



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

JUDGMENT

CASE NO: 148122/2024

Reportable

In the matter between:

GARY DONOVAN WALLACE N.O

First Applicant

LOUISE GROENEWALD N.O

Second Applicant

CHAVONNES BADENHORST

ST CLAIR COOPERS N.O

Third Applicant

ABBHEY MHLOPHEKI DLVANA N.O

Fourth Applicant

GERMANI TRANSPORT (PTY) LTD

(IN LIQUIDATION)

Fifth Applicant

EXPIDOR 155 CC (IN LIQUIDATION)

Sixth Applicant

GLOMIX 150 CC (IN LIQUIDATION)

Seventh Applicant

**DVS SPECIAL PROJECTS (PTY) LTD
(IN LIQUIDATION)**

Eight Applicant

and

**PIETER TROOST JACOBUS
JOHANNES CALITZ**

Respondent

Coram: HOLDERNESS J

Heard: 26 February 2026

Delivered: 6 July 2026

Summary:

Section 341(2) of the Companies Act 61 of 1973 – dispositions subsequent to deemed date of liquidation are void. Section 12 of the Prescription Act 68 of 1969 – prescription starts running on creditor’s actual or deemed knowledge of debt. Section 20(9) of the Companies Act 71 of 2008 - Collapse of companies – Date on which prescription commenced to run earlier than date of appointment of liquidators. Claim arising from void dispositions prescribed and therefore dismissed with costs.

ORDER

1. The application is dismissed with costs, the costs of counsel to be taxed on Scale B.

JUDGMENT

Holderness J

[1] This application is for an order in terms of section 341(2) of the Companies Act 61 of 1973 (the “1973 Companies Act”) declaring that certain dispositions made by the eighth applicant, DVS Special Projects (Pty) (In Liquidation) (DVS), to the respondent, Pieter Troost Jacobus Johannes Calitz (Mr. Calitz), after DVS was placed into liquidation on 24 October 2023 to be void.

[2] The joint liquidators further seek an order directing the respondent to make payment to the first to fourth applicants in their capacities as the joint liquidators (the “liquidators”) of the fifth to eight applicants¹ (the “liquidated companies”), in the amount of R263,000.00, together with interest thereon at the maximum permissible statutory rate from 27 March 2024 to date of final payment.

Background

The winding up of Germani

[3] The fifth applicant, Germani Transport (Pty) Ltd (Germani), was provisionally and finally liquidated respectively on 20 June 2019 and 1 August

¹ Alternatively to the fifth to eight applicants.

2019, pursuant to an application for winding up instituted against it by one of its creditors on 17 September 2018.²

[4] On 16 March 2020, the liquidators were appointed by the Master of the High Court (the “Master”) as the final liquidators of Germani.

[5] After 17 September 2018, the deemed date of Germani’s liquidation,³ DVS made seventeen payments totalling R263,000 (the “payments”) to Mr. Calitz from its banking account. The payments spanned the period from 16 October 2018 to 20 February 2020.

[6] The present application was issued on 17 December 2024 and was originally enrolled for hearing on 22 May 2025. The matter was allocated for hearing and argued before me on 26 February 2026.

The section 20(9) collapse order

[7] On 24 October 2023, at the instance of the liquidators, an order was granted⁴ in terms of which Germani, the sixth applicant, Expidor 155 CC (in liquidation) (Expidor), the seventh applicant, Glomix 150 CC (in liquidation) (Glomix), and DVS were:

- a) Deemed not to be separate juristic persons in respect of any right, obligation or liability that they or any of their shareholders may have.

² Under case number 17191/2018.

³ The "deemed date of liquidation" refers to the retroactive date on which a company's liquidation officially commences in the eyes of the law, freezing the rights of all creditors and creating the *concurso creditorum* (a legal framework for the fair distribution of assets).

⁴ Under case number 4346/2023, by Parker AJ.

b) Collapsed into Germani to exist as a single entity by ignoring their separate legal existence as contemplated in section 20(9) read with section 22⁵ of the Companies Act 71 of 2008⁶ (the “2008 Companies Act”) and Chapter 14 of the 1973 Companies Act.

c) All placed into liquidation together with effect from the date on which Germani was placed into liquidation, being 17 September 2018, alternatively 20 June 2019. (The section 20(9) order).

