



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. AR236/21

In the matter between:

**KURT ROBERT KNOOP N.O.
THAMSANQA EUGENE MSHENGU N.O.
NTOMBIZETHU THABILE NTANZI N.O.**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

BOARDWARE (PTY) LTD

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of the application for leave to appeal.

JUDGMENT

Steyn J (Chili et Hadebe JJ concurring):

[1] The appellants appeal, with leave granted by the court a quo, against the whole of the judgment of that court. The appellants are the liquidators of Evowood (Pty) Ltd (hereinafter 'Evowood'), a company in liquidation. The respondent is Boardware (Pty) Ltd ('Boardware') a company in George, Western Cape. The

respondent used to purchase materials from Evowood, which conducted its business in Estcourt, KwaZulu-Natal.

Background

[2] The respondent owed Evowood money for goods delivered. It received a notification from Evowood that if it paid the amount owed immediately, a reduced amount of R333 495.90 would be payable, rather than the full purchased amount of R338 573.80. The respondent paid the reduced amount on 27 May 2019. Erroneously, it paid Evowood again the same amount of R338 573.80 on 31 May 2019. Evowood was informed of the erroneous payment that was made on 3 June 2019 at 07h03, and was requested to transfer back the amount paid in error. On the same day at 07h47, Evowood sent a form, which is termed a bank indemnity form, to the respondent to complete. The respondent returned the completed form on the same day at 12h29 to Evowood, together with a letter from the bank. On 4 June 2019, Evowood did a weekly reconciliation and acknowledged the overpayment and that there had to be a refund of R338 573.80 to the respondent. On 12 June 2019, the respondent enquired from Evowood when payment would be received but no response was received. On 19 June 2019, a further email was sent and again, no response was received from Evowood. On 4 July 2019, after a further email was sent, the response was that Evowood would discuss the matter with its Chief Financial Officer. On 18 July 2019, Evowood was placed under liquidation by special resolution in terms of the Companies Act 61 of 1973.¹

[3] The appellants conceded that the amount that was claimed by the respondent was claimed well before the winding-up of Evowood. The refund was claimed at a time when Evowood was still in business and trading. The appellants, in their answering affidavit before the court a quo, contended as follows:

‘5.

5.1. The applicant’s duplicated payment was utilised by the insolvent company prior to the winding up and there are accordingly no steps which the joint liquidators can take to obtain those funds as they were utilised in Evowood’s ordinary course of business;

¹ See annexure GAR13 at page 26 of the indexed bundle.

5.2. The joint liquidators have acted expeditiously and with due diligence in tracing the payment and accordingly there ought to be no order as against the joint liquidators given that they are exercising their duties as joint liquidators and report to the Master of the High Court.

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The Applicant would be entitled to lodge a claim in the estate of Evowood so that if funds do become available in regard to winding up, it could receive a dividend. The Master of the High Court would determine the nature of such a claim and its ranking as to whether it would be preferent or concurrent.¹²

[4] The appellants were informed on 12 August 2019 that the payment of R338 537.80 made to Evowood was not the property of Evowood but belonged to the respondent.³ The appellants, however, only replied to the respondent on 15 September 2019 and informed it that it was required to lodge a claim against the company in liquidation.⁴ The appellants thus knew since 12 August 2019 that the amount of R338 578.80 was not due to Evowood and could not be utilised by Evowood. Despite this knowledge, the appellants delivered an interim answering affidavit deposed to on 28 February 2020 requesting an adjournment to investigate the matter.⁵ On 25 March 2020, the appellants deposed to another answering affidavit and contended:

'There are insufficient funds in the insolvent estate at present to effect any payment to the Applicant and until the assets of the business are realised, the joint liquidators are simply not in a position to refund the amount claimed by the Applicant. Further, even when the assets are sold, there are secured creditors whom payment must be made and there will be no free residue in the insolvent estate in terms of which payment could then be made to the Applicant.'⁶

[5] The weekly reconciliation attached to the answering affidavit is a reconciliation statement for the period from 31 May 2019 to 4 June 2019, which reflects that an amount of R439 395.07 was still in the account. No reconciliation statement was attached to the papers for the period when Evowood was requested

² See Vol 1 page 44, para 5 and 6 of the indexed bundle.

³ See the content of the letter that was sent to the appellants on 12 August 2019 (annexure GAR 14) at page 27 et seq.

⁴ See annexure GAR 15 at page 32 of the indexed bundle.

⁵ Vol 1 pages 33 to 36 of the indexed bundle.

⁶ Vol 1 page 43 of the indexed bundle.

to refund the respondent. The request was only made on 3 July 2019, one month after respondent requested the refund. Inasmuch as the appellants aver that there were insufficient funds in the estate of Evowood, no bank statements or reconciliation statements were produced to support the averment that the property of the respondent was not realisable.

