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

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

Application no.: 4999/2022

In the application between:

ELRICH RUWAYNE SMITH N.O. 1st Applicant

ZIYAD SONPRA N.O. 2nd Applicant

[In their capacity as liquidators of Golden Ribbon Trading 86 (Pty) Ltd (in liquidation) Master reference number B62/2019]

and

PANNAR SEED (PTY) LTD 1st Respondent

[Reg. no.: 1986/002148/07]

THE MASTER OF THE FREE STATE

HIGH COURT, BLOEMFONTEIN 2nd Respondent

CORAM: VAN ZYL, J

HEARD ON: 11 MAY 2023

DELIVERED ON: 9 OCTOBER 2023

[1] The applicants, in their capacity as liquidators of Golden Ribbon Trading 86 (Pty) Ltd [in liquidation] are seeking the following relief:

> "1. That the payment in the amount of R571,730.93 made by Golden Ribbon … to the first respondent on 5 August 2019, alternatively the payment in the amount of R571,730.93 belonging to Golden Ribbon … made by Silostrat (Pty) Ltd to the first respondent on 5 August 2019 be confirmed to be void in terms of section 341(2) of the Companies Act, 61 of 1973, and is set-aside;
>
> 2. That the payment in the amount of R571,730.93 made by Golden Ribbon … to the first respondent on 6 August 2019, alternatively the payment in the amount of R571 730.93 belonging to Golden Ribbon … made by Silostrat (Pty) Ltd to the first respondent on 6 August 2019 be confirmed to be void in terms of section 341(2) of the Companies Act, 61 of 1973, and is set-aside;
>
> 3. That the first respondent be ordered forthwith to make payment of the amount of R654,372.45 (R1,113,461.86 less repayment in the amount of R489.972.41 on 19 August 2019) to the applicants;
>
> 4. That the first respondent be ordered forthwith to make payment of interest on the amount of R654,372.45 at the prescribed rate of interest as from 19 August 2019 until date of payment, both days inclusive;
>
> 5. That the first respondent be ordered to pay the costs of this application on an attorney and client scale."

[2] The first respondent opposed the main application and also filed a conditional counter-application. For purposes of clarity, I will

throughout the judgment refer to the parties as cited in the main application.

[3] In terms of the conditional counter-application the first respondent stated that should it be found that the payments of 5 and 6 August 2019 to the first respondent are void, then and in that instance the first respondent is seeking the following relief:

1. That the two payments of R571,730.93 each made to the first respondent by Silostrat (Pty) Ltd on 5 and 6 August 2019 respectively, be declared valid in terms of section 341(2) of the Companies Act, 61 of 1973;

2. That the first respondent is authorised to retain the balance amount of R654,372.45;

3. That the applicants pay the costs of the counter-application, should they oppose same.

Background and chronology:

[4] The first and second applicants ("the applicants") are the duly appointed co-liquidators of Golden Ribbon Trading 86 (Pty) Ltd [in liquidation] ("Golden Ribbon").

[5] Golden Ribbon commenced business rescue proceedings on 10 August 2018.

[6] Mr JF van Tonder was appointed as business rescue practitioner on 21 August 2018.

[7] The business rescue practitioner published a business rescue plan on 30 October 2018 and on 13 November 2018 the business rescue plan was adopted by the creditors of Golden Ribbon.

[8] On 20 December 2018 Mr Willie Viljoen, the late director of Golden Ribbon, signed an order form, ostensibly on behalf of Golden Ribbon [in business rescue] in terms whereof Golden Ribbon [in business rescue] ordered sunflower seed from the first respondent in the amount of R558,600.00.

[9] The first respondent sold and delivered the seed to Golden Ribbon [in business rescue] on credit so as to allow Golden Ribbon to cultivate crops.

[10] On 4 January 2019 Golden Ribbon [in business rescue] concluded a cession *in securitatem debiti* in favour of the first respondent to provide security for the payment of, *inter alia,* the aforesaid purchase price. The cession was concluded and signed on behalf of Golden Ribbon [in business rescue] by Mr Willie Viljoen.

