



IN THE HIGH COURT OF

SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 1495/2022

In the matter between:

CHAVONNES BADENHORST ST CLAIRE COOPER N.O. 1ST APPLICANT

TIRHANA SITOS DE SITOS MATHEBULA N.O. 2ND APPLICANT

CAPE BASIC PRODUCTS (PTY) LTD (IN LIQUIDATION) 3RD APPLICANT

and

MIFTAH UL JUNAINAH CC

RESPONDENT

Bench: E.S GROBBELAAR, AJ

Heard: 16 August 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be on 5 October 2022.

JUDGMENT

GROBBELAAR, AJ:

1. This is an application for an order in terms of Section 341(2) of the Companies Act, 61 of 1973 “(the Companies Act”) for the repayment of six payments in the total amount of R183 896.00, paid by Cape Basic Products (Pty) Ltd (in

liquidation), (“the company”) to respondent after the company was provisionally wound-up.

2. When the company was wound-up it was unable to pay its debts. The applicants claim that the payments are void dispositions of property by the company. This application is brought by the liquidators of the company and the company itself.
3. It is common cause that all the payments were made after the company was provisionally wound-up and was for goods sold and delivered.
4. In its opposing papers the respondent denied that the payments were dispositions in terms of the Companies Act because it was made as a quid pro quo for goods actually received by the company.
5. The respondent abandoned the above defence and on 11 August 2022 delivered an unconditional written offer in terms of Uniform Rule 34(1) to settle the application by paying the full amount of R183 896.00 plus interest *a tempore morae* to the company.
6. In the offer the respondent offered to pay the party and party costs of the applicant on the appropriate Magistrate’s Court tariff only. The applicants did not accept the offer.
7. On 16 August 2022, the day on which the application was set down for hearing, respondent’s counsel brought the offer to the attention of the Court.

8. Applicant's counsel informed the Court that the applicant accepts the offer, but not the costs offered therein.
9. The parties then agreed that an order be made for the repayment of the R183 896.00 plus interest as set out in the written offer, but that the Court should decide what the appropriate cost order is.
10. If it is ruled that costs on the Magistrate's Court scale is appropriate, the applicant will be entitled to costs on the Magistrates Court scale up to the date that the offer was delivered, and be liable for all costs occasioned after that date.
11. I pause to mention that applicant's counsel did not argue that the applicants were not in a position on 11 August 2022 to consider the offer and make a decision on that day.
12. If it is ruled that costs on the Magistrate's Court scale are not appropriate the applicants would be entitled to their costs on the High Court scale, including costs occasioned after 11 August 2022.
13. Mr Newton, for the applicants, argued that the applicants were compelled to bring the application in the High Court because the Magistrate's Court do not have jurisdiction to hear the application, they are therefore entitled to costs on the High Court scale.
14. His argument is based on Sections 1 and 12(1) of the Companies Act.
15. Section 1 of the Companies Act defines "Court" as follows:

“Court”, in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate, and, in relation to any offence under this Act, includes a magistrate’s court having jurisdiction in respect of that offence;”.

16. Section 12(1) of the Companies Act states:

“(1) The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate.”

17. According to Mr Newton the position is clear, the application is brought under Section 341(2) of the Companies Act and only the High Court has jurisdiction to hear the application, the application not relating to an offence.

18. Mr Jonker argued that the Magistrates Court has jurisdiction to hear the application because, even when added up, the repayment claimed falls within the monetary jurisdiction of the Magistrate’s Court, being less than R200 000.00.

19. He argued that it is not necessary for an order declaring the payments void under section 341(2) of the Companies Act, all payments made after the company was wound-up are automatically void in terms of Section 341(2) and all that is required is an ordinary application for an order for the repayment of money.

20. According to him the Magistrate's Court has jurisdiction to hear all applications for the repayment of money, provided it falls within the monetary jurisdiction of the Magistrate's Court.

21. Section 341(2) of the Companies Act provides that:

“(2) Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.”

22. In *Herrigel NO v Bon Roads Construction Co (Pty) Ltd & Another*¹ it was found that the Companies Act do not require that dispositions made contrary to Section 341(2) be set aside before repayment is ordered, in contrast with impeachable dispositions and transactions contemplated by Sections 26, 29, 30 or 31 of the Insolvency Act, 24 of 1936 (“the Insolvency Act”), where an order setting aside the impeached disposition and transaction is required before it can be recovered. The Companies Act declares the disposition void and all that is required is an order for the return of the disposition. I agree with this finding.

23. At this juncture it is helpful to refer to Section 348 of the Companies Act, it reads as follows:

“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.”

¹ 1980 (4) SA 669 (SWA), at 681H-682A

24. In *Pride Milling Company (Pty) Ltd v Bekker NO & Another*² the Court interpreted Section 341(2) of the Companies Act and found that a Court cannot validate dispositions made by a company subsequent to it being provisionally wound up due to its inability to pay its debts in terms of Section 341(2) of the Companies Act. A Court can only do so in the case of dispositions made after the presentation the application for winding up to the Court up to it being provisionally wound-up.

25. This finding was based on the premise that a provisional winding-up order establish a *concursum creditorum* and thereafter nothing can be allowed to be done by a creditor to prejudice or alter the rights of the other creditors.³

26. Mr Jonker concedes that the reference to “the Court” in Section 341(2) of the Companies Act refer to the High Court of South Africa as provided for in Sections 1 and 12(1) of the Companies Act and that only such Court can validate void transactions referred to in Section 341(2) of the Companies Act.

