

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 2022/011114

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
10 July 2023 DATE SIGNATURE

In the matter between:

MARYNA ESTELLE SYMES N.O.

FIRST APPLICANT

PINKIE MARTHA MAHLANGU N.O.

SECOND APPLICANT

(in their capacities as the duly appointed joint liquidators of Manor Squad Services (Pty) Ltd (in liquidation)

and

DE VRIES ATTORNEYS INCORPORATED

FIRST RESPONDENT

KHOZA, LEON PERCY

SECOND RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

[1] The applicants in this application are the joint liquidators of Manor Squad Services (Pty) Ltd (in liquidation), who enjoy extended powers under section 386(5) of the Companies Act 61 of 1973 (Old Companies Act). They seek an order for payment of various sums by De Vries Attorneys Incorporated (De Vries) and Leon Percy Khoza (Mr Khoza). This, on the basis of payments made to De Vries and Khoza between the date of the issue of the application for the winding up of Manor Squad Services (Pty) Ltd (Manor Squad) and the date of the final winding up order.

[2] The application is said to be one in terms of section 341(2), read with section 348, of the Old Companies Act.

2.1. Section 341(2) provides that *“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”*.

2.2. Section 348 deems the winding up of a company by the Court to commence at the time of the presentation to the Court of the application for the winding up.

[3] Both De Vries and Mr Khoza oppose the application. Both admit the payments. However, Ms Debbie De Vries (Ms De Vries), the sole director of De Vries, asserts that the firm was not the *“benefactor”* of the payments, and Mr Khoza says he received the monies with an instruction to utilize the funds. Although inelegantly put, the substantive point made by both these respondents is that the payments to

them do not constitute “*disposition*” within the meaning of section 341(2) of the Old Companies Act.

[4] In addition, Mr Khoza raises the non-joinder of Manor Squad and of Manor Squad’s sole director and shareholder, Mr Timothy Gordon Marsland (Mr Marsland) as points *in limine*.

[5] In the circumstances, three potential questions are raised for determination:

5.1. whether the points *in limine* are good;

5.2. if not, whether the payments made to De Vries and Khoza constitute “*disposition*” as contemplated in section 341(2) of the Old Companies Act; and

5.3. if so, whether this Court ought to exercise its direction to order that the payment were not void

RELEVANT FACTS

[6] On 27 August 2021, an application for the winding up of Manor Squad was issued in this Court. At the time, Mr Marsland was incarcerated in Modderbee Medium Correctional Facility.

[7] On 2 September 2021, two payments of R500 000 each were made into the trust account of De Vries, with the references indicating that such payments were made on behalf of Mr Marsland.

- 7.1. On Ms De Vries' version, De Vries represented Mr Marsland in a bail application for purposes of which it instructed Mr Khoza, a practicing advocate. Bail was set in an amount of R1 000 000.
- 7.2. Ms De Vries alleges that Mr Marsland then instructed a certain Mr Scott McIntyre (Mr McIntyre) to transfer that amount to De Vries' trust account, which he did. Mr McIntyre is said to have been a former director of Manor Squad and, at the relevant time, a project manager for Manor Squad. Correspondence attached to the replying affidavit in response to these allegations indicates that De Vries requested payment from Mr McIntyre of LMJ Consulting (Pty) Ltd on the instruction of Mr Marsland "*in favour of Messrs Manor Squad Services*", but with the reference "*TG Marsland*".
- 7.3. Payment of R500 000 each was made to accounts held by De Vries and Khoza, who in turn made payments of R500 000 each to the Department of Justice on Mr Marsland's behalf to secure his release on bail.

[8] On 7 September 2021, R400 000 was paid to Mr Khoza. He says that the R400 000 was "*utilized as per client instructions*", which instructions he says constitutes privileged information that cannot be divulged without instruction or a court order. The client referred to is Mr Marsland.

[9] Mr Marsland was released on bail, and he says that it was only on 9 September 2021 that he learnt of the application for the provisional winding up of Manor Squad. For the sake of completeness it must, however be noted that notice of opposition in the liquidation proceedings had already been filed on 31 August 2021. Mr Marsland later confirmed that the attorneys who filed the notice were in fact acting for Manor Squad in the winding up proceedings. It is not explained how the instruction to

oppose came to be given if the sole director and shareholder did not know of the application.

