
JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The plaintiffs are the liquidators of a company (*'Water Africa'*¹). On 7 February 2014 a creditor (*'DPI Plastics'*) issued an application for a final winding-up order of Water Africa (*'the winding-up application'*).

[2] On 28 October 2015, Judge Hughes granted a final winding-up order. Water Africa was thereafter placed under business rescue by Judge Tuchten and on 12 April 2016, the final winding-up of Water Africa was reinstated by Judge Potterill. The plaintiffs were appointed as liquidators on 30 June 2016.

[3] The first defendant is a practising firm of attorneys who represented Water Africa during the winding-up application (*'Water Africa's attorneys'*). The second and third defendants were directors of Water Africa.

[4] On 20 May 2015, Water Africa's attorneys made a tender (*'the tender'*) to DPI Plastics in terms of which an amount of R1,664,207 was tendered on certain conditions. Such amount was held by Water Africa's attorneys in trust. DPI Plastics rejected the tender. After the final winding-up order was granted, and on 24 March 2016, Water Africa's attorneys paid out of the trust account an amount of R400,000 to the second defendant and an amount of R400,000 to the third defendant. On the 5th of April of 2016 a further sum of R200 000 was paid to the second defendant.

[5] The plaintiffs' case is essentially that Water Africa's attorneys held the amount of R1,664,207 in trust on behalf of Water Africa, that it was an asset or property of

¹ The company was Ronnie Dennison Agencies (Pty) Ltd which traded as "Water Africa" and changed its name to Water Africa Systems (Pty) Ltd.

Water Africa, and that on liquidation the liquidators became entitled to this amount. They contend that the payments to the second and third defendants stand to be reversed or repaid. After the payments to the second and third defendants, a balance of R664,207 remained unaccounted for and they contend that Water Africa's attorneys should also repay such amount. The plaintiffs rely on the provisions of the Companies Act 61 of 1973 (*'the old Companies Act'*) and the Insolvency Act, 24 of 1936 (*'the Insolvency Act'*).

[6] The defendants' main case is that the second and third defendants were the source of the money in Water Africa's attorney's trust account and that the money in the trust account was not the property of Water Africa.

Evidence

[7] Mr van den Heever testified on behalf of the plaintiffs and Mr Christie a director of Water Africa's attorneys, testified on behalf of the first defendant. The second and third defendants also testified. The thrust of the defendants' evidence was that the second and third defendants were the source of the money that was paid into Water Africa's attorneys trust account and that the money was therefore not the property of Water Africa.

Undisputed facts or facts which became common cause

[8] As is so often the case, much of what was in dispute at the commencement of the trial, is no longer at the conclusion of the trial. I summarise such facts hereinafter.

[9] On 7 February 2014, DPI Plastics issued a winding-up application against Water Africa.

[10] On 20 May 2015, Water Africa's attorneys wrote a letter to DPI Plastics in which it confirmed that it represented Water Africa in the winding-up application, that it had received an amount of R1,664,207 from Water Africa and made an unconditional tender on behalf of Water Africa to pay such amount to DPI Plastics in the winding-up application.

[11] The amount of R1,664,207 had been paid into Water Africa's attorneys' trust account via various routes and sources, on behalf of or by the second and third defendants (the intention was that each contribute 50% of such amount but the second defendant was short and the third defendant paid the shortfall).

[12] On 1 June 2015, Mr Christie of Water Africa's attorneys, deposed to a supplementary affidavit to which was attached the unconditional tender on behalf of Water Africa and caused this affidavit to be filed and served in the winding-up application.

[13] On 28 October 2015, Judge Hughes granted a final winding-up order, leave to appeal was granted on 20 November 2015 and on 15 December 2015 a notice of appeal was filed.

[14] On 9 December 2015, Water Africa was placed under business rescue in terms of a court order granted by Judge Tuchten. On 24 March 2016, Water Africa's attorneys made payments to both the first and second defendants of R400,000 each. On 5 April 2016, it made another payment to the second defendant of R200,000.

[15] On 12 April 2016, the final winding-up of Water Africa was reinstated in terms of a court order granted by Judge Potterill.

[16] On 30 June 2016, the plaintiffs were appointed as final joint liquidators of Water Africa by the Master.

[17] On 20 September 2018, the application launched by the directors of Water Africa to reinstate the appeal lodged against the granting of the final winding-up order on 28 October 2015 was dismissed.

The causes of action

[18] There are two claims. Claim A is based on section 341(2) read with section 348 of the Companies Act 61 of 1973 (*the old Companies Act*). Claim A became an alternative claim to claim B² as claim A can only apply if claim B is unsuccessful.