[6] The court a quo, after hearing the application, was satisfied that Evowood was unjustifiably enriched and issued the following order:

- ‘1. Respondents in their capacity as joint liquidators of Evowood (Pty) Ltd are ordered to repay to Applicant the amount of R338 573,80.
2. Respondents to pay the costs of the application.’

Grounds of appeal

[7] The appellants contend that the appeal against the judgment should succeed on the following grounds:

- ‘a. By virtue of Evowood (Pty) Ltd (the insolvent company represented by the appellants) having been placed under winding up after the date of the payment from which the respondent’s claim against it arose, the respondent is in the same position as any other pre-liquidation creditor of Evowood, and its only recourse, should it wish to pursue its claim, is to lodge with the appellants in terms of section 44(1) of the Insolvency Act 24 of 1936 (“the Act”).
- b. The laws of Insolvency preclude the respondent from bringing its claim against the appellants in the manner in which it did.
- c. The Learned Judge erred in relying on several case authorities in his judgment which, it is respectfully submitted, are distinguishable from the facts of the present matter and irrelevant to the issues to be decided.
- d. The Learned Judge further erred in finding that it was just and equitable that the respondent be entitled to claim repayment of the amounts owed to it immediately, and failed to consider the effect of such a decision on the other creditors of Evowood.
- e. No basis exists in law for the respondent to be treated any differently to any other pre-liquidation creditor of Evowood.’

Was section 44 of the Act applicable?

[8] It is necessary to start with the appellants' submission that s 44(1) of the Insolvency Act 24 of 1936 (the Act) should have found application, and that it precluded the respondent from bringing its claim against the appellants in the manner it did. The section reads:

'(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section *one hundred and thirteen*, but subject to the provisions of section *one hundred and four*, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.' (Underlining is my emphasis.)

[9] The appellants have submitted that the respondent was a creditor, and that it should form part of the *concursum creditorum*, and was required to lodge a claim against the insolvent company.

[10] The court a quo held that Evowood was well aware that it received an amount that had to be repaid. It found that 'it cannot be just and equitable that the company or person who receives such payment incorrectly and without cause is then liquidated or sequestrated must benefit from such incorrect payment *and that the person who made the incorrect payment must only have a claim against the estate in terms of section 44 of the Insolvency Act*'.⁷ (My emphasis.)

[11] Importantly, the court applied the principles of interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸ and concluded that s 44 of the Act does not serve as a limitation for the claim to be brought in the manner it did.⁹

[12] The approach to be followed in interpreting legislation has been well established. The SCA in *Endumeni* stated it as follows:

⁷ Para 17 of the court a quo's judgment.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁹ Para 18 of the court a quo's judgment.

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. *The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.* Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.¹⁰ (My emphasis, and footnotes omitted).

[13] It is evident from the judgment that the court a quo duly considered the provision and interpreted the provision in accordance with the trite principles of interpretation. Nothing more was required. Counsel for the appellants did not refer us to any rule of interpretation that was not observed.

[14] When the matter was heard by the court a quo, it was submitted by the appellants that the timing of the claim was of vital importance. The appellants claimed that the respondent was a pre-liquidation creditor, and as such, the respondent was only entitled to lodge a claim against the liquidated company. It is accordingly necessary for purposes of this appeal, to consider whether the respondent was a pre-liquidation creditor when it made the erroneous payment to Evowood.

Who is a creditor?

¹⁰ Ibid para 18.

[15] Generally a creditor is defined as a person 'who gives credit for money or goods; one whom a debt is owing'.¹¹ In *Pine Village Home Owners Association Ltd and others v The Master and others*¹² the court confirmed that the Act does not contain a definition of a creditor. It held that:

'The Act does not define the term "creditor", consequently it shall be given its ordinary meaning viewed in the particular context. Under the Act a creditor could be a proved or unproved creditor or to both, depending on the circumstances relevant to the particular provision.'¹³

[16] Conradie J in *Myburgh v Walters NO*¹⁴ considered that a person without a claim against an insolvent estate cannot be considered a 'creditor'. It was held that: 'Just as a plaintiff must have a claim to litigate, the person litigating in the name of the trustee must have a claim. *If he has no claim, he cannot be considered to be a "creditor"*. An agent for a "creditor" is not, by virtue of that capacity, himself a creditor. The Act, moreover, provides that a trustee may demand indemnification from a "creditor". It does not provide that he may demand indemnification from one who is not a creditor. In my view, Davidson was not empowered to have indemnified the respondent or to have taken proceedings against the applicant in his name.'¹⁵ (My emphasis).