[10] On 15 September 2021, a further payment of R30 000 was made to the De Vries trust account, followed by R200 000 on 23 September 2021. De Vries says that these payments were made on Mr Marsland's behalf, to cover the cost of "*medical services, service providers and other services*" that De Vries had secured on Mr Marsland's behalf, with the providers looking to De Vries for payment. There is serious question mark hanging over that allegation, as follows:

10.1. Correspondence of 13 September 2021 from De Vries reveals that De Vries requested payment of R30 000, with reference number DV/0410. An invoice of that same day attached to the reply bears the reference number in relation to "*MR TG MARSLAND / VARIOUS MATTERS*". The invoice for R30 000 is said to have been "*To fees – Liquidation*".

10.2. Further correspondence of 23 September 2021 asked for the payment of R200 000 "*in favour of Manor Squad Services*", again with reference number DV/0410. An invoice of the same date issued to Mr Marsland reflected that the amount of R200 000 was billed "*To fees – Various matters*".

[11] On 29 September 2021, Manor Squad was placed in provisional liquidation.

[12] On 21 February 2022, it was placed under final winding up, on the basis that it was unable to pay its debts.

THE OPERATION OF SECTION 342(1)

[13] The object of section 341(2) is to prevent the dissipation of the company's assets 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. In relation to payments made between the bringing of the winding up application and the grant of the provisional order, the *onus* is on the person seeking to uphold the transaction to establish circumstances justifying the making of a validating order (*Lane NO v Olivier Transport* 1997 (1) SA 383 (C)). If that *onus* is not discharged, there is no basis for the exercise of the discretion in section 342(1).

[14] In its terms, section 341(2) says nothing about the recovery of the void disposition. It merely renders the disposition void, subject to the exercise of the Court to order otherwise. However, if the transaction is void, it must be a necessary corollary of section 341(2) that the Court may order a refund of the void disposition, as explained in *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and another* 1980 (4) SA 669 (SWA) (*Herrigel*) at 681B-D.

THE POINTS IN LIMINE

[15] As indicated, Mr Khoza relies on the non-joinder of Manor Squad and Mr Marsland as a basis to avoid the grant of the relief sought. The non-joinder points have no merit as follows.

[16] Manor Squad is a company in liquidation. The applicants are the duly appointed liquidators, bringing the application in that capacity and on behalf of Manor Squad as they are entitled to do in accordance with their extended powers. Simply put,

such interests as Manor Squad may have in the proceedings are represented by the liquidators.

[17] A director does not merely by virtue of that status have a direct and substantial interest in litigation involving the company of which he is a director (see *Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) paras 9 – 11). Mr Marsland's status as director of Manor Squad can accordingly not, without more, be relied on to substantiate a non-joinder point.

[18] Even accepting the version of the respondents that the payments made to them were for the ultimate benefit of Mr Marsland, Mr Marsland has no legal interest in the proceedings. No relief is sought against him, and the order sought can be sustained and carried into effect without prejudicing Mr Marsland. The actual point made is not that Mr Marsland has an interest, but that Mr Khoza has an interest in Mr Marsland revealing to the Court why payment of R400 000 had been made to Mr Khoza. That is not a proper non-joinder point. If Mr Khoza considered that it was necessary for his opposition to the application to succeed, he ought to have secured it. Notably, De Vries obtained a confirmatory affidavit from Mr Marsland in support of its defence of the order sought. Mr Khoza could have done the same, but did not.

[19] The fact that there is an affidavit from Mr Marsland before this Court is in any event instructive in the adjudication of the non-joinder point. It is accepted that a failure to join a necessary party may be cured if an informal notice asking such a party whether it wished to intervene is met by an unequivocal response that it would abide by the decision of the Court (*In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 242A). No such notice was given here, but there is no doubt that Mr

Marsland had been informed of the litigation, since he filed an affidavit in support of De Vries' answer to the application. He gave no indication that he considered that his legal interests were to be affected by any order granted – rightly so, in my view. It hardly behoves Mr Khoza to now make a point of non-joinder on Mr Marsland's behalf.

[20] In the circumstances, the points *in limine* are dismissed.

WAS THERE A DISPOSITION WITHIN THE CONTEMPLATION OF SECTION 341(2) OF THE OLD COMPANIES ACT?

[21] It is common cause before me that the payments alleged to have been made were in fact made, and that they were made in the period between the issue of the winding up application and the grant of the provisional order.