Companies unable to pay their debts

[8] Germani was a transport company that employed 83 permanent staff, operated a fleet of over 100 mostly heavy duty vehicles, and had a monthly turnover of approximately R11.5 million and an annual turnover of approximately R138 million.

[9] According to the liquidators, Germani was rendered hopelessly commercially and factually insolvent principally as a result of a scheme that was perpetrated on it by its late director, Mr. Pieron Romani (Mr. Romani), in concert with Mr. Neil Swanepoel (Mr. Neil Swanepoel) and Mr. Vernard Van Dyk (Mr. Vernard Van Dyk), the auditors for Romani and all the entities in his stable.

⁵ In terms of section 22(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.

⁶ Section 20(9) provides that If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).

[10] Mr. Van Dyk was the sole director of DVS,⁷ whose controlling mind was Mr. Swanepoel. Mr. Swanepoel and Mr. Van Dyk were the shareholders of DVS.

[11] The operation of the scheme involved purchasing vehicles to conduct its transport business whilst devaluing such assets in their books to zero for taxation purposes, and then ‘shifting’ these assets, which were still worth ‘tens, if not hundreds, of thousands of rands each,’ from Germani to Expidor by causing them to be registered in Expidor’s name on the E-Natis system.⁸

[12] The evidence of the liquidators is that the section 20(9) order was granted because Expidor, Glomix and DVS were unconscionably abused by their controlling minds to siphon or divert funds from Germani in fraud of its creditors.

[13] Expidor would deal with Germani’s assets as if they were its own and after the application for Germani’s liquidation was launched, and again at the time it was placed into provisional liquidation, sell same to third parties for market related prices in terms of invoices and/or agreements providing for the proceeds of these sales to be paid into the bank account of DVS, which funds would be considered to be the personal funds of Mr. Romani to be disbursed at his discretion. According to the liquidators, the aggregate sum of R8,926,870 was paid into DVS’s bank account from 9 February 2016 to 31 March 2021.

[14] It appears from the liquidation and distribution account of Germani that its creditors have proved claims totalling R27,190,990 against it and its insolvent estate suffers a shortfall of R22,171,351.

⁷ By his own admission a ‘puppet director’.

⁸ Apparently on the basis that Expidor would be liable to pay Germani a nominal price of R1,00 for each asset, although there is no evidence of any such payments every actually having been made.

[15] The liquidators applied for and obtained the section 20(9) order on 24 October 2023 that collapsed and liquidated the companies, according to them with effect from 20 June 2019, precisely because the scheme rendered Germani so hopelessly commercially and factually insolvent.

[16] Pursuant to their appointment as the companies' joint liquidators, the liquidators launched the present application to recover the payments as void dispositions in terms of section 341(2) of the 1973 Companies Act.

[17] Mr. Calitz in his answering affidavit denies that he is indebted to the applicants in any amount at all. He states that he loaned an amount of R300,000 to Blackbird Trading 104 CC (Blackbird), also known as the Springbok Blues Pub & Grill, as working capital in terms of a written loan agreement concluded on 5 December 2017. Blackbird was represented by Mr. Romani, its sole director at the time. Mr. Calitz acted in his personal capacity.

[18] In terms of the loan agreement, the bank account of DVS was nominated as the bank account into which Mr. Calitz was to deposit the R300,000 loan amount.

[19] Mr. Calitz avers that the monies paid to him as repayment of the monies loaned and advanced were paid by DVS but were not its property and DVS was merely a conduit or nominee for Blackbird.

[20] The counter argument by the liquidators to the averments by Mr. Calitz is that the arrangement alleged by Mr. Calitz illustrates the abuse of DVS's separate juristic personality by Mr. Romani.

The legal framework

[21] In terms of section 341(2) of the 1973 Companies Act:

‘(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.’

[22] Section 348 of the 1973 Companies Act provides that ‘[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’.

[23] Section 340(1) of the 1973 Companies Act provides that that the provisions of the law relating to insolvency applies *mutatis mutandis* to the winding-up of a company.

[24] ‘Disposition’ is not defined in the 1973 Companies Act. It is however defined in section 2 of the Insolvency Act 24 of 1936⁹ (the “Insolvency Act”) to *inter alia* include any payment made by the company being wound up.