[11] After the crops were harvested, the harvest was sold by Golden Ribbon [in business rescue] to Silostrat (Pty) Ltd ("Silostrat") and on 5 June 2019 the first respondent's attorney of first instance gave written notice to Silostrat of the cession *in securitatem debiti*, advising Silostrat, *inter alia,* as follows:

"1. … Kindly take note that all amounts due to Golden Ribbon [in business rescue] … have been ceded to our client.

2. We understand that you are currently and will in future be indebted to Golden Ribbon and we hereby perfect the said cession. You therefore have to make payment of any and all amounts due by yourselves to Golden Ribbon, to our client as the cessionary.

3. The said payments have to be made into our trust account …"

[12] On 17 July 2019 First National Bank ("FNB) lodged an application for the liquidation of Golden Ribbon.

[13] Silostrat made two payments of R571,730.93 each to the first respondent`s attorney of first instance on 5 and 6 August 2019, respectively.

[14] It is common cause between the parties that the amount which was due by Golden Ribbon to the first respondent at the time was R654,372.45, which the first respondent's attorney of first instance paid over to the first respondent from the payment received from Silostrat. The surplus balance of R489,972.41 was refunded to Silostrat. The first respondent therefore received a nett payment of R654,372.45.

[15] Golden Ribbon was subsequently provisionally liquidated on 10 October 2019 and finally liquidated on 20 February 2020.

[16] The main issues to be decided are, firstly, whether the payment of the nett amount of R654,372.45 by Silostrat to the first respondent is void in terms of the provisions of section 341(2) of

the Companies Act, 61 of 1973 ("the 1973-Act"), and, secondly, should it be found that the said payment is indeed void, whether the payment is to be validated in terms of the proviso contained in section 341(2) of the 1973-Act.

The validity of the cession:

[17] The applicants dispute the validity of the cession, *inter alia,* on the basis that Mr Willie Viljoen signed the cession without having been authorised thereto by the business rescue practitioner and further that FNB, who at the time also held security over the crops, did not consent to the conclusion of the cession.

[18] Mr van der Merwe, who appeared on behalf of the applicants, relied, *inter alia,* on the provisions of section 137 of the Companies Act, 71 of 2008 ("the 2008-Act") in terms whereof the appointed business rescue practitioner, during a company's business rescue proceedings, has full management control of the company in substitution for its board and pre-existing management. Mr van der Merwe also specifically referred to the provisions of section 137(2) of the 2008-Act, which section determines that during a company's business rescue proceedings a director of a company must continue to exercise the functions of director, but subject to the authority of the business rescue practitioner. Mr van der Merwe consequently relied on section 137(4) of the 2008-Act which determines as follows:

> "(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on

behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner."

[19] In the founding affidavit the applicants made the bold statement in paragraph 29.5 thereof that the business rescue practitioner "*conceded in the insolvency enquiry held in the Hoopstad Magistrate's Court that he did not authorise Mr Viljoen to act on behalf of the company".*

[20] In paragraph 42.6 of the answering affidavit the first respondent stated as follows in response to the aforesaid allegation:

"42.6 It is denied that the BR practitioner at the enquiry conceded not being authorised. This transcript shall be made available if so required. The session was in fact not even dealt with in the enquiry, but rather the control over the bank accounts. It is apparent that the BR practitioner allowed the directors to continue the farming operation."

[21] The first respondent also referred to and relied on certain correspondence attached to the answering affidavit on the basis of which it alleges that the business rescue practitioner had been aware of the cession, that he authorised the director, Mr Willie Viljoen, to sign same and that FNB also consented to the conclusion of the cession. The applicants, in their replying affidavit, also attached and referred to correspondence on the basis of which they deny the alleged authorisation by the business rescue practitioner and consent by FNB.

