



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: A278/2024

In the matter between:

ENDERSTEIN VAN DER MERWE INC

Appellant

And

RENEE BERNICE BAILEY N.O.

First Respondent

AVIWE NTANDAZO NDYAMARA N.O.

Second Respondent

**(in their capacities as the duly appointed
joint provisional Trustees of the insolvent estate
of the LAUMAS TRUST, No C407/2021)**

Coram: LE GRANGE J, CLOETE J et NZIWENI J

Heard: 21 July 2025

Delivered: 3 September 2025 (electronically)

Summary: *Whether payment by an insolvent Trust to the appellant constituted a disposition not made for value within the meaning of s 26(1)(b) of the Insolvency Act 24 of 1936.*

ORDER

The appeal is dismissed with costs on scale C, including the costs of two counsel where so employed.

JUDGMENT

CLOETE J (LE GRANGE et NZIWENI JJ concurring) :

[1] This is an appeal with special leave of the Supreme Court of Appeal against the decision of the court a quo delivered on 12 October 2023¹, in which it granted an order in favour of the respondents that the appellant, a firm of attorneys, pay over R1 505 000² plus interest and costs, pursuant to the provisions of s 26(1)(b) of the Insolvency Act³. The court a quo had also granted an order by agreement at the commencement of the hearing before it that the claim based on this statutory provision be separated from the remaining claims, and determined first.

[2] Section 26(1)(b) reads in relevant part as follows:

‘Disposition without value

(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities ...’

[3] The respondents are the joint trustees of the insolvent estate of the Laumas Trust (the ‘Trust’) which was provisionally sequestrated by this court on 9 June 2021 and finally sequestrated on 12 August 2021. It is common cause that: (a) the Trust made the payments to the appellant totalling R1 505 000 during the period 6 August 2020 to 18 May 2021, ie. less than two years prior to its provisional sequestration; (b) when the Trust made these payments it was insolvent; and (c) the payments were made in respect of legal services rendered by the appellant, comprised of fees

¹ *Bailey N.O. and Another v Enderstein van der Merwe Inc* [2023] ZAWCHC 251 (12 October 2023)

² An amount was claimed of R1 605 000, alternatively R1 205 000, but it was accepted that the correct amount was R1 505 000.

³ No 24 of 1936

and disbursements, including a substantial portion for counsel's fees, but these services were not rendered to the Trust.

[4] What is in dispute, and this is the narrow issue in this appeal, is whether those payments to the appellant were 'not made for value' as contemplated in s 26(1)(b). It is the appellant's case that: (a) the Trust received value in the form of deposits from third parties in order to make those payments; (b) the value did not need to emanate from the appellant, although factually this was the case since the Trust was discharged from its obligation to pay once such payments were made; and (c) the nett asset position of the Trust was not adversely affected by the receipt and payment of the monies to the appellant. On the other hand, it is the respondent's case that no value was given to the Trust as consideration for the payments because no services were rendered to it by the appellant.

[5] The background to the issue before us may be summarised as follows. Mr Craig Massyn ('Massyn') conducted an illegal investment scheme through various related entities. These were primarily Imagina FX (Pty) Ltd ('Imagina'), Octox (Pty) Ltd ('Octox') and Trius Capital Ltd ('Trius'). During July 2020, Massyn approached the appellant's Mr Sean Pienaar ('Pienaar'), one of its directors, for assistance with an investigation which the Financial Sector Conduct Authority (FSCA) was conducting into the trading practices of Imagina and Trius.

[6] Pienaar deposed to the main answering affidavit. I set out his evidence hereunder. As with any new attorney-client relationship, he immediately had Massyn, Imagina and Trius (both represented by Massyn) conclude three separate fee agreements in terms of which the appellant was: (a) mandated to act on behalf of the 'three entities' where required (although I will assume in his favour that Pienaar meant to refer to Massyn personally as well as the two entities); and (b) to be remunerated in terms of those agreements. At the time Pienaar had no idea of the litigation 'that was about to erupt against Massyn'. This litigation would endure for approximately two years. The appellant eventually ended its mandate with these three clients on 7 March 2022, as it could no longer continue to rack up legal fees and incur the costs of counsel without a substantial payment being made to it. At that stage, and after receiving the payments which are the subject matter of the dispute,

it was still owed in excess of R1 million, of which over R700 000 comprised unpaid counsel's fees.