[25] I am mindful of the caveat of the Apex court in *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others*¹⁰, namely that a definition of a word in one statute does not ‘automatically or compulsorily apply to the same word in another statute, however Section 339 of the 1973 Companies Act dictates that in the winding-up of a company unable to pay its debts, the provisions of the law relating to insolvency must be applied *mutatis*

⁹ Which applies by virtue of section 339 of the 1973 Companies Act, to mean ‘any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and “dispose” has a corresponding meaning;’

¹⁰ *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others* 2020 (2) SA 325 (CC) at para 18.

mutandis. Therefore, it appears the baseline definition from Section 2 of the Insolvency Act applies to companies.

[26] Section 341(2) explicitly expands the scope of ‘dispositions’ in relation to companies by adding the phrase ‘including rights of action. This ensures that if a company waives, transfers, or compromises a legal claim or debt owed to it after the commencement of winding-up, it is explicitly categorised as a void disposition.

[27] In casu the payments plainly constitute a ‘disposition’ as envisaged in section 341(2).

[28] In *Pride Milling Co (Pty) Ltd v Bekker NO (Pride Milling)*,¹¹ the Supreme Court of Appeal (the “SCA”) affirmed that the predominant purpose of section 341(2) is ‘to decree that all dispositions made by a company being wound up are void’.¹² Therefore, ‘the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render s 341(2) operative’.¹³

[29] The Court in *Pride Milling* emphasised that the default position ordained by section 341(2) ‘is that all such dispositions have no force and effect in the eyes of the law’.¹⁴ Put differently, the disposition is regarded as if it had never occurred.

[30] This court is empowered under section 341(2) of the 1973 Companies Act to depart from the statutorily ordained default position and validate void dispositions, only in respect of payments made between the date of presentation

¹¹ *Pride Milling Co (Pty) Ltd v Bekker NO and Another* 2022 (2) SA 410 (SCA).

¹² Id at para 13.

¹³ Id at para 13.

¹⁴ Id at para 30.

of the application for winding up and the date of granting of the provisional order.¹⁵

The submissions of the liquidators

[31] The liquidators contend that all the payments were made after the companies were placed in liquidation and/or are accordingly void as contemplated in section 341(2) of the 1973 Companies Act. Accordingly, they fall to be recovered from Mr. Calitz, as if they were never made.

[32] The central issue which crystallised in this matter is the date on which the companies were placed in liquidation, as this is determinative of which of the payments are void in terms of section 341(2) of the 1973 Companies Act. Flowing from that is the question of when prescription in relation to the void payments commenced running.

[33] Mr. Newton, on behalf of the liquidators, contended that to give effect to the provisions of the section 20(9) order, in terms of which the companies were collapsed into Germani to exist with it as a single entity, all of the companies are to have been liquidated together with Germani from the inception of its liquidation process, a fact which they say is borne out by paragraph 3 of the section 20(9) order. Paragraph 3 of the section 20(9) order requires the Master and the Companies and Intellectual Property Commission (the “CIPC”) to amend their records to reflect the consolidation of Expidor, Glomix and DVS, their collapsing into Germani, and the resulting composite winding up process.

The grounds of opposition and evaluation

¹⁵ Id at paras 24 and 31.

[34] Mr. Calitz has raised various grounds of opposition to the section 341(2) relief sought. In summary, he contends that section 341(2) of the 1973 Companies Act does not find application and that the applicants lack *locus standi*. He raises two pleas of prescription and lastly raises certain issues pertaining to the section 20(9) order.

[35] At the hearing, Mr. Rabie, who appeared on behalf of Mr. Calitz, indicated that he would not be persisting with his argument that the section 20(9) order was invalid. The matter proceeded on the basis that such order, which Mr. Calitz has not applied to rescind or set aside, is extant and valid.

[36] Notably, Mr. Calitz has not sought to rescind or set aside the section 20(9) order, nor has he instituted a counter application for the validation of the payments made to him by DVS prior to the date of Germani's liquidation. The relevance of this will become apparent in what follows.

Locus standi and applicability of section 341(2)

[37] Mr. Calitz contends that the monies were loaned to Blackbird and paid into the bank account of DVS, and the fact that the monies were repaid from DVS's bank account does not mean that those funds were in fact DVS's funds and could accordingly be distributed to its creditors, particularly as Blackbird was not part of Mr. Romani's scheme.