[17] The authors of *Mars: The Law of Insolvency in South Africa*¹⁶ state the following in relation to creditors:

"Creditor" is not defined in the Act, but it includes any person or any estate of a person who is a creditor in the usual sense of the word . . . As a rule, a person whose claim was not in existence at the date of sequestration is not a creditor of the estate sequestrated.'¹⁷ (Footnotes omitted.)

[18] In my view, the application of s 44 of the Act is triggered if a person is a creditor. Once the respondent has paid for the goods delivered, it was no longer a creditor of Evowood. The second amount paid over to Evowood was not due nor did the money belong to Evowood. The court a quo was therefore not misdirected

¹¹ The Shorter Oxford English Dictionary (1978) at 453.

¹² *Pine Village Home Owners Association Ltd and others v The Master and others* 2001 (2) SA 576 (SE).

¹³ *Ibid* at 581C-D.

¹⁴ *Myburgh v Walters NO* 2001 (2) SA 127 (C).

¹⁵ *Ibid* at 130H-I.

¹⁶ E Bertelsmann *et al Mars: The Law of Insolvency in South Africa* 10 ed (2019).

¹⁷ *Ibid* para 17.1 at 404.

when it held that the money was not the money of Evowood and that it could not keep it in its accounts. As the respondent was not a creditor of Evowood, the question arises what other remedy was available to the respondent other than bringing this application.

Undue enrichment

[19] Evowood was unjustifiably enriched by the second amount paid to it. *Nissan South Africa (Pty) Ltd v Marnitz NO and others (Stand 186 Aeroport (Pty) Ltd intervening)*¹⁸ dealt with such unjustified enrichment. The SCA held that ‘payment is a bilateral juristic act requiring the meeting of two minds’.¹⁹ It then proceeded to state the following:

‘Where A hands over money to B mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. *Ownership of the money does not pass from A to B.* Should B in these circumstances appropriate the money such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E–H).’²⁰ (My emphasis).

It was further held that the position does not change in respect of a transfer of money:

‘The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a *credit because of an amount mistakenly transferred to his bank account.* Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.’²¹ (My emphasis).

[20] It was held in *Nissan* that the liquidators of Maple Freight (who were the first and second respondents) were not entitled to the funds which were erroneously transferred:

‘[26] In this case FNB, as agent of the appellant, intended to effect payment to TSW, and Standard Bank, as agent of Maple, intended to receive payment on behalf of Maple. There was no meeting of the minds. In these circumstances, *Maple, did not become entitled to the*

¹⁸ *Nissan South Africa (Pty) Ltd v Marnitz NO and others (Stand 186 Aeroport (Pty) Ltd intervening)* [2006] 4 All SA 120 (SCA).

¹⁹ *Ibid* para 24.

²⁰ *Ibid*.

²¹ *Ibid* para 25.

funds credited to its account. Any appropriation of the funds by Maple, with knowledge that it was not entitled to deal with the funds, would have constituted theft. The transfer of the funds to the receipts account and thereafter to the payments account of Maple did not change Maple's position concerning those funds. Just like Standard Bank, FNB received funds to which Maple was not entitled. An appropriation of these funds by Maple, with knowledge that it was not entitled to the funds, would likewise have constituted theft thereof. The first and second respondents, consequently, have no claim against FNB in respect of the funds.

[27] It was common cause that, in the event of it being found that the first and second respondents were not entitled to the funds, *the appellant was entitled to payment thereof.*' (My emphasis).

[21] Essentially, the SCA has held that a person, who receives money into his account in his name, knowing that he is not entitled thereto, and who uses it, commits theft. Evowood, by using the credit to which it was not entitled to, committed theft. More recently, the SCA in *Firstrand Bank Ltd v Spar Group Ltd*²² re-affirmed the principle stated in *Nissan* as follows:

*'In Perry NO the funds deposited were stolen. In Nissan the funds were deposited in error. The court in Nissan nevertheless required that, since the account holder credited with the deposit had no claim against the bank, payment must be made to the appellant who had paid in error. To do otherwise would permit of the unjustified enrichment of the bank.'*²³

(My emphasis).

[22] In my view, the appellants, as liquidators of the company in liquidation, are duty bound in terms of s 391 read with s 342 of the Companies Act 61 of 1973 to recover and realise all the assets of Evowood. However, in light of the findings in *Nissan*, ownership of the money erroneously paid to Evowood did not pass to it and the utilisation of the money constituted theft. The appellants ought to have realised that the money belonged to the respondent, and that it could not form part of the assets of Evowood. Consequently, it could also not be distributed to the creditors of Evowood. A prudent liquidator would, in such an instance, have preserved the money pending a court order. The appellants are in a precarious position, as should they use the money from the respondent (which in applying *Nissan* would constitute

²² *Firstrand Bank Ltd v Spar Group Ltd* [2021] ZASCA 20; 2021 (5) SA 511 (SCA).