[7] During the course of its mandate the appellant (through Pienaar and various of its employees) spent an enormous amount of time and effort representing 'Massyn' and ensuring competent representation in the various legal proceedings launched against 'him'. Pienaar went on to say that in rendering these legal services the appellant, on the instructions of Massyn, his wife Mara-Li, 'and in due course the trustees of the Laumas Trust' appointed several advocates to assist Massyn, and further that the appellant 'rendered legal services on behalf of Massyn on the instruction and with the full knowledge of 'the trustees of the Trust. At the time these trustees were Massyn, Mrs Massyn and Mr Roland Hendrikse, the so-called independent trustee.

[8] Pienaar stated that it became apparent to him over several months of litigation that the business operations of Imagina were illegal, and he advised Massyn that Imagina would, in due course, be liquidated and Massyn's personal estate sequestrated. On the advice of counsel, Pienaar had several discussions with Massyn and his wife in order to explain to them that payment of the amount owed to the appellant should be made from a third party and not from Massyn himself. They informed him that they would be able to secure payment through several sources, namely the Trust, Massyn's father, Mrs Massyn's father, and Massyn's uncle. It was Pienaar's evidence that these discussions took place with the Massyns both in their personal capacities and in their capacities as trustees of the Trust; and that they undertook to make payment of the legal fees of Massyn through the Trust on several occasions. In addition, Pienaar was assured that Hendrikse was fully aware the Trust had agreed to make such payment, and Hendrikse himself later personally confirmed this to him.

[9] Pienaar was then provided with various documents pertaining to this undertaking, one of which was a resolution of the trustees dated 15 April 2021. It records the decision taken as follows:

- '1). Craig Massyn is authorized to make payments from the Laumas Trust FNB bank account to Enderstein van der Merwe for legal fees in his capacity as Trustee, Beneficiary and authorised power of attorney on behalf of the trust.
- 2). These funds do not originate from Imagina FX or its related companies or its investors.
- 3). The source of the funds are the trust's personal assets and or funds loaned from the trustees.'

[10] It is noteworthy that the resolution is silent about the basis upon which the payments would be made, inter alia whether as a loan (and to whom, given the differing versions as to precisely who it was that the appellant rendered the legal services), a distribution or a donation. Nor was any mention made in the supporting affidavits of the trustees of the Trust as to what the basis was, which is something that would have been peculiarly within their knowledge, and expected of them to disclose, in light of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁴. Of course, the respondents (insolvency trustees) would have had no knowledge thereof.

[11] Pienaar's evidence was further that on each occasion that payment was made to the appellant thereafter, money was first transferred into the Trust's First National Bank account from a third party or other source. The bank statements to which I refer hereunder show that not all the deposits emanated from the trustees or from the Trust's personal assets (there were none) as had been resolved, but the parties appeared to be ad idem during argument before us that nothing much turns on this. In their founding affidavit the respondents alleged that, based on the evidence adduced at a related s 415 enquiry in terms of the Companies Act ⁵ on 11 March 2022, the monies paid by the Trust to the appellant were made mainly for the payment of legal services rendered by it to Imagina. This Pienaar denied, stating that the Trust never paid a cent towards Imagina's 'alleged legal fees'. This compounds the contradictory versions of the appellant as to who exactly it rendered the legal services for which it received the payments from the Trust.

⁴ 2008 (3) SA 371 (SCA) at para 13

⁵ No 61 of 1973 read with item 9 of Schedule 5 of the Companies Act 75 of 2008

[12] According to Pienaar, it was further specifically agreed with the trustees that the payments into the Trust's bank account by depositors could only be utilised for the sole purpose of making payment of legal fees and disbursements owed to the appellant until settled in full; and the deposits were thus received and accepted by the Trust subject to this specific condition, with the Trust not having the right to deal freely with the credits in its bank account resulting from the deposits made.