[19] In respect of claim B the issues and disputes are: (a) whether the plaintiffs have in law a claim for repayments made by Water Africa's attorneys to the second and third defendants in terms of the Law of Insolvency (statutory or common law); and (b) whether the money which Water Africa's attorneys kept in its trust account is the property or an asset of Water Africa as it is understood in Insolvency Law, i.e. whether it forms part of the *concursum creditorum*.

Claim B

[20] The grounds on which a liquidator seeks repayment of an amount that has been paid by or on behalf of a company which has been placed under winding-up depends on the stage when the payment was made. Claim B is based on alleged payments made by Water Africa after the granting of the final winding-up order in which event the court would have no discretion to validate such a disposition and the order would be *void ab initio*.³

² Section 348 of the old Companies Act only has application if Water Africa is and was at all stages unable to pay its debts. Judge Hughes never relied on the deeming provision contained in section 345 of the old Companies Act. She found as a fact that Water Africa was unable to pay its debts and perhaps more significantly, when Mr van den Heever testified he gave detailed evidence based on the liquidation and distribution accounts and stated that these accounts reflected that Water Africa was clearly unable to pay its debts. It was never suggested during cross examination of him that Water Africa was able to pay its debts.

³ *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)* 2015 (6) SA 21 (GJ) at para [16] pp 27 – 28; paras [25.2] to [25.4] p 31.

[21] At the time when the payments were made to the second and third defendants, Water Africa had already been placed under winding-up by the court. The payments were therefore *per se* void.

Can the business rescue undo the fact that the payments were void?

[22] Subsequent to the liquidation of Water Africa, it was placed in business rescue by an order made by Judge Tuchten. In terms of a court order made by Judge Potterill, Judge Tuchten's order was set aside and it was ordered that the winding-up order be reinstated.

[23] The defendants did not plead a defence based on the business rescue order. It is trite that defendants cannot raise a defence that has not been pleaded. Be that as it may, as a matter of law, the business rescue order did not change the legal position relating to the payments made after the winding-up.

[24] The principle is settled: in terms of section 131(6) of the Companies Act 71 of 2008 (*the new Companies Act*) it is the liquidation proceedings and not the winding-up order that is suspended. The winding-up order remains in place.⁴

[25] At the time payments to the second and third defendants were made, they were void as having been effected after the winding-up of Water Africa. In terms of *Maroos (infra)*, a subsequent placing of a company in business rescue cannot undo the voidness of the dispositions. Water Africa was finally wound up in terms of the order made by Judge Hughes on 28 October 2015 and not on 12 April 2016 when Judge Potterill reinstated the court order and when she made the declarator that the business rescue proceedings had ended.

⁴ *GCC Engineering (Pty) Ltd and others v Maroos and others* 2019 (2) SA 379 (SCA).

[26] In addition, both Judges Tuchten and Potterill made it clear in the wording of their orders that the winding-up of Water Africa was reinstated. Reinstatement means “the restoration of the status quo ante”.⁵

Meaning of property

[27] The property of a company being wound up is in the custody and under the control of the liquidator.

[28] Section 2 of the Insolvency Act⁶ defines property as follows:

“ ‘property’ means movable or immovable property wherever situate in the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary*, heir or legatee”.

[29] The section defines movable property as meaning every kind of property which is not immovable property. It is clear that the definition of “property” is much wider than the common law meaning of property.⁷

[30] Accordingly, a right of action which someone has against his or her banker to claim payments of the amount standing to the credit of his or her account constitutes movable property as defined in the Insolvency Act.⁸ Conceptually one should distinguish between “property” on the one hand which is much wider and encompasses much more and ownership on the other hand which is narrower.

[31] In *Nationwide*⁹ the company paid money into its attorneys’ trust account for purposes of settlement and was thereafter liquidated. The High Court held on the facts that the matter had not become settled and upheld the claim of the provisional

⁵ *Themba v Mintroad Sawmills (Pty) Ltd* [2015] 2 BLLR 174 (LC) at p 179 para [22]; see too *Equity Aviation Services (Pty) Ltd v CCMA and others* 2009 (1) SA 390 (CC) at para [36].

⁶ Which applies by virtue of the provisions of section 339 of the old Companies Act.

⁷ *Van Zyl and others NNO v Turner and Another NNO* 1998 (2) SA 236 (C) at 242.

⁸ *De Hart NO v Kleynhans and others* 1970 (4) SA 303 (O) at 387

⁹ *EDS South Africa (Pty) Ltd v Nationwide Airlines (Pty) Ltd* 2011 (5) SA 158 (SCA).

liquidators to the amount in the attorneys' trust account. The decision was confirmed on appeal. The SCA held that on the evidence the attorneys held the funds as agent of the company which was eventually liquidated.