[22] In my view, the following relevant facts and circumstances are evident from the papers:

1. A copy of the order for the sunflower seed which Mr Willie Viljoen placed at the first respondent, was also e-mailed to the business rescue practitioner on 20 December 2018, the very same day on which Mr Willie placed and signed the order. A copy of the e-mail is attached to the first respondent`s answering affidavit as “AA4”. The business rescue practitioner did not cancel or object to the order; instead he addressed the e-mail of 22 December to FNB, which e-mail I deal with in the next paragraph.

2. On 22 December 2018 the business rescue practitioner addressed an e-mail to one Ms Cawood, an employee/representative of FNB. The subject line of the e-mail reads “Cession on harvest”. The e-mail, *inter alia,* reads as follows:

> “I apologise for the late message while you are most probably on leave. The weather however determines work activities on a grain farm.
>
> The situation relating to this message is that the initial plan to plant soybeans came to a standstill due to the drought and late rains. … an alternative plan was made to proceed with sunflower … because it is too late in the season for planting soybeans.
>
> **Another supplier (Panard)** (*sic)* **is willing to provide sunflower seed on a delayed payment basis at a low interest rate but**

require a cession on the harvest. They also ask for confirmation that FNB will not lay claim to the sunflower harvest based on the covering bond registered in favour of FNB over the immovable property of Golden Ribbon. … See waiver document attached. (My emphasis)

I therefore ask for your support to proceed with the new operational plan to plant sunflower (if adequate rainfall is received) on the farms owned and rented by Golden Ribbon Trading; as well as your approval to waive your rights only over the sunflower harvest in favour of Panard (*sic*) who provide the seeds.

The cost of the seeds is R558 600.00 and only the amount planted will be invoiced. The harvest will be delivered to grain silos in the district and depending on favourable rains are expected in April/May 2019.

The main benefit for all creditors, of the new operational plan, is that it will become more likely to find long-term finance if the loan amount is reduced with the nett proceeds from these farming operations (estimated at R2,9 million). This is also still aligned with the Business Rescue Plan which stated that the business operations must proceed to provide income for dividend payments and ongoing future operations.

Because the seeds are required with the first good rainfall I urgently hope to receive your feedback as soon as possible."

3. On 10 January 2019 Ms Cawood of FNB addressed an e-mail to the business rescue practitioner in which she stated as follows:

> "We are prepared to sign the waiver as amended – see attached. If you accept the amendment, kindly confirm and we will sign and forward the waiver to you."

4. The aforesaid amended waiver, annexure "AA8" to the answering affidavit, reads, *inter alia,* as follows:

> "The Bank hereby irrevocably waives all its rights, title, interest, liens as well as any other encumbrances, whatsoever, in and to the Crop as cultivated during the 2018/2019 season and financed by Pannar Seed. As such Pannar shall be entitled to the proceeds of the Crop."

[23] I agree with the contention of Mr Pretorius, who appeared on behalf of the first respondent, that it is evident from the aforesaid that the business rescue practitioner was aware of the first respondent`s requirement of a cession of the proceeds and he supported same. It is furthermore clear that FNB agreed that the first respondent "*shall be entitled to the proceeds of the crops*", therefore consenting to such rights vesting in the first respondent and waiving its own entitlement thereto.

[24] In the business rescue practitioner's Business Rescue Status Report, dated 20 February 2019, which report is attached to the founding affidavit as "FA9", the business rescue practitioner expressly confirmed the cession in favour of the first respondent:

> "5. **Furthermore, PANARD** (*sic*) **provided sunflower seed with a cession on the harvest planted. The land owners approved the cession and it was completed middle February 2019.**" (My emphasis)

[25] In their replying affidavit the applicants dealt with communications exchanged between the respective roll players on which they rely in support of the following contentions:

1. That the director, Mr Willie Viljoen, did not have the authorisation from the business rescue practitioner to have signed the cession in favour of the first respondent; and

2. Although FNB was willing to waive its rights to the proceeds of the harvest, it was not willing to consent to a cession being given in favour of the first respondent.