[22] The point that De Vries makes in defence is that it was not the “*benefactor*” of the payments, in that all amounts paid to it and relied on in this application were paid out. It was merely the conduit for payment, with the payments to de Vries expressly said to have been made into its trust account. I infer that the payment to Mr Khoza was in fact also a payment into his trust account: (i) he asserts that he is a trust account advocate as contemplated in section 34(2)(b) of the Legal Practice Act 28 of 2014 (LPA); (ii) the payment of the R400 000 does not reflect on his business account statement that covers the period of in which the amount was paid; and (iii) he says that the payment was made in order to be utilised in accordance with instructions from Mr Marsland, although he does not say what they were to be utilised for.

[23] I was not directed to, nor could I find, any case law dealing directly with the question whether payment into an attorney's or advocate's trust account amounts to a disposition in terms of section 341(2) of the Old Companies Act. However, the judgment of the Supreme Court of Appeal (SCA) in *Van Wyk Van Heerden Attorneys v Gore NO and another* [2022] 4 All SA 649 (SCA) (*Gore*), which De Vries relied on, dealt with the question whether deposits made into an attorney's trust account constituted dispositions without value within the contemplation of section 26(1)(b) of the Insolvency Act 24 of 1936 (Insolvency Act). The section provides that every disposition not made for value may be set aside if made by an insolvent within two years of sequestration of the estate.

[24] The *Gore* judgment and the authorities referred to therein proved most useful for purposes of the present analysis. Of particular relevance was the SCA's recordal of the judgment in the English case of *Bank of Ireland v Hollicourt (Contracts) Ltd* [2001] 1 All ER 289 (CA) (*Hollicourt*). There, liquidators sought to recover payment of monies from the Bank of Ireland to third parties from the account of Hollicourt, based in section 127 of the English Insolvency Act, 1986, which provided that:

"In a winding up by the court, any disposition of the company's property ... made after the commencement of the winding up is, unless the court orders otherwise, void".

[25] It will be immediately apparent that section 217 employs almost identical language to that of section 341(2) of the Old Companies Act.

[26] In *Hollicourt* (at para 23) it was held that *"the policy promoted by section 127 is not aimed at imposing on a bank restitutionary liability to a company in respect of*

*payments made by cheques in favour of creditors, in addition to the unquestioned liability of the payees of the cheques”. The Court concluded that “section 127 only invalidates the dispositions by the Company of its property to the payees of the cheques. It enables the Company to recover the amounts disposed of, but only from the payees. It does not enable the Company to recover the amounts from the Bank, which has only acted in accordance with its instructions as the Company’s agent to make payments to the payees out of the Company’s bank account. As to the intermediate steps in the process of payment through the Bank, there is no relevant disposition of the Company’s property to which the section applies” (at para 31). Support for this position was found amongst others in the Australian case of *Re Mal Bower’s Macquarie Electrical Centre Pty Ltd (in liquidation)* [1974] 1 NSWLR 245 at 258, where the Court considered that:*

“... the word ‘disposition’ connotes in my view both a disponent and a disponentee. The section operates to render the disposition void so far as concerns the disponentee. It does not operate to affect the agencies interposing between the company, as disponent, and the recipient of the property, as disponentee ... The intermediary functions fulfilled by the bank ... do not implicate the bank in the consequences of the statutory avoidance prescribed by section 227.

... I consider that the legislative intention ... is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponentee that forms the basic legislative purpose of section 227.”

[27] The same purposive interpretation undertaken by the English and Australian Courts find application in our law, as is evident from the oft-cited judgment of the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). Following the English and Australian authority, cited with approval by the SCA in *Gore*, I must come to the conclusion that the “*disposition*” contemplated in section 341(2) requires consideration of who the true disponent is, and that it does not include payments to an intermediary or agent that truly fall within that category.

[28] That conclusion is consistent also with the approach of Goldblatt J in *Zamzar Trading (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* 2001 (2) SA 508 (W) (*Zamzar*) at 515B-C. There, the Court expressed the view that it would be “*repugnant to logic and law*” to “*create a situation where a principal could visit liability on his on his agent for performing precisely the mandate which it had given to its agent*”. In *Gore* (at para 25) the SCA explained that the “*reasoning strikes me as unassailable and equally applicable to an attorney who is merely instructed to make a payment*” (*Gore* at para 25). Indeed, in *M and another v Murray NO and others* 2020 (6) SA 55 (SCA) (*Iprolog*), a judgment concerning a deposit into the trust account of an attorney who acted for a nominated payee, the SCA had held that “*the disposition was to Iprolog [the payee on whose behalf it was received] and occurred ... when the money was paid into the attorney’s trust account*” (*Iprolog* at para 31).