[38] Mr. Rabie sought to distinguish the facts *in casu* from those in *Cooper N.O and Others v Blue Label Distributions*,¹⁶ where Maier-Frawley J was confronted with a similar 'conduit' argument and provided a careful and

¹⁶*Cooper N.O and Others v Blue Label Distributions* [2024] ZAGPJHC 615; [2024] 3 All SA 800 (GJ).

detailed exposition on the principles applicable to section 341(2) of the 1973 Companies Act. The court concluded that considering the wide meaning attributed to ‘disposition’, payments such as those made by DVS *in casu* amounted to dispositions in terms of section 341(2).¹⁷

[39] The judgment of Maier-Frawley J was taken on appeal and was recently upheld by the SCA in *Blue Label Distribution (Pty) Ltd v St Clair Cooper N O and Others (Blue Label)*,¹⁸ which found Maier-Frawley J’s findings unassailable,¹⁹ and stated that:

‘A disposition refers to a disposition of the property of a company, be it moveable or immovable, which the company disposes of, and includes a contract to effect such transfer. The act of disposition of property can also occur when assets are alienated without receiving any value in return, even in instances where the insolvent merely had some contingent right in the property. It can even include goods that are given away and not paid for. What is apparent is that the act of disposition has been widely interpreted, restricted by few parameters.’²⁰

[40] In *Pride Milling*,²¹ it was emphasised that section 341(2) renders such dispositions *void ab initio (ex tunc)*. The recipient acquires no right to retain the funds and incurs an immediate obligation to restore them, irrespective of any counter performance or subsequent events.

[41] When the loan proceeds were paid to DVS, such monies became the property of DVS. DVS held the power of disposal. Mr. Romani then had a claim against DVS – but if DVS had been liquidated at that point, those funds would

¹⁷ Id at para 39.

¹⁸ *Blue Label Distribution (Pty) Ltd v St Clair Cooper N O and Others* [2026] ZASCA 61; [2026] 2 All SA 423 (SCA) (*Blue Label*).

¹⁹ Id at para 17.

²⁰ Id at para 18.

²¹ Id at fn 10 para 13.

be in the *conkursus*, as they were not ring fenced or held separately. Mr. Calitz would have to put in a claim as a concurrent creditor.

[42] It cannot be put any plainer than it was by the SCA in *Blue Label* where it held:²²

‘These authorities do not hold that repayment prior to the institution of proceedings does not give rise to a claim where the estate has already been restored. Rather, they establish that voidness gives rise to a restitutionary obligation upon receipt. This Court in *Eravin Construction CC v Bekker NO and Others*,²³ made it clear that the recipient of a void disposition acquires no right to retain the payment but incurs an immediate restitutionary obligation upon receipt, in order to establish a *conkursus creditorum*. Voidness gives rise to a debt owed to the company in liquidation.’

[43] DVS exercised its power of disposal, and the payments therefore amount to a disposition, as envisaged in the wide definition of ‘property’ in section 2 of the Insolvency Act.

[44] The manifest purpose of section 341(2) of the 1973 Companies Act is to claw back monies paid out to the disadvantage of the *conkursus*. There is no dispute that payments were made after the *conkursus*. They are therefore struck by section 341(2) and must be repaid.

[45] In the circumstances, there is no merit to this ground of opposition.

Prescription

²² Id at fn 17 para 22.

²³ *Eravin Construction CC v Bekker NO and Others* [2016] ZASCA 30; 2016 (6) SA 589 (SCA) at para 21.

[46] Under section 12(1) of the Prescription Act 68 of 1969 (the “Prescription Act”), prescription begins to run as soon as the debt is due.

[47] Section 12(3) of the Prescription Act in turn provides that ‘[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care’.

[48] A claim under section 341(2) of the 1973 Companies Act is statutory. The object is to prevent the dissipation of the company’s assets and to restore assets to the company’s estate for the benefit of the *concursum creditorum*, while the winding-up application is pending and to ensure that its creditors are paid *pari passu*. Accordingly, the section applies as much to *bona fide* business transactions as to preferences.²⁴

[49] In *MEC for Health, Western Cape v Coboza*,²⁵ the SCA set out the manner in which the issue of prescription, and specifically section 12(3) of the Prescription Act, should be applied. They are —

(a) what are the facts from which the debt arises (‘the primary facts’);
and

(b) when were the primary facts known, or when should they reasonably have been known, to the creditor?²⁶

²⁴ *Symes N.O and Another v De Vries Attorneys Incorporated and Another* (2022/011114) [2023] ZAGPJHC 777 (10 July 2023) para 13.