[26] However, as correctly pointed out by Mr Pretorius, the confirmation of the conclusion and existence of the cession was expressly stated by the business rescue practitioner in his aforesaid report of 20 February 2019.

[27] In my view it is consequently to be accepted that the business rescue practitioner authorised Mr Willie Viljoen to have ordered and bought the seed from the first respondent on behalf of Golden Ribbon and to have concluded the cession agreement; alternatively, the business rescue practitioner ratified Mr Willie Viljoen's aforesaid actions, since it is evident from his e-mail to Ms Cawood on 22 December 2018 that he was well aware of the transaction with the first respondent and in his report of 20 February 2019 he confirmed the existence of the cession. At no stage did the business rescue practitioner repudiate any of the two agreements. See **Molefe v Dihlabeng Local Municipality & Others** (1885/2003) [2003] ZAFSJHC 12 (14 August 2033). See

also **Bohica Business Consulting CC v Bathusi Investments (Pty) Ltd** (6229/2013) [2017] ZAGPPHC 1118 (8 December 2017).

[28] With regard to FNB, one has to be mindful of the fact that what the first respondent required, was a waiver by FNB of its rights and entitlement to the crop and the proceeds thereof. This is also what was requested from FNB by the business rescue practitioner in the already mentioned e-mail of 22 December 2018 and which was agreed to by FNB. It was never required by any party that FNB should consent to the conclusion of the cession as such. There is also no indication in the papers that FNB is averring the opposite. In fact, the report of 20 February 2019 would have been furnished to all creditors. FNB did not subsequently thereto object to the said cession.

[29] I consequently conclude that the cession agreement between Golden Ribbon and the first respondent constituted a valid cession *in securitatem debiti* agreement.

The date of liquidation and the voidness of the payments:

[30] Section 341(2) of the 1973-Act provides as follows:

> "**341 Dispositions 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."

[31] Section 348 of the 1973-Act determines as follows:

"**348 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."

[32] Mr Pretorius, however, submitted that in terms of section 132(2)(a) of the 2008-Act, business rescue proceedings only end when the Court sets aside the resolution or order which started the business rescue proceedings.

[33] The relevant part of section 132(2)(a) of the 2008-Act reads as follows:

"**132 Duration of business rescue proceedings**

(1)…

(2) Business rescue proceedings end when-

(a) the court-

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings."

[34] Mr Pretorius pointed out that the provisional liquidation order in respect of Golden Ribbon, dated 10 October 2019, attached to the founding affidavit as "FA 5.2", determined in addition to the provisional sequestration of Golden Ribbon, the following:

"The Business rescue proceedings and supervision of the respondent is terminated."

[35] Mr Pretorius consequently submitted that the only reasonable and business-like interpretation is that section 348 of the 1973-Act does not find application where a company was in business rescue before it was liquidated. He therefore contended that the payments which were made to the first respondent were done whilst Golden Ribbon was still under business rescue and are therefore not void as stipulated in section 341(2) of the 1973-Act.

[36] In response to the aforesaid arguments, Mr Van der Merwe relied, *inter alia,* on the judgment of **Pride Milling Co (Pty) Ltd v Bekker NO and Another 2022 (2) SA 410 (SCA)**, in which the Supreme Court of Appeal re-affirmed the purpose and effect of section 341(2) of the 1973-Act at paras [30] - [31] of the judgment:

[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, ie 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.

[31] As to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. As already discussed, this discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of

a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition."