[13] One of the appellant's grounds of appeal is that the court a quo erred in finding the appellant failed to present proof, by way of bank statements, that the various deposits into the Trust's bank account were made on the basis that such funds would be utilized to pay Massyn's legal costs. I accept that the bank statements (which were provided, reflecting in the main the sources of the deposits) could not have evidenced this. What is important however is that the bank statements reveal the total sum deposited over the period in question being R2 237 867 and the amount paid over to the appellant being only R1 605 000. The difference of R632 867 was paid to Massyn, Mrs Massyn or on account of what appear to have been their personal living and related expenses. This too was not explained. When raised with counsel for the appellant, the response was that it does not matter, since in light of *Strydom v Snowball Wealth*⁶ it is irrelevant whether the 'value' was inadequate, the Supreme Court of Appeal having held that the proper interpretation of 'not made for value' in s 26(1)(b) is 'for no value at all'.

[14] We are obviously bound by that decision. However, the appellant's case is based squarely on the terms of the agreement which it concluded with the Trust, and as I see it, this renders any debate about 'inadequate' versus 'no' value irrelevant. Taken to its logical conclusion, the 'value' the Trust would receive in terms of that agreement, on the appellant's own argument, was the application of the deposits received for the sole and exclusive purpose of payment over to the appellant until such time as the amount owed to it had been settled in full. Not only were the deposits not applied exclusively for this purpose, but the legal costs were not settled in full by the Trust. Put differently, it was not a case of there being no underlying

⁶ 2022 (5) SA 438 (SCA) esp at para 36

basis for the Trust receiving the deposits. It only received any kind of 'value' if it complied fully with the terms of the agreement. It did not, and accordingly on the appellant's own version, the Trust received no value at all. The appellant also relied on **Meskin**⁷ where the author states '[a] release from a contractual obligation is prima facie value' and '[a] payment in discharge of a lawful obligation to pay is a disposition for value'. But to my mind, neither assist the appellant since, again on its own version, the Trust was neither released from, nor did it discharge, its contractual obligation to the appellant.

[15] Turning now to the argument of the respondents, which is that the true enquiry is whether the Trust received value from the appellant, based on the decision of the Supreme Court of Appeal in *Van Wyk Van Heerden Attorneys v Gore N.O. and Another*⁸. The facts were briefly as follows: Three deposits had been made into the trust account of the appellant, which was also a firm of attorneys. All three were made from the account of an entity referred to in the judgment as Brandstock less than two years prior to Brandstock's liquidation. These came to the attention of Brandstock's liquidators, who brought an application to have them set aside in terms of s 26(1)(b). Their contention was that the deposits into the trust account of the attorneys constituted dispositions not made for value.

[16] At the time of the deposits the attorneys acted for one Philp and another entity controlled by him, BRP. The attorneys neither acted for, nor even knew of, the existence of Brandstock. BRP was provisionally liquidated by court order on 3 November 2017 and finally wound up on 8 March 2018. Philp at the time was facing a sequestration application. The attorneys were involved in negotiations to secure a purchaser to buy the claims of a creditor, Utexx, (which was driving the sequestration) against Philp and BRP. Philp indicated to the attorneys that a certain Muir would be the purchaser, and they were instructed to draft a cession and sale agreement to that effect at a sale price of R1.25 million.

[17] The attorneys representing Utexx required the sale price to be paid upfront into the trust account of the appellant attorneys as part of the deal. Payment of the

⁷ Meskin: Insolvency Law, para 5.31.3 at 5-104 and 5-106

⁸ 2023 (1) SA 80 (SCA)

agreed sale price was then made into the appellant attorneys' trust account, whereafter the agreement was signed and the moneys paid over. However, it emerged that Philp misled his attorneys, or at best for him failed to disclose, that the funds deposited came from Brandstock and not the purchaser (it also turned out that it was in fact a different purchaser but that is not relevant for present purposes). The other two amounts of R75 000 and R200 000 were deposited by Brandstock into the attorneys' trust account on 23 February 2018 and 30 April 2018 respectively. These were applied by the attorneys to settle fees and disbursements owed in respect of their representation of Philp and BRP. Directly relevant to the issue before us are the following passages from the judgment:

[32] At the heart of s 26 (1)(b) is the requirement that the party to whom the disposition is made is put to the proof that immediately after the disposition was made, the assets of the insolvent exceeded its liabilities. The person on whom that obligation rests is only one who "benefited by the disposition". The construction of the section does not allow for liability to attach to one who did not benefit by it. The plain language requires the disponent to have benefited....