[29] At this stage of the analysis, it makes no difference to the legal position that the payments made were for the benefit of Marsland, and that they had no bearing on or relation to Manor Squad.

- [30] The real question is whether De Vries and Mr Khoza were mere conduits, or whether they were indeed the benefactors of some or all of the funds, within the meaning of that term the SCA has adopted in the context of disposition.
- [31] The payments of the R30 000 and the R200 000 to De Vries were made on the basis of fees charged to Mr Marsland, as the invoices evidence. In *Gore* (at para 41), the SCA considered the situation where payments of fees are made to attorneys from their trust account: *“The attorneys made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. As such, they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account”* (emphasis supplied) In *Gore*, the SCA made the point that, since the payment was made by the company embroiled in liquidation proceedings and not the beneficiaries of the legal services in question, the deposits became *“dispositions”* within the meaning of section 26(1)(b) of the Insolvency Act. The same principle must apply in the present case, under section 341(2).
- [32] Even if I treat the R230 000 as having been paid for medical reasons, Ms De Vries’ version is that the service providers looked to her for payment, so that the payments would equally be treated as disbursements paid by De Vries that were made good. In that scenario, De Vries appropriated the funds in its trust account to settle disbursements incurred on behalf of Mr Marsland, and in circumstances where Manor Squad was not the beneficiary of the disbursements, the approach in *Gore* dictates that the payments are to be treated as *“dispositions”* for purposes of section 341(2).

[33] Insofar as the R1 000 000 bail money is concerned, it is common cause on the papers that the amount was paid for on-payment as bail money and that in fact happened. However, it would appear to me that in this scenario De Vries equally appropriated the monies in the trust account to pay a disbursement incurred on behalf of Marsland, its client (the payment of the bail money). It thus also falls within the definition of disposition adopted in *Gore*.

[34] In respect of the R400 000 paid to Mr Khoza's account, the position is less clear. On Mr Khoza's version, the payment was made to him and "*utilized as per client instructions*". The applicants have asserted that the amount was a disposition, but did not allege that the payment was made for fees charged. They have not put up evidence, as they did in the case of De Vries, that the amounts were paid in respect of an invoice for fees. On the other hand, Mr Khoza's coy explanation does not say that the fee were *not* utilised for payment of his fees "*as per client instructions*". He has therefore not discharged the onus that he bears to show that the payment was not a disposition. I find that the reliance on alleged privilege is entirely unhelpful. Like the SCA in *Johannesburg Society of Advocates and Another v Nthai and Others* 2021 (2) SA 343 (SCA) at paragraph 59, I find myself "*unclear on what basis privilege was asserted*". Nothing stood in the way of Mr Khoza at least giving a general description of the way in which the funds were utilised (*eg* for fees, or for payments to creditors of Mr Marsland), even if for some unexplained reason there attached privilege to the instructions given to him.

[35] In all of these circumstances, I conclude that all of the monies claimed constituted dispositions within the contemplation of section 341(2) of the Old Companies Act.

[36] This then brings me to the question of the discretion that I enjoy.

IS THERE A BASIS FOR THE COURT TO EXERCISE ITS DISCRETION?

[37] The Court's discretion to validate a disposition is absolute and is controlled only by the general principles which apply to every kind of judicial discretion. The Court is free to exercise the discretion on the basis of its opinion on what is just and fair in the circumstances of the case.

[38] The first point that must be made is that the fact that the recipient of the disposition was unaware of the presentation of the application for winding-up or of the fact that the company was in financial difficulties is a factor to be taken into account but is not decisive (*Re J Leslie Engineers Co Ltd* [1976] 2 All ER 85 (Ch) at 95). In any event, where the disposition has resulted in a creditor's being preferred, the mere fact that he was unaware that this was the case does not justify validation (*Herrigel* at 680).