[37] In addition Mr Van der Merwe relied on the judgment of **Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in Liquidation) and Others 2023 (1) SA 398 (SCA)** in which the aforesaid **Pride Milling**-judgment was referred to with approval. In addition, the Supreme Court of Appeal specifically dealt with the question whether sections 341(2) and 348 of the 1973-Act are applicable in instances where business rescue proceedings precede the provisional liquidation of a company. In that matter business rescue proceedings commenced in respect of the first respondent on 2 November 2015. The business rescue practitioners who were in the employment of the appellant, were appointed with effect from the said date. On 14 April 2016 a number of the company's creditors commenced liquidation proceedings against the company. On 16 May 2016 the business rescue practitioners made their own application to convert the business rescue proceedings into liquidation proceedings. On 23 May 2016 and on 2 June 2016, two payments were made to the appellant by the business rescue practitioners in respect of their fees during the business rescue. On 14 June 2016 the High Court ordered that the business rescue proceedings be discontinued and the company was placed in provisional liquidation. The liquidators, who were the respondents in the appeal, issued an application in October 2018, in which they sought a declaration that both payments were void

in terms of s 341(2) of the 1973 Act and an order that the moneys be repaid, together with interest. The application succeeded. On appeal the Supreme Court of Appeal, *inter alia,* made the following findings:

"[22] In terms of item 9(1) of sch 5 to the Companies Act 71 of 2008 (the 2008 Act) certain provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies. These include s 341(2), which provides:

> '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.'

In terms of s 348 of the 1973 Act:

> '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] It was not in dispute that: (i) in view of s 348 of the 1973 Act, the deemed commencement date of the winding-up of the company was 16 May 2016 (when the application to convert the business rescue into liquidation proceedings was lodged by the BRPs); and, (ii) the payments made by the BRPs to Mazars were accordingly made after the commencement of the winding-up of the company. It thus came to be accepted by the appellants that the provisions of ss 341(2) and 348, if applied according to their terms, would render the payments void. That ought to be the end of the matter because, as this court recently observed in *Pride Milling*, 'the provisions of s 341(2) could not be clearer'. The 'predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void'.

…

[24] However, the appellants contend that 'the two payments do not constitute dispositions by the company of its property' and that the

interpretation of s 341(2) must be informed by the more recent provisions in the 2008 Act relating to business rescue …

…

[28] 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. …

…

[30] Accepting the argument advanced on behalf of the BRPs would not only render nugatory the discretion conferred upon a court by the proviso in s 341(2), but also place all payments made by BRPs in the relevant period beyond judicial scrutiny. That could hardly have been the intention of the legislature. On the other hand, the case of the respondents is simple and relatively straightforward. It accords with the unambiguous provisions of the 1973 Act — that the payments are void and must be repaid.

…

[31] In view of the common-cause facts, as well as the clear wording and object of s 341(2) of the 1973 Act, the High Court cannot be faulted for having declared the payments void in terms of that section and ordering Mazars and the BRPs to make repayment. There is accordingly no merit in the appeal."

[38] I consequently find that sections 341(2) and 348 of the 1973-Act are mutatis mutandis applicable in instances where business rescue proceedings precede the provisional liquidation of a company. They are consequently also applicable *in casu.*

The so-called "perfection" of the cession:

[39] Mr Pretorius contended on behalf of the first respondent that the first respondent perfected the cession on 5 June 2019 by means of the e-mail which the first respondent`s attorney of first instance addressed to Silostrat, informing Silostrat of the cession. I have already referred to the relevant contents of the said e-mail earlier in the judgment. Mr Pretorius submitted that because the cession *in securitatem debiti* was perfected before the deemed date of sequestration (17 July 2019), the rights in terms of the cession and the entitlement to the proceeds of the crops, thereafter vested in the first respondent as the cessionary and no longer in the cedent, Golden Ribbon. The payments were consequently, according to his submission, correctly and lawfully made and did not fall within the ambit of section 341(2) of the 1973-Act.