The defendants' assertion that the money was always the "property" of the second and third defendants analysed

[32] The tender was made to demonstrate an ability to pay and it also contained an offer. The purpose of the unconditional tender was to avert the winding-up of Water Africa. Water Africa had to show that it was able to pay DPI Plastics whatever was due to it. If the court seized with the winding-up application accepted that the amount of the indebtedness was as alleged by Water Africa and that Water Africa (as opposed to its directors or shareholders or any other person) was able to pay the amount of such admitted indebtedness, then the tender might well have had the desired result of staving off the winding-up. If the court were aware that the money being tendered was not the money of Water Africa then the tender would not have achieved its objectives or as Mr van den Berg argued, would have been stillborn.

[33] The second and third defendants were shareholders and directors of Water Africa at the time when the tender was made. It is common for shareholders to advance money to the company on loan account (often without repayment terms and with the loans being subordinated). There is nothing unbusinesslike in an interpretation that the payments into Water Africa's attorneys trust account by the second and third defendants constituted loans or investments.

[34] It is against this background that the surrounding facts and circumstances are to be analysed.

Water Africa's attorneys letter dated 20 May 2015

[35] The tender was first made in a letter addressed by Water Africa's attorneys to DPI Plastic's attorneys on 20 May 2015. In the heading of the letter Water Africa's attorneys expressly defined their client as "*Water Africa Systems SA (Pty) Ltd trading as Water Africa SA (formerly Ronnie Dennison Agencies (Pty) Ltd)*". Paragraph 1 of the letter reads as follows:

'The sum of R1 664 207,00 (one million six hundred sixty four thousand two hundred and seven rand) has been received from **our client**, and constitutes proof that **our client** is able to pay any outstanding debts after deducting various challenges and counterclaims mentioned below ...' (emphasis provided).

[36] This letter states in its terms that the amount of R1 664 207 was received from Water Africa. Mr Christie's explanation during cross-examination was that the phrase "our client" which appears twice in lines 2 and 3 of the letter bears two different meanings: the first use of "our client" was meant to be "our clients" in the plural and is a reference to the second and third defendants, whereas the second use of the phrase "our client" was meant to be in the singular (being a reference to Water Africa). This explanation is rejected¹⁰ as it contradicts the express wording of the letter and the purpose for which it was tendered. Apart from the clear references to "our client" in the singular, the phrase has been expressly and specifically defined in the heading of the letter. There is no mention of the second or third defendants. The letter intends to convey that the receipt of the money constitutes proof that Water Africa is able to pay its debts (and hence is solvent). Any other interpretation would not constitute proof of solvency at all.

DPI Plastics' attorneys letter dated 26 May 2015

¹⁰ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2013 (1) SA 11 (SCA), par 5 on p14 and further.

[37] DPI Plastics' attorneys responded to the letter of 20 May 2015 on 26 May 2015.

After disputing the amount tendered, the letter continued as follows:

- '5. In any event, payment into an attorney's trust account under these circumstances does not constitute payment. It also gives no comfort to our client.

6. Should the Respondent [Water Africa] be placed under liquidation by another creditor, the amount held in trust will not be secured and will fall within the (insolvent) estate of the company in liquidation."

[38] The letter clearly conveyed that the view was held that the money held in trust fell into the insolvent estate should Water Africa be placed in liquidation. If Water Africa held a different view, it should have responded to it. There was no response to this letter. I find that Water Africa accepted that the amount held in trust would fall into the insolvent estate in the event of a future liquidation.

[39] Mr Christie's explanation is that he never received this letter and saw it for the first time when it was discovered. I can not accept this explanation having regard to what the parties agreed to at the pre-trial conference:

- '9.1 that copies of all documents may be used and accepted as true copies of the original thereof.

- 9.2 that documents are what they purport to be, but do not prove the truth of their contents.

- 9.3 that letters and emails will be considered to have been sent and received as set out therein.

- 9.4 that the arrangement in respect of 9.1, 9.2 and 9.3 supra is subject to the fact that any part may on reasonable notice dispute any document on any legal basis.'

[40] No document was disputed. Mr Christie signed the pre-trial minute.

[41] Mr van den Heever testified about this letter of 26 May 2015 and quoted from it during his evidence in chief. It was never suggested to him that this letter was not sent or received. Mr Christie did not testify during his evidence in chief that he had not received the letter at the time. He did so for the first time under cross-examination.