²⁵ *MEC for Health, Western Cape v Coboza* [2020] ZASCA 165.

²⁶ *Id* at para 8.

[50] The Constitutional Court in *Le Roux and Another v Johannes G Coetzee & Seuns and Another*²⁷ recently held that the knowledge that section 12(3) contemplates could be either actual or deemed. Actual knowledge relates to the subjective knowledge that a creditor acquires of a fact, while deemed knowledge is that which a creditor could have acquired by exercising reasonable care.²⁸

[51] In *Drennan Maud & Partners v Pennington Town Board*,²⁹ the SCA stated that:

‘[T]he requirement ‘exercising reasonable care’ requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.’³⁰

[52] Mr. Calitz raises two special pleas of prescription.

[53] In terms of the first special plea, he avers that the applicants’ claims have prescribed as three years have elapsed since the final appointment of the liquidators of Germani on 16 March 2020 and the date of service of the application.

[54] Whilst acknowledging that the liquidators for DVS were only appointed on 21 November 2023, Mr. Calitz contends that as the companies were interrelated, part of a scheme and collapsed into one entity, and the fact that the liquidators appointed in November 2023 are the same liquidators appointed for

²⁷ *Le Roux and Another v Johannes G Coetzee & Seuns and Another* [2023] ZACC 46; 2024 (4) SA 1 (CC).

²⁸ Id at paras 39 and 40.

²⁹ *Drennan Maud & Partners v Pennington Town Board* [1998] ZASCA 29; 1998 (3) SA 200 (SCA).

³⁰ Id at 209F-G.

Germani in 2020, they ought to have known or could reasonably have acquired the knowledge of any such claims as would have arisen out of the liquidation of the liquidated companies.

[55] Should this plea of prescription not succeed, Mr. Calitz submitted that any claim against him has prescribed as three years have elapsed since the debt fell due, that is, according to him, from 16 October 2018 to 20 February 2020, when the disputed payments were made.

[56] The liquidators' counter to these averments is that the payments only became due once DVS was placed into liquidation on 24 October 2023, which is when they contend section 341(2) of the 1973 Companies Act 'became operative'. Put differently, they contend that no claim arose in terms of section 341(2) until DVS was placed in liquidation. As such a claim is a claim in the hands of the liquidators, they can only claim once they are appointed. The liquidators are claiming debts which may have been voided years before, and the fact necessary for such debts to come into existence is the granting of the liquidation.

[57] The SCA in *Duet and Magnum Financial Services CC (In Liquidation) v Koster*³¹ held that prescription commences 'no later than the date on which a liquidator is appointed'.³² The SCA in so finding clearly contemplated that depending on the circumstances of the matter, prescription could commence running earlier than the date upon which the liquidator is provisionally or finally appointed.

³¹ *Duet and Magnum Financial Services CC (In Liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA).

³² *Id* para 27 (own emphasis).

[58] The SCA in *Bester and Others NNO v Gouws and Others*,³³ cited with approval its earlier decision in *Minister of Finance and Others v Gore NO (Gore)*,³⁴ where it was held that ‘for the purposes of prescription, knowledge extends to a conviction or belief that is engendered by or inferred from attendant circumstances’. In that case, the court found that despite not being 100% certain, the liquidators had sufficient knowledge of the facts, specifically that it was a pyramid scheme and that it had always been insolvent.

[59] The Court in *Gore* reiterated that the SCA has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action, and that the running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably.³⁵

[60] Accepting that the liquidators were only appointed to the liquidated companies on 21 November 2023, in this matter regard must be had to the fact that they were the same liquidators appointed to Germani on 16 March 2020.

[61] These entities were all intertwined and part of the same unlawful scheme, which culminated in them being collapsed into Germani and being liquidated at the same date effectively as the date on which Germani was liquidated.

[62] The liquidation and distribution account for Germani was completed on 31 July 2020. Counsel for Mr. Calitz submitted that this would necessarily have been preceded by a thorough investigation into its financial affairs, from which the liquidators would have become aware of the scheme being operated by its

³³ *Bester and Others NNO v Gouws and Others* (851/2019) [2020] ZASCA 174 (17 December 2020).

³⁴ See *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA).