[40] I cannot agree with the aforesaid submission. The case law which Mr Pretorius referred to does also not support his contention. In **BP Southern Africa (Pty) Ltd v Intertrans Oils SA (Pty) Ltd and Others** 2017 (4) SA 592 (GJ), to which he referred, it was specifically stated at para [46] of the judgment that "*even the reversionary right was ceded to the creditor in this agreement*". That cession was therefore similar to an out-and-out session, which is not the case in the present matter. Mr Pretorius also relied on the judgment of **Grobler v Oosthuizen** 2009 (5) SA 500 (SCA) and submitted that "*it is now trite that such cession is likened to a pledge, vesting in the cessionary and not in the cedent".* However, that is not how I understand the said judgment. Brand, JA, in my view, held that under the pledge theory, which

had been accepted as applying in South African law, the effect of a cession *in securitatem debiti* is that the principal debt is 'pledged' to the cessionary, while the cedent retains the 'bare *dominium*' or a 'reversionary interest' in the claim against the principal debtor.

[41] At the commencement of the hearing of the present application, I indicated to the parties that I have previously written a judgment in which I specifically dealt with the effect of a cession *in securitatem debiti* and also with the legal position, as I understood it at the time, in instances where such security was “perfected” by the cessionary before the deemed date of liquidation of the cedent, but where the proceeds were only paid to the cessionary after the deemed date of liquidation. I consequently stood the hearing of the present application down in order to grant counsel an opportunity to peruse the said judgment, where after we continued with the hearing and they were granted the opportunity to address me on the said judgment.

[42] The aforesaid judgment is reported as **Nedbank Ltd v Cooper NO and Others** 2013 (4) SA 353 (FB), which matter served before me as a stated case. I am not going to repeat the detailed facts in that matter, other than to state that to my mind they were basically on all fours with the facts *in casu,* although part of the dispute was the liquidators’ entitlement to certain fees. In short, in that matter a company to which I shall only refer as “Marlim” was liquidated and the first and second respondents were the finally appointed joint liquidators in the liquidated estate of Marlim. Prior to its liquidation Marlim concluded certain deeds of pledge and

cession pertaining to, *inter alia,* specific Momentum policies which it ceded, assigned and made over to Nedbank *in securitatem debiti.* On 30 January 2009 Nedbank called up Marlim's banking facilities and surrendered the policies and requested payment of the proceeds thereof from Momentum. This occurred a couple of days before the deemed date of liquidation, which was 4 February 2009. Pursuant to Nedbank`s surrendering of the policies and prior to the provisional liquidation of Marlim on 26 February 2009, Nedbank received payment of certain amounts of money from Momentum. Nedbank subsequently received two further payments of money from Momentum subsequent to the provisional liquidation of Marlim. I dealt with the applicable legal principles at paragraphs [20] – [30] of that judgment. My conclusions in that judgment which are, in my view, directly relevant to this matter, were the following, at paras [27] and [28] of the judgment:

"[27] …It is evident that by means of a cession *in securitatem debiti* a personal right is pledged, that the pledgor retains the dominium of the right, that he transfers only the power to realise the right to the pledge, and accordingly the right falls into his estate upon his insolvency. See Susan Scott, *The Law of Cession,* paras 12.2.1.5.1 at 240 – 1. Therefore, when book debts are ceded *in securitatem debiti*, the effect thereof is as was held in *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294C – D:

> 'When book debts are ceded *in securitatem debiti*, as in the cession to Nedbank, the cedent cedes to the cessionary the exclusive right to claim and receive from the existing and future "book debtors" the amounts owing by them. The amount so collected by the cessionary are credited to the account of the cedent. Any amount collected in

> excess of the cedent's debt belongs to the latter. Thus it cannot be said that by such a cession that it was intended to pass ownership.'
>
> Therefore, even if it were accepted that in the current instance the surrendering of the policies terminated them as such, it is irrelevant. What was effectively ceded in this instance was Marlim's right to claim and receive the surrender value of the policies. Therefore, even if the policies were terminated because of the surrendering thereof, Marlim still held the dominium in the said right, being, inter alia, the 'entitlement' to the money. That is why, when the money was to be received by the applicant — had it not been for the liquidation of Marlim — it still was to be credited to the account of Marlim to reduce Marlim's liability towards the applicant. Should there have been any excess, Marlim would have been entitled to claim it back from the applicant.
>
> [28] Therefore, where the proceeds had not yet been received by the applicant by the deemed date of liquidation, Marlim was still to be considered to have held the ownership of those proceeds, and accordingly it vested in Marlim's estate upon its liquidation. Even if it were accepted that the surrendering of the policies terminated them, up and until the proceeds of the policies were in fact paid out, the dominium of the right to receive payment of the surrender values of the policies remained vested in Marlim and formed an asset in the estate of Marlim. …"

[43] Despite proper research I could not find any judgment which criticizes or overturned the aforesaid principles or findings. In addition, from the case law I studied for purposes of the present judgment, it appears to me that my findings are still in accordance with other more recent judgments.

