5. Payments made, were made into the trust account of DMO Attorneys , for and on behalf of the “creditors”, whereafter the amounts were, in accordance with the instructions issued to DMO Attorneys, distributed to [Beaumont] and [Auby].
6. As such, there is a mis-joinder of [Auto] who at no stage received any payment and/or benefit as alleged by the Plaintiffs.”

[15] Elsewhere, at paragraph 8.3 of its amended plea, Auto contends:

“8.3 All payments made to [Auto] and/or [Beaumont] and/or [Auby] were made into the trust account of DMO Attorneys pursuant to and in terms of the Settlement Agreement and were made by, alternatively at the instance and for and on behalf of, Hylton, in discharge of all his obligations arising from and pursuant to the Settlement Agreement.”

[16] In the plea of the defendants in the second action, it is contended, *inter alia*:

“1.8 The Plaintiffs had insufficient proof that [Auto] received these payments as alleged and [Auto] denied receiving these said payments.

1.9 [Auto] admitted that payments were to be made in terms of a settlement agreement.

1.10 ...

1.11 The Plaintiffs were aware or reasonably ought to have been aware to whom these payments were made prior to issuing their first summons against [Auto] having been required to do a due diligence before issuing summons.

1.12 Alternatively, the Plaintiffs ought to have reasonably become aware of the payments on or about September 2019 when [DMO] informed the Plaintiffs in writing that the “creditors” as defined in the settlement agreement received payments as per the terms of the settlement agreement.

1.13 Further alternatively, the latest date the Plaintiffs could have become aware of these payments was on 25 March 2020, when [Auto] filed its plea attaching the said settlement agreement.

1.14 The alleged claim, if any, has thus become prescribed.”

[17] Elsewhere in the plea in the second action, the defendants contend:

“7.2 The Plaintiffs instituted the exact same claim against [Auto] on or about 4 October 2019.

7.3 The Plaintiffs had insufficient proof that [Auto] received these payments as alleged and [Auto] denied receiving these payments.

7.4 [Auto] admitted that payments were to be made in terms of a settlement agreement, however [Auto] did not receive payments. ...

7.5 ...

7.6 ...

7.7 All payments made to [Beaumont] and [Premier], being the entity designated by [Auby] to receive all payments due to [Auby], were made into the trust account of [DMO] pursuant to and in terms of the Settlement Agreement and were made by, alternatively at the instance and for and on behalf of Hylton, in discharge of all his obligations arising from and pursuant to the Settlement Agreement.”

- [18] The essence of the defences raised by the defendants in the two actions amount to this: Auto contends in the first action that it did not receive or benefit from the payments as contemplated by s26(1)(b) of the Insolvency Act; and the defendants in the second action contend that the plaintiffs’ claims against them have become prescribed.
- [19] In both the actions, the plaintiffs delivered a replication and rely *inter alia* on estoppel: the plaintiffs contend that they were deliberately misled and prevented from obtaining knowledge of the existence of the respective debts and identities of the defendants and were induced to believe that Auto had received and benefitted from the payments. The plaintiffs allege that they did not know that Beaumont and Auby and/or Premier benefitted from the payments, until 7 February 2023, therefore the claims against the defendants in the second action have not become prescribed.
- [20] It appears from the version of the defendants in the two actions that the defendants are, amongst themselves, *ad idem* that the payments were not made to Auto, but rather to DMO who in turn made payment to Beaumont and/or Auby and/or Premier.
- [21] However, as was pointed out by Mr Pretorius who appeared on behalf of the plaintiffs, a live issue on the pleadings is whether Auto benefitted from the payments.
- [22] The party to whom a disposition was made within 2 years of winding-up, and from whom is claimed the setting aside of the disposition in terms of s26(1)(b) of the Insolvency Act, is put to the proof that immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.
- [23] The onus to prove solvency only rests on persons who benefitted from the disposition. There can be no liability of a person who did not benefit from the disposition (*Van Wyk supra* at [32]).