[39] Ms De Vries sought to make out the case that she had been unaware of the winding up proceedings or where the money was coming from. However, it is clear that De Vries knew the payments were coming from Manor Squad. Indeed, although it is common cause that the payments were clearly requested for the ultimate benefit of Mr Marsland, the requests for payment all indicated that the payments were for the account of Manor Squad and that the monies were to be paid "*in favor of Manor Squad*". By the time the payment of the R30 000 and the R200 000 were made, Ms De Vries patently knew of the winding up proceedings, with her invoices making reference to it and suggesting that the payment sought was for fees in the liquidation, although Ms De Vries now accepts on oath that the payments were made for the benefit of Mr Marsland. I do not consider it fair and just for the creditors of Manor Squad to make a declaration that the dispositions are not void, given that De

Vries knowingly participated in a scheme to receive payment from Manor Squad when it knew that the payments were not based in any obligation of Manor Squad, or for its benefit, but for the benefit of Marsland. The participation in the scheme continued even after De Vries objectively knew that winding up proceedings had been instituted.

[40] In the case of both De Vries and Mr Khoza, their versions are to the effect that the payments had no relationship whatsoever to the *bona fide* carrying on of Manor Squad's operations in the ordinary course, which would generally form the basis of a Court making a validating order. The jurisprudence and commentaries on the Old Companies Act make the point that the Court ordinarily will refuse to validate a disposition where it was made for example with the object of securing 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. In the *Herrigel* case the Court refused to validate the disposition notwithstanding that the recipient of it was *bona fide* where its result was that such recipient had in fact been preferred above other creditors (at 679–680).

[41] Here, the position is even worse for De Vries and Mr Khoza. It is not a case of Manor Squad's creditor's being preferred, but in fact of Mr Marsland's creditors being preferred.

[42] In the circumstances of the case, I accept that onward payments were made. This is most apparent in the case of the R1 000 000 bail. There is thus a certain hardship that will flow from any order to repay the amounts sought. However, in accordance with the principles set out in the Australian case of *Re Tellsa Furniture Pty Ltd* (1984–1985) 9 ACLR 869 (SC (NSW)) relatively little weight should be

attached to the hardship which will be suffered if the payment is not validated, the purpose of the section being to minimise hardship to the body of creditors generally.

I find that the same principle applies in the context of section 341(2).

[43] Based on all of these considerations, I find that there is no basis for this Court to exercise its discretion in favour of De Vries and Mr Khoza. The payments are void, and the repayment must follow.

COSTS

[44] In the notice of motion, the applicants sought “*costs of suit*”. A draft order uploaded on 12 April 2023 asks for the costs to include the costs consequent upon the employment of two counsel, one being a senior counsel, and for the respondents to be jointly and severally liable. In addition, it proposes an order that De Vries pay the costs on scale as between attorney and client, from the date of the filing of the answering affidavit. This, on the basis that Ms de Vries, who is an officer of the Court, perjured herself in the answering affidavit. I agree. The documents presented in reply to Ms De Vries’ assertions that she did not know of the liquidation proceedings and that payments had been made in respect of medical services when in fact the request for payment was accompanied by invoices for legal services clearly evidence that Ms De Vries was less than truthful in the version she presented. Moreover, two counsel were certainly warranted in the present case, which raised questions of some complexity and novelty.

ORDER

[45] In the circumstances, I make the following order:

- 45.1. The first respondent is ordered to pay:
- 45.1.1. the sum of R500 000.00, plus interest on this amount, calculated at a rate of 7.25% per annum, *a tempore morae*, from 2 September 2021 to date of final payment;
 - 45.1.2. the sum of R500 000.00, plus interest on this amount, calculated at a rate of 7.25% per annum, *a tempore morae*, from 2 September 2021 to date of final payment;
 - 45.1.3. the sum of R30, 000.00, plus interest on this amount, calculated at a rate of 7.25% per annum, *a tempore morae*, from 15 September 2021 to date of final payment; and
 - 45.1.4. the sum of R200 000.00, plus interest on this amount, calculated at a rate of 7.25% per annum, *a tempore morae*, from 23 September 2021 to date of final payment;
- 45.2. The second respondent is ordered to pay the sum of R400, 000.00, plus interest on this amount, calculated at a rate of 7.25% per annum, *a tempore morae*, from 7 September 2021 to date of final payment;
- 45.3. The first and second respondents are ordered to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel, one being a senior counsel, jointly and severally, the one paying, the other to be absolved.

45.4. The first respondent is ordered to pay the costs of this application on a scale as between attorney and client, such costs to include the costs consequent upon the employment of two counsel, one being a senior counsel, from the date of filing of the answering affidavit.

MJ Engelbrecht

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 10 July 2023.

Heard on : 12 April 2023

Delivered: 10 July 2023

Appearances:

For the Applicants: P Stais SC with LF Laughland

For the 1st Respondent: SB Friedland

For the 2nd Respondent L Mashilane