Conclusion in respect of the main application:

[44] I therefore conclude that Golden Ribbon retained its reversionary interest in the cession agreement and consequently its claim against Silsostrat in terms of the cession *in securitatem debiti.* The said claim and hence the proceeds paid by Silostrat to the first respondent consequently vested in the liquidated estate of Golden Ribbon and therefore in the hands of the applicants as the appointed liquidators.

[45] The payments by Silostrat to Golden Ribbon consequently fall within the ambit of the first part of section 341(2) of the 1973-Act and are consequently void, unless the Court, as determined in the proviso contained in section 341(2), orders otherwise.

The conditional counter-claim:

[46] Due to my conclusion in the preceding paragraph, the first respondent`s conditional counter-claim becomes relevant and needs to be adjudicated.

[47] I have already cited the **Pride Milling**-judgment above where the Supreme Court of Appeal specifically found at para [31] that "*as to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature*" and *"in exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding up a company*

unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition". (My emphasis)

[48] In **Lane N.O. v Olivier Transport** 1997 (1) SA 383 (C) at 386 C – 387 B the Court set out some guidelines for the exercise of the said discretion:

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

(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. …"

[49] In *casu* Golden Ribbon and the first respondent dealt at arm`s length when Golden Ribbon ordered the sunflower seed from the first respondent. Golden Ribbon was not an existing client of the first respondent. The business rescue practitioner was aware of and authorised; alternatively ratified the ordering of the seed and the conclusion of the cession *in securitatem debiti.* FNB conceded to the waiver of its rights pertaining to the crop as was requested by the first respondent. The first respondent therefore supplied the seed under the *bona fide* and reasonable impression and belief that payment will in fact materialize as e secured by the cession.

[50] I have earlier referred to the e-mail which the business rescue practitioner addressed to Ms Cawood, an employee/representative of FNB, dated 22 December 2018, annexure "AA6" to the replying affidavit. For ease of relevance I repeat certain relevant parts thereof:

"…The situation relating to this message is that the initial plan to plant soybeans came to a standstill due to the drought and late rains. With only a fraction of the soybean harvest planted (35%) an alternative plan was made

to proceed with sunflower. The rest of the soybean seed (65%) will be handed back, because it is too late in the season for planting soybeans.

Another supplier (Panard) (*sic)* is willing to provide sunflower seed on a delayed payment basis at a low interest rate but require a cession on the harvest. …

I therefore ask for your support to proceed with the new operational plan to plant sunflower (if adequate rainfall is received) on the farms owned and rented by Golden Ribbon Trading…

The main benefit for all creditors, of the new operational plan, is that it will become more likely to find long-term finance if the loan amount is reduced with the nett proceeds from these farming operations (estimated at R2,9 million). This is also still aligned with the Business Rescue Plan which stated that the business operations must proceed to provide income for dividend payments and ongoing future operations. (My emphasis)

Because the seeds are required with the first good rainfall I urgently hope to receive your feedback as soon as possible." (My emphasis)

[51] From the aforesaid it is evident that the first respondent`s willingness to have sold the sunflower seed to Golden Ribbon was an essential life line to Golden Ribbon and all its creditors at the time, without which its creditors would have suffered even bigger losses.