²³ *Ibid* para 62.

stolen money), to pay creditors, it could possibly be argued that the appellants might be complicit in committing a criminal offence like being in receipt of stolen property.²⁴

[23] Counsel for the appellants submitted that *Nissan* is distinguishable from the present matter. I disagree. Counsel argued that *Nissan* should be distinguished because in *Nissan* a preservation order was obtained. Whilst it is correct that the respondent did not apply for a preservation order, the failure to do so will have to be considered against the following facts: Evowood, by requesting the respondent to complete the bank indemnity form, implicitly undertook to repay the funds. It was never disputed that such funds were owed to the respondent. Ex facie the record, there was no reason to doubt the bona fides of Evowood. There was no need to bring a preservation order in circumstances where there was an undertaking, albeit implied, to pay. Furthermore, the presence or absence of a preservation order does not change the ratio in *Nissan* that the utilisation of funds erroneously transferred, whilst knowing that these funds were erroneously transferred, constituted theft. Counsel's reliance on *Trustees, Estate Whitehead v Dumas and another*²⁵ is also misplaced. *Whitehead* is distinguishable since the money in *Whitehead* was transferred pursuant to an agreement induced by misrepresentation.

[24] The court a quo, quite correctly in my view, held that Evowood was aware of the fact that it had been unjustifiably enriched and had a duty to preserve the money that did not belong to it. It held that in a situation as in the present matter, it was necessary to determine what would be just and equitable given the circumstances so as to ensure that there is corrective justice and to restore the position that existed prior to the enrichment taking place. The only way it could have been done was to repay the money to the rightful owner, which is the respondent.²⁶

[25] In circumstances where the money was mistakenly paid to Evowood and where Evowood was made aware of the fact, the ownership of the money did not

²⁴ See CR Snyman *Criminal Law* 7 ed (2020) at 452, which defines the crime as:

'A person commits the crime of receiving stolen property knowing it to be stolen if he unlawfully and intentionally receives into his possession property knowing, at the time that he does so, that it has been stolen.' (My emphasis.)

²⁵ *Trustees, Estate Whitehead v Dumas and another* [2013] ZASCA 19; 2013 (3) SA 331 (SCA).

²⁶ Para 20 of the court a quo's judgment.

pass to Evowood, and Evowood was not entitled to appropriate the money. Accordingly, the court a quo was not misdirected in its finding that Evowood should not have used the money.

[26] The court a quo considered the *condictio indebiti* and whether it could be used in respect of a pre-liquidation payment. This was considered as the appellants submitted that the respondent was a pre-liquidation creditor. It held that:

'The money could not and should not have been used by Evowood. *They were well aware that it was an overpayment and had to be repaid.* In this day and age where electronic payments are made daily it is easy for a wrong digit, for example, to be placed in a bank account number causing an incorrect payment to be made.'²⁷ (My emphasis).

[27] The court a quo dealt with the fact that it was not just to consider the amount paid erroneously as part of the property of Evowood. It stated:

'In my view the facts of this case are unique. It cannot, in my view, be just and equitable that a *wrong payment received, acknowledged and which should have been repaid and could have been repaid at that stage as the money had been received from Nedbank was not done and the company liquidated about a month later*, that the person who made the incorrect payment should only have a claim in terms of section 44 of the Insolvency Act merely because the repayment was not made when it should have been done. That money was never the money of the company and they were well aware that they could not keep it but had to repay it.'²⁸ (My emphasis).

[28] The respondent, as the owner of the money, is entitled to have its own money back and cannot be labelled as a creditor of Evowood, when it is not. Counsel for the appellants argued that the other creditors will be prejudiced if it is expected to pay the amount back to the respondent. This submission fails to acknowledge that the money never belonged to Evowood and should not have been utilised by it. Accordingly, the creditors will not be prejudiced in casu where the asset (the money) was never part of the assets of Evowood. In fact, the respondent has already been prejudiced since Evowood has not returned its money.²⁹

²⁷ Para 17 of the court a quo's judgment.

²⁸ Para 19 of the court a quo's judgment.

²⁹ In my view, the appellants as liquidators of the company are duty bound to expose the offences of any of the directors or officers of Evowood and ought to report the alleged theft of money to the Master in terms of s 400

Conclusion

[29] The court a quo was not misdirected on fact or law in granting the relief that was sought by the respondent. The appellants failed to show that the respondent was a creditor of the insolvent estate. The appeal cannot succeed.

Order

[30] The following order is accordingly made:

1. The appeal is dismissed with costs, such costs to include the costs of the application for leave to appeal.

STEYN J

CHILI J

HADEBE J

APPEARANCES

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