³⁵ *Id* at para 17 and the authorities there cited.

controlling mind, Mr. Romani, and would have had sufficient knowledge, or at the very least, been in a position to acquire the facts from which the debt arose, at the date of liquidation. I agree. This is so because they were in a unique position to have been privy to the affairs of DVS that ultimately resulted in it being collapsed into Germani and were able to satisfy the court that a case was made out for the relief sought in terms of section 20(9), due to an abuse of juristic personality.

[63] Moreover, the section 20(9) order is not without consequence. By choosing to backdate the liquidation date of DVS to Germani's date, the liquidators triggered the commencement of prescription.

[64] Notably, nowhere in the founding or replying papers do the liquidators state when they became aware of the impugned payments made by DVS to Mr. Calitz. Their knowledge or deemed knowledge of the payments at the time of Germani's liquidation was pertinently raised and placed in issue by Mr. Calitz in his answering affidavit, where he also questioned why the liquidators waited three years after Germani's winding up to bring the section 20(9) application. The liquidators failed to deal with this in reply, save to state that they were only appointed on behalf of the collapsed companies on 24 November 2023.

[65] The liquidators' failure to adduce evidence in this regard leads to the ineluctable inference that they were aware of these dispositions prior to July 2020 or earlier. These facts were within their peculiar knowledge.³⁶ Had they only become aware of these payments by DVS to Mr. Calitz upon their appointment as the liquidators of the liquidated companies, it was incumbent on them to say so.

³⁶ See *Gericke v Sack* 1978 (1) SA 821 (A) 827E.

[66] In any event, in my view, this is one of those situations where on a conspectus of the evidence as a whole, it has been shown that the liquidators as the liquidators of Germani, the company at the centre of the scheme, would have been in a position to acquire the requisite knowledge and failed to do so timeously.

[67] In the context of section 341(2) of the 1973 Companies Act claims, a liquidator may be deemed to have knowledge of the primary facts if they could have acquired it by exercising reasonable care, as soon as a reasonably diligent liquidator investigating the company's affairs and bank statements would have uncovered the payments constituting the void dispositions.

[68] I agree with the contentions by Mr. Rabie that the liquidators would not have brought a section 20(9) application if they had not concluded that there were untoward dealings by the liquidated companies, in particular DVS, from which it must follow that on the probabilities they had constructive knowledge of the payments to Mr. Calitz.

[69] The liquidators chose to 'backdate' the winding up of the liquidated companies to the date on which Germani was liquidated. Had the winding up date been the same as the section 20(9) order, they would have avoided any debt arising in terms of section 341(2) of the 1973 Companies Act from prescribing.

[70] Mr. Rabie in argument highlighted that should the liquidators' argument prevail, namely that notwithstanding the backdating of the liquidation order, prescription only started to run on the date of appointment, it would usurp the court's discretion to validate payments as there would no longer be a period between the date of the commencement of the winding up and the date of the

provisional order of liquidation, which would deprive Mr. Calitz of such remedy.

[71] It would further cause uncertainty in relation to commercial transactions, as one could transact with a wholly solvent company only to have the company liquidated effective from a retrospective date and have transactions that occurred several years ago set aside without the protection of prescription.

[72] In my view, this argument is sound. If the liquidators' argument is upheld, applicants could delay bringing a section 341(2) application, absent the threat of prescription, whilst transactions that took place after the initial liquidation order and the section 341(2) order will (possibly several years later) be under scrutiny.

[73] As a consequence, the dispositions are deemed to be after the winding up of DVS and occurred more than three years prior to the service of the application.

[74] Arising from the foregoing, prescription would have commenced to run on 17 September 2018, alternatively 20 June 2019, or at the very latest on 31 July 2020. The present application was served on the respondent more than three years later, on 15 January 2025.

[75] The applicants' claims have accordingly prescribed and fall to be dismissed.

[76] There is no reason why the costs should not follow the result. In view of the nature and complexity of the matter and the issues raised, I am of the view that the costs of counsel should be taxed on Scale B.

Order

[77] Accordingly, the following order is granted:

1. The application is dismissed with costs, the costs of counsel to be taxed on Scale B.

M Holderness

Judge of the Western Cape High Court

Appearances

For Applicant : Adv AR Newton

Instructed by : Lombard & Kriek Inc.

For Respondent : Adv PJ Rabie

Instructed by : Hannes Pretorius Bock & Bryant c/o Macgregor Stanford Kruger Inc.