[52] The seed so supplied by the first respondent enabled Golden Ribbon to generate substantial proceeds which were to the benefit of all the creditors of Golden Ribbon. In fact, the initial estimate of the proceeds from the maize and sunflower crops,

was an amount of R6 951 300 as stated in the Business Rescue Status Report dated 19 April 2019, whilst it eventually yielded an actual income of R7 554 134. More importantly, R6 026 516 of the last-mentioned total emanated from the sunflower crops.

[53] The transaction therefore benefitted the general body of creditors, since it generated surplus funds for distribution. All the secured creditors of Golden Ribbon had also been paid in full.

[54] Silostrat was not a party to the agreement pertaining to the ordering of the seed nor was it a party to the cession. In fact, the cession provided for the sale of the crop by Golden Ribbon to either Silostrat or Senwes Limited. In fact, on the papers Silostrat only became aware of the cession when informed thereof by the first respondent`s attorney of first instance by means of the letter dated 5 June 2019, which was prior to the date of the issuing of the liquidation application. Silostrat subsequently made the payments to the first respondent in accordance with the terms of the cession, as advised by the first respondent`s attorney of first instance. There is no indication on the papers that there was anything untoward or *mala fide* about the fact that Silostrat made the payments to the first respondent.

Conclusion in respect of the counter-application:

[55] In the totality of the aforesaid facts and circumstances I consider it just and fair that the disposition in favour of the first respondent be declared not to be void and that I exercise my judicial discretion accordingly.

Costs:

[56] Mr Van der Merwe submitted that even should the main application be unsuccessful and the counter-application be successful, the first respondent should be ordered to pay the costs of both the applications. In support of this submission Mr Van der Merwe relied upon the correspondence between the respective attorneys of first instance during which the applicant`s attorney of first instance eventually stated in a letter, dated 12 August 2022, that the first respondent should bring the necessary validation application within fifteen days, failing which the applicants "*shall proceed to institute legal proceedings against Pannar…for repayment of the amounts received by them after 17 July 2019".* Mr Van der Merwe submitted that it was the first respondent`s failure to have launched such a validation application that necessitated the applicants to have launched the main application, since they were statutorily obligated to do so.

[57] Mr Pretorius submitted that even if the first respondent had approached court for an order of validation in terms to the proviso in terms of section 341(2) of the 1973-Act, the result in respect of the nature and extent of the papers that would have been filed in those circumstances would have been the same as presently. The applicants would have opposed the first respondent`s application and would also have launched a counter-application to have the disposition be declared void.

[58] I have to agree with the submission of Mr Pretorius. There would have been no difference in the nature and extent of the papers

and also not in the essence of the outcome. In the circumstances I can find no reason why the applicants should not be ordered to pay the costs of both the application and the counter-application from the liquidated estate of Golden Ribbon.

Order:

[59] The following order is made:

1. The main application is dismissed, with costs.

2 The counter-application is granted, with costs, in the following terms:

2.1 The payment of R571 730.93 made to Pannar Seed (Pty) Ltd by Silostrat (Pty) Ltd on 5 August 2019 is declared to be valid in terms of the proviso contained in section 341(2) of the Companies Act, 61 of 1973.

2.2 The payment of R571 730.93 made to Pannar Seed (Pty) Ltd by Silostrat (Pty) Ltd on 6 August 2019 is declared to be valid in terms of the proviso contained in section 341(2) of the Companies Act, 61 of 1973.

2.3 It is declared that Pannar Seed (Pty) Ltd is authorised and entitled to retain the nett payment of R654 372.45 received from Silostrat (Pty) Ltd.

3. The aforesaid costs of the main application and the counter-application are to be paid by the applicants from the estate of Golden Ribbon Trading 86 (Pty) Ltd [in liquidation].

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C. VAN ZYL, J

On behalf of the applicants:	Adv. R. van der Merwe Instructed by: Badenhorst Attorneys Bloemfontein (pieter@badenhorst.law)
On behalf of the first respondent:	Adv. J.J Pretorius Instructed by: Muller Gonsior Attorneys Bloemfontein (johanette@mullergonsior.co.za)