Water Africa's attorneys letter dated 29 May 2015

[42] On 29 May 2015 Water Africa's attorneys addressed another letter to DPI Plastic's attorneys, to which was attached the notice of unconditional tender. In the letter "*our client*" is again defined as Water Africa (and again the full description of Water Africa is set out). The letter reads:

'We attach our client's notice of unconditional tender, which will be filed shortly.

In the premises, our client is not insolvent as is alleged.'

[43] The conclusion sought to be drawn that Water Africa is not insolvent would only hold water if the money tendered was Water Africa's money.

Notice of Unconditional Tender

[44] The actual notice of unconditional tender also does not support the defendants' version.

[45] In the tender the parties to the liquidation application (DPI Plastics as applicant and Water Africa as respondent) are listed in the heading. The tender then commences as follows:

"BE PLEASED TO TAKE NOTICE that the Respondent [i.e. Water Africa] tenders, unconditionally, to payment to the Applicant [DPI Plastics] of the sum below, subject to the provisions stated herein, namely:

1. Payment in the sum of R1 664 207,00 ...”

[46] The tender is clearly made by the respondent (Water Africa). If the tender were made on behalf of the second and/or third defendants, the tender would have to say so, as any acceptance of the tender would have to involve an agreement with the second and third defendants.

Supplementary Affidavit

[47] Mr Christie submitted a supplementary affidavit in the liquidation application to which was attached the unconditional tender. In paragraphs 4 and 5 it is expressly stated that the tender is “*submitted by the Respondent [Water Africa]*” and that the amount has been “*tendered by the Respondent [Water Africa]*”.

The Trust Account

[48] Water Africa’s attorneys trust account in which the amount of R1 664 207 was held refers to the client as Water Africa Systems (Pty) Ltd. This is consistent with an interpretation that the money was the property of Water Africa, and not of the second or third defendants.

Evidence at Inquiry

[49] Mr Christie was a witness at an insolvency inquiry where he was questioned by Mr van den Heever. Mr van den Heever questioned him about the letter addressed to DPI Plastics on 20 May 2015 and after confirming that the amount was held in a section 78(2)(a) account, Mr van den Heever asked him whether the amount was held on behalf of Water Africa to which Mr Christie answered: “*Yes, on behalf of Water Africa*”.

[50] Later on in the questioning, Mr Christie explained the tender as follows:

'We said to our clients: The way to prove, you can continua (sic) business in order to show solvency. But they had already been in provisional liquidation, so those ... [intervenes].'

[51] This extract confirms that the purpose of the tender was to show the solvency of Water Africa, and that the tender was made on behalf of Water Africa. The evidence given at the enquiry is in line with the interpretation that the money was held on behalf of Water Africa, that it was its property, and that the tender was made in order to prove the solvency of Water Africa.

Water Africa's attorneys letter dated 19 October 2018

[52] On 19 October 2018 Water Africa's attorneys addressed a letter to Mr van den Heever.

[53] After explaining that some of the money was disbursed to the second and third defendants, the letter continued:

- '4. You will note that the monies were made available to the company for the purpose of settlement of the creditor's claim. Had the tender been accepted, the transaction would have been reflected as a loan from the directors in the company's books and their respective loan accounts adjusted.'

[54] The payment by the second and third defendants to Water Africa could not be both a loan to Water Africa and remain their property.

The Mandate

[55] The defendants testified that the second and third defendants signed a mandate. The evidence is that the document got lost and that a duplicate was then later again signed by them and backdated. It is significant that the second and third

defendants could not give a meaningful explanation as to why the monies were paid into Water Africa's attorneys trust account.

[56] The wording of the mandate is destructive of the defendants' version.

[57] Paragraph 2 of the mandate reads:

"The Tender constitutes monies from Clients [defined as second and third defendants] which is placed at the disposal of Water Africa Systems (Pty) Ltd for the purpose of settling the dispute with DPI Plastics (Pty) Ltd and subject to the following: ..."
[Own emphasis]

[58] The Appellate Division, in an exception, had to interpret the words "*we hold at the disposal¹¹ of your Board the sum of R20 000.00*" in a letter. Diemont AJA said:

'The use of the word 'disposal' is significant. In its ordinary connotation one of the meanings of the words is 'the power or right to make use of or deal with as one pleases'. (Oxford Dictionary, Vol 3, p 219). It is within the power of the board to make use of or deal with the R20 000.00 at any time when it is pleased to ...'¹²

What do second and third defendants say?

[59] The defendants explained how the second and third defendants acquired the money, and that they paid it into Water Africa's attorneys trust account. This does not shed light on the issues which fall for determination. The objective evidence contradicts Mr Christie's evidence. Mr Christie could not explain how his letters or the tender could have "proved" solvency if the money was the property of the second or third defendants.