[38] Who then benefited from the disposition? During argument, the parties were ad idem that Utexx benefited by the deposit of R1,25 million which was thus hit by the provisions of s 26 (1)(b). This must be correct. Utexx received moneys of Brandstock without Brandstock receiving value since it was not a party to the transaction. In turn, Utexx benefited by that amount since its claim for the purchase price under the agreement was satisfied...

[39] As regards the deposit of R1.25 million, the attorneys acted in accordance with the instructions of their client...[i]n giving effect to their mandate, therefore, the attorneys acted as a conduit in the onward transmission to Utexx and for its benefit. The disposition of Brandstock was one to Utexx. Since the attorneys did not benefit...[t]he deposit into their account was not a disposition to the attorneys and was thus not impeachable under s 26(1)(b).

[40] What, then, of the deposits of R75 000 and R200 000? They were not paid on to a third party. On the other hand, they were dealt with in accordance with the principles governing trust accounts...[a]ttorneys are entitled to account to their clients for fees and disbursements and to then appropriate moneys held in trust for that purpose. This is what was done by the attorneys. This does not, however, necessarily render them immune to the machinery of s 26(1)(b). The same enquiry governs the outcome of these two deposits. Who benefited from those deposits?

[41] The attorneys made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. As such, they clearly benefited from the deposit of these two amounts...[a]s between the attorneys, BRP and Philp, the application of these funds to settle fees and disbursements was lawful and appropriate. If BRP or Philp had deposited these amounts, they would have received value for them. But the deposit was made by Brandstock which did not receive value. When applied to amounts due by BRP and Philp, these two deposits became dispositions which fall within the provisions of s 26 (1)(b) ...'

[18] In my view, the facts in the matter before us are in essence no different. The position of the appellant must not be conflated with that of the Trust. It is not the appellant's defence that the Trust acted as a conduit, but rather as an independent third party which assumed liability- at best for it - for the indebtedness of its beneficiary, Massyn. Further, whether or not there was a positive balance in the Trust's bank account after any particular payment (as was also submitted on its behalf) does not assist the appellant, because this does not take into account any concomitant liability that might have been created, given the Trust's failure to disclose the basis upon which the deposits were made into its account by the third parties concerned. It also does not take into account any other liabilities the Trust may have had. The evidence of Pienaar himself was that he had no knowledge of the personal affairs of the Trust, and he could not even say whether the payments to the appellant were reflected as loans to Massyn in the Trust records or as capital distributions or donations. And as previously stated, despite all three trustees deposing to affidavits in support of the appellant's version not one of them took the

court into their confidence in this regard. The appellant thus failed to discharge the positive obligation resting on it, as donee, that immediately after each payment was made to it by the Trust, the assets of the Trust exceeded its liabilities.

[19] Lastly, the appellant also relied on *Goode, Durrant and Murray Ltd v Hewitt and Cornell NN.O*⁹ in support of its submission that a disposition may be for value even where it emanates from someone other than the person to whom the disposition is made. In that decision the court found, in the context of an application for interim interdictory relief pending an action, where a company had provided a suretyship to the applicant without receiving consideration of any kind in return, it was not possible, at that stage of the proceedings, to say that ‘no value’ was given, since the company was part of a group of companies and the suretyship might have ensured the financial stability of the whole group. The court emphasised however that ‘whether an insolvent has received “value” for a disposition must be decided by reference to all the circumstances under which the transaction was made’.¹⁰ Applying that established principle, and for all the reasons already given, I am persuaded that the payments by the Trust to the appellant were dispositions not made for value within the meaning of s 26(1)(b).

[20] As far as costs are concerned, both parties employed senior and junior counsel and the nature of the matter warrants an award on scale C.

[21] **In the result the following order is made:**

The appeal is dismissed with costs on scale C. including the costs of two counsel where so employed.

J I CLOETE

Judge of the High Court

⁹ 1961 (4) SA 286 (NPD) at 291 E-F

¹⁰ At 291 F-G

I agree.

A LE GRANGE

Judge of the High Court

I agree.

C N NZIWENI

Judge of the High Court

Appearances

For applicant: ADV L M OLIVIER SC
 ADV F SIEVERS

Instructed by: Enderstein Malumbete Inc – Mr S Pienaar

For respondent: ADV J VAN DER MERWE SC
 ADV M VAN STADEN

Instructed by: Mostert & Bosman Attorneys - Mr HA Botes