27. He further concedes that after the decision in *Pride Milling Company (Pty) Ltd v Bekker NO & Another*⁴ the position remain that only the High Court may hear matters for the repayment of dispositions made contrary to Section 341(2) after the winding-up application was presented to the Court and before the provisional winding-up order. His concession is partly based on the fact that only the High Court can validate such dispositions. If proceedings are brought in the Magistrate’s

² 2022 (2) SA 410 (SCA)

³ Paragraph 19

⁴ Supra

Court for the repayment of such dispositions, the recipients would be deprived of counter-applying for an order to have it validated because only the High Court may hear such proceedings.

28. But, the argument goes, after the decision in the *Pride Milling* case⁵ the Court cannot validate dispositions after the company was wound-up provisionally, therefore the Magistrate's Court has concurrent jurisdiction with the High Court in matters where the repayment of such dispositions are sought. Proceedings for the repayment of such dispositions brought in the Magistrate's Court will not deprive the recipients of the disposition to counter-apply for validation, because such order can no longer be made by the Court.

29. The provisions regarding "Court" in the Companies Act provide that, except for offences, only the High Court has jurisdiction **under this Act in respect of any company or other body corporate** (my emphasis).

30. To my mind it is clear that, except for offences, this grants the High Court exclusive jurisdiction in matters brought under the Companies Act in respect of a company or other body corporate.

31. It does not oust the jurisdiction of the Magistrate's Court in matters not brought under the provisions of the Companies Act in respect of a company or other body corporate, provided the Magistrate's Court otherwise has jurisdiction.

⁵ Supra

32. To hold otherwise would result in the Magistrate's Court not having jurisdiction in claims against a company, for instance for arrear rental or for repayment of monies advanced.
33. Mr Jonker's argument is in fact premised on the assertion that an order to repay the dispositions is not brought in terms of the Companies Act but is an ordinary claim for repayment of money.
34. What is not clear is the situation where proceedings are brought, not under the Companies Act in the sense that an order in terms of the Act is required, but emanating from the provisions of the Companies Act, albeit it against a company or body corporate or not.
35. Section 339 of the Companies Act incorporates the provisions relating to insolvency contained in the Insolvency Act mutatis mutandis in the winding-up of a company unable to pay its debts, including the definitions of "disposition" and "property" in Section 2 thereof.
36. Section 340 of the Companies Act provides that if a company is wound-up because it is unable to pay its debts, every disposition made by that company may be set aside as if made by an individual who has been sequestrated, and the provisions of the Insolvency Act shall apply mutatis mutandis to such disposition. This clearly refer only to dispositions provided for in the Insolvency Act.
37. The definition of "Court" or "the Court" in Section 2 of the Insolvency Act provides that the High Court has jurisdiction in relation to any matter under the Insolvency

Act, but that the Magistrate's Court has concurrent jurisdiction in terms of certain sections of that Act, including offences and proceedings in terms of Section 32 for the recovery of dispositions or transactions set aside in terms of Sections 26, 29,30 and 31 of the Insolvency Act.

38. It is instructive to note that, unlike the Insolvency Act, the Companies Act contain no such provision conferring jurisdiction on the Magistrate's Court for proceedings instituted to recover dispositions made void by Section 341(2) of the Companies Act.

39. The fact that the Court does not have to make an order declaring dispositions made contrary to Section 341(2) void does, in my view, not detract from the fact that the Court must make a finding that the dispositions were made contrary to Section 341(2) before an order for the repayment can be made.

40. When considering the Insolvency Act and the Companies Act in conjunction with each other it appears to me that the legislature intended that the High Court shall have exclusive jurisdiction, not only to sequester and wind-up, but also in matters relating to, or emanating from, such sequestration or winding-up unless it is specifically provided that the Magistrate's Court has jurisdiction.

41. As seen above, such provision may be found in the Insolvency Act or the Companies Act. It may also be found in other legislation, for instance Section 29(1)(fA) of the Magistrate's Court Act, 32 of 1944, which provides concurrent jurisdiction to the Magistrate's Court to wind up a close corporation.

42. There is no such provision for proceedings emanating from Section 341(2) in the Insolvency Act, Companies Act or other legislation.

43. I find that the decision in the Pride Milling case⁶ did not change the existing position regarding jurisdiction in proceedings emanating from Section 341(2) of the Companies Act for the repayment of void dispositions made after a provisional winding-up order had been granted.

44. In the premises the Magistrate's Court does not have jurisdiction to order the return of property disposed of by a company being wound-up and unable to pay its debts in contravention of Section 341(2) of the Companies Act, irrespective of whether the disposition was made before or after a provisional winding-up order was granted.

45. The respondent's written offer of costs on the Magistrate's Court scale was not adequate and the applicants did not have to accept it.

46. It follows that the applicants are entitled to the order agreed on and their costs on the High Court scale.

47. The following order is therefore granted:

1. The respondent is ordered to pay the following to the First and Second applicants in their capacities as the joint liquidators of the Third applicant:

⁶ Supra

- 1.1 The amount of R183 896.00;
- 1.2 Interest on the amount of R183 896.00 at the rate of 7% per annum from 1 October 2021 to 31 December 2021 and thereafter at 7.25% per annum from 1 January 2022 to date of final payment;
- 1.3 Costs of suit on the High Court Scale.

GROBBELAAR, AJ