[60] The second and third defendants did not know how or under what circumstances they would recover the money paid to Water Africa's attorneys. The

¹¹ The word is emphasised in the judgment.

¹² *SA Warehousing Services (Pty) Ltd & Others v South British Insurance Co Ltd* 1971 (3) SA 10 (A) at 18A-C, see too *Finger & Others v Secretary of England Revenue* 1971 (2) SA 411 (W) at 418fin-419A

second defendant testified that no decision or agreement had been made at the time as to how the money would be recovered.

[61] In the absence of any meaningful evidence from the second or third defendants that the money remained their property, there are simply no grounds on which the defendants' version and defence can be accepted. There is no evidence that Mr Christie would have had personal knowledge of the relationship and arrangements between Water Africa and its shareholders/directors.

[62] The only clear understanding evident from the defendants' evidence about the money was that it would stave off liquidation, which it could only do if it were the property of Water Africa.

[63] The suggestion that the money in the trust account was not Water Africa's property is rejected.

Conclusion

[64] The money advanced by the second and third defendants to Water Africa became Water Africa's property (as defined in the Insolvency Act). The fact that the money would be repayable at some point in the future (either when a tender were rejected or at a later stage if the tender were accepted) does not detract from (and in fact supports) the following conclusions: (a) at the very least it was a loan to Water Africa and (b) it is Water Africa's property as contemplated in section 2 of the Insolvency Act. The latter conclusion entitles the plaintiffs to such amount.¹³

[65] Based on *Engen*¹⁴ and the fact that the money was the property of Water Africa, the plaintiffs are entitled to an order that the monies received by the second

¹³ Section 391 of the old Companies Act.

¹⁴ Footnote 3 *supra*

defendant (R600 000) and the third defendant (R400 000) respectively be repaid by them.

[66] Water Africa's attorneys had a duty to account to Water Africa for the funds in the trust account.¹⁵ After Water Africa was placed under winding-up, Water Africa's attorneys could only deal with the money on the instructions of the liquidators.

[67] Water Africa's attorneys are liable for any unauthorised payments from their trust account.¹⁶ In making payments to the second and third defendants, they dealt with property which was not their property, and without the instructions of the persons who had the required authority, i.e., the liquidators (the plaintiffs). Instead, they made unauthorised payments to persons who had no right to the payments.

[68] The first defendant is accordingly liable, jointly and severally, with the second and third defendants respectively for the amounts paid to them. After payments totalling R1 million to the second and third defendants had been made, there was still an amount of R664 207 which had been in the trust account (and formed part of the tender) which has not yet been repaid to the plaintiffs. Any payment which the first defendant may have made in respect of other litigation in which the second defendant or the third defendant may have been involved, was equally unauthorised.

[69] I have found in favour of the plaintiffs in respect of claim B and Claim A has thus fallen away.

Order

[70] I accordingly grant the following order in favour of the first, second and third plaintiffs, in their capacities as joint final liquidators of Water Africa Systems (Pty) Ltd (in liquidation):

¹⁵ *Fourie v Van der Spuy & De Jongh Inc and Others* 2020 (1) SA 560 (GP) at para's 13-17

¹⁶ See *Fourie supra*.

- (1) As against the first and second defendants, jointly and severally, the one paying the other to be absolved:
 - 70.1.1 The amount of R600 000; and
 - 70.1.2 Interest on the amount of R400 000 at the rate of 10,25% per annum from 24 March 2016 to date of payment; and
 - 70.1.3 Interest on the amount of R200 000 at the rate of 10,25% per annum from 5 April 2016 to date of payment.
- (2) As against the first and third defendants, jointly and severally, the one paying the other to be absolved:
 - 70.2.1 The amount of R400 000; and
 - 70.2.2 Interest on the aforesaid amount of R400 000 at the rate of 10,25% per annum from 24 March 2016 to date of payment.
- (3) As against the first defendant:
 - 70.3.1 The amount of R664 207; and
 - 70.3.2 Interest on the aforesaid amount of R664 207 at the rate of 10,25% per annum from 28 October 2015 to date of payment.
- (4) Costs of this action to be paid by the first, second and third defendants, jointly and severally, the one paying the other to be absolved.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the plaintiffs: Adv P van der Berg SC

Instructed by: Van Veijeren Inc

Counsel for the defendants: Adv CD Roux

Instructed by: RC Christie Inc

Date of hearing: 11 and 12 May 2022, 13 June 2022.

Date of Judgment: 16 November 2022