- [24] Ms Slabbert who appeared on behalf of the defendants in the two actions, emphasised that consolidation of the two actions is inappropriate, because the version of the defendants is aligned: they are *ad idem* that the payments were not made to Auto and that Auto did not benefit from the payments.
- [25] The difficulty I have with the submission, is that this Court is not called upon to determine who benefitted from the payments from ORE. That is an issue that goes to the merits of the two actions. It will best be determined at trial. The true “disponee” (using the terminology of Gorven JA in *Van Wyk*) in respect of the payments will be determined at trial. This in turn will dictate which of the defendants, if any, will bear the onus to prove that the assets of ORE exceeded its liabilities, as contemplated by s26(1)(b) of the Insolvency Act.
- [26] Whether a particular defendant has received or benefitted from the payments, and whether there was any value given in return, must be decided with reference to all the circumstances under which the transaction was made. (*Inverdoorn Farming and Trading Co. Ltd.* 1965 (2) SA 597 (AD) at 604 to 605)
- [27] The word ‘value’ is not confined to a monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. (*Hurley and Seymour, N.O v W. H. Muller and Co.* 1924 NPD 122 at 133).
- [28] The first and main issue to be determined in both actions is who received, or benefitted from, the payments made by ORE. As I see it, the same witnesses will be required to give evidence in respect of that issue. Upon determination of that issue, one or more of the defendants may bear the onus to prove the solvency of ORE at the time when the payments were made.
- [29] Considering the definition of the word “creditors” in the settlement agreement, it cannot be ruled out that Auto benefitted from the payments, even though it may not have received the payments directly.
- [30] Rule 11 of the Uniform Rules of Court provides for the consolidation of actions. It reads:

“Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon –

- (a) the said actions shall proceed as one action;
- (b) the provisions of rule 10 shall *mutatis mutandis* apply with regard to the actions so consolidated; and
- (c) the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said action."

- [31] The object of the rule is to prevent multiple actions based on the same facts proceeding independently of each other (*Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A) at 801).
- [32] A court has a wide discretion to grant or refuse the application (*Beier v Thornycroft Cartage Co; Beier v Boeresamwerk Bpk* 1961 (4) SA 187 (N) at 191 and *Chhita v Ranchod* (2023) JDR 0021 (GJ) at para 30).
- [33] Convenience and absence of substantial prejudice to the other party are the two main considerations. The applicant in a consolidation application bears the onus of proving the convenience resulting from consolidation. Once this onus has been discharged, the applicant bears the onus of proving the absence of substantial prejudice to the other party (*Ranchod supra* at para 30 to 32).
- [34] In my view the evidence to be lead; the witnesses to be called; the issues to be decided and the large overlap of the facts and issues in the two actions will render it convenient for the consolidation of the two actions.
- [35] The next question is whether the plaintiffs have shown the absence of substantial prejudice to the defendants if the two actions are consolidated.
- [36] It was argued on behalf of the defendants that the consolidation will be prejudicial to the defendants in the second action, since it will preclude or hamper them from raising their special plea of prescription.
- [37] I do not see the prejudice. The defendants in the second action will be at liberty to raise their special plea of prescription. They may even seek a separation of that issue in terms of Rule 33(4) of the Uniform Rules of Court, if so advised.
- [38] So too, the special plea of Auto can be raised by it, even by way of separation of issues in terms of Rule 33(4), if so advised.
- [39] The defendants in the two actions will not be precluded from raising all and any of the defences, if the two actions are consolidated.

- [40] The defendants also submitted that they will be prejudiced if a witness must testify in respect of both actions, at the same hearing. Instead of testifying in respect of one action the witness will have to testify and be cross-examined in respect of both actions.
- [41] In my view, no substantial prejudice will arise if witnesses are required to testify in respect of both actions, especially where the main issue in both actions is the identity of those who received, or benefitted from, the payments.
- [42] In the result, I am of the view that a proper case has been made by the plaintiffs for the consolidation of the two actions.
- [43] In respect of costs, the plaintiffs in their notice of motion seek an order that the costs of the application are to be costs in the cause in the consolidated action. I am inclined to grant such an order.
- [44] I accordingly make the following order:
1. The actions under case numbers 34782/2019 and 2023-038612 are consolidated and will henceforth proceed and be heard as one action under case number 34782/2019.
 2. The costs of this application are to be costs in the cause in the consolidated action.



J E SMIT
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Counsel for applicants:	Adv W Pretorius
Instructed by:	Mr Brooks at Brooks & Braatvedt Inc
Counsel for respondents:	Adv K Slabbert (Wilson)
Instructed by:	Mrs Oliphant at DMO Attorneys
Date of hearing:	5 August 2025
Date of judgment:	8 August 2025