THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20736/2014

In the matter between:

ERAVIN CONSTRUCTION CC **APPELLANT**

and

JACOBUS NICOLAAS BEKKER NO **FIRST RESPONDENT**
CLIFFORD THABANG MAREDI NO **SECOND RESPONDENT**
CHAVONNES BADENHORST ST'CLAIR COOPER **THIRD RESPONDENT**

Neutral citation: *Eravin Construction CC v Bekker NO* (20736/2014) [2016] ZASCA 30 (23 March 2016).

Coram: Lewis, Tshiqi, Swain and Dambuza JJA and Plasket AJA

Heard: 15 March 2016

Delivered: 23 March 2016

Summary: Company law – whether void disposition in terms of s 341(2) of the Companies Act 61 of 1973 recoverable by creditor or whether enforcement precluded by s 154(2) of the Companies Act 71 of 2008 – whether pre-business rescue debt – meaning of 'debt owed'.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Landman J sitting as court of first instance)

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Plasket AJA (Lewis, Tshiqi, Swain and Dambuza JJA concurring):

[1] The issue to be determined in this appeal is whether the payment of R389 593.49 by Ditona Construction (Pty) Ltd (Ditona) – a company being wound-up – to the appellant, Eravin Construction CC (Eravin), is recoverable at the instance of Ditona's liquidators as a void disposition in terms of s 341(2) of the Companies Act 61 of 1973 (the old Act), or may not be recovered by them because, in terms of s 154(2) of the Companies Act 71 of 2008 (the new Act), it is a pre-business rescue debt which may not be enforced. In the court below, the North West Division of the High Court, Mahikeng, Landman J declared the payment to be void and ordered the repayment of the money. He subsequently granted Eravin leave to appeal to this court.

Background

[2] In order to place the matter in its proper context, it is necessary to chronicle the travails of Ditona in its winding-up and Eravin in it being placed under business rescue. The events that I shall outline and their chronology are common cause.

[3] On 20 October 2010, an application was brought by KLK Landbou Ltd for the winding-up of Ditona. A provisional winding-up order was made on 9 December 2010. A final order was made on 3 March 2011. The effective date of the winding-up, in terms of s 348 of the old Act, was 20 October 2010, the date of 'the presentation to the court of the application for the winding-up'.[1] On 4 October 2011, Messrs. J N Bekker, C T Maredi and C B St Clair Cooper, the respondents in this appeal and who were the applicants in the court below, were appointed as Ditona's liquidators.

[4] On 21 October 2010, a day after the winding-up application was launched, the disputed payment of R389 593.49 was made by Ditona to Eravin.

[5] On 24 September 2012, Eravin's board resolved to place it under business rescue in terms of s 132 of the new Act. Notice to commence business rescue proceedings was filed in the offices of the Companies and Intellectual Property Commission (CIPC) on 26 September 2012, thus beginning the business rescue process.[2] A business rescue practitioner, Mr Jean-Pierre Jordaan, was appointed on 5 October 2012 and a business rescue plan was adopted on 25 January 2013. The business rescue was terminated on 31 May 2013 and a notice was filed to the effect that substantial compliance with the business rescue plan had been achieved.[3]

[6] Ditona's liquidators, having established that the disputed amount had been paid to a firm of attorneys, Grobler, Levin and Soonius Inc, instructed their attorneys to ascertain the basis of the payment. By letter dated 15 February 2013, their attorneys gave notice to Grobler, Levin and Soonius Inc that the payment, having been made after the effective date of the winding-up, was void and that they were obliged to pay the money received back to Ditona.

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[1] Section 348 of the old Act provides:
'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.'
[2] New Act, s 132(1)(*a*)(i).
[3] New Act, s 132(2)(*c*)(ii).

[7] Having stated in the letter that Ditona's liquidators intended establishing a s 417 enquiry to investigate the circumstances of the payment, the attorneys proceeded to say that this would not be necessary if Grobler, Levin and Soonius Inc either repaid the money or furnished a comprehensive written explanation of the circumstances under which the payment to them had been made. In other words, the letter continued, 'we want to know on what basis you received the payment, what you have given in exchange for receipt of the payment to the company in liquidation and also when the governing agreement was concluded as well as what the terms of the agreement were'.

[8] On 1 May 2013, Grobler, Levin and Soonius Inc, which had by now changed its name to Grobler Vorster Inc, responded by letter. It said:

'We confirm that the amount of R389 593.49 (THREE HUNDRED AND EIGHTY NINE THOUSAND FIVE HUNDRED AND NINETY THREE RAND AND FORTY NINE CENTS) was paid to our company in terms of an Acknowledgement of Debt signed by Mr G P Pretorius in his personal capacity and on behalf of the company.

Mr Pretorius failed to perform in terms of the Acknowledgement of Debt and we therefore proceeded to obtain judgment whereafter a warrant of execution was issued against the property of Mr Pretorius, as a result of the said judgment. Mr Pretorius's mother proceeded to pay this judgment debt.

Accordingly it is our submission that the monies you refer to was not paid by the company in liquidation, but was paid by a third and independent party,'

[9] The person mentioned in the letter, Mr G P Pretorius, was Ditona's managing director prior to its winding-up. In an affidavit attached to the liquidators' replying affidavit Pretorius denied that the money paid to Eravin emanated from his mother and that Ditona's account was used as a mere conduit for that payment by his mother. Instead, he said, the 'money was Ditona's money and came from a Ditona bank account'. This was confirmed by the liquidators in the replying affidavit. It was stated that an examination of the bank accounts of Ditona established that the funds were Ditona's funds and that 'there was no prior injection of funds from Mr Pretorius' mother as alleged'.

The issues

[10] The case of the liquidators, that they are entitled to recover the payment made by Ditona to Eravin, rests on s 341(2) of the old Act. It provides:

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

It is not in dispute that Ditona was unable to pay its debts.

[11] Eravin's case, on the other hand, is that s 154(2) of the new Act precludes the liquidators from recovering the debt. This section provides:

'If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'

[12] The first argument raised in the court below by the liquidators was that the entire business rescue proceedings were void and that therefore s 154(2) of the new Act did not bar the recovery of debt. This was so because Eravin had not complied with s 129 of the new Act in one respect: the business rescue practitioner was not appointed within five business days of the filing of the resolution, as required by s 129(3)(*b*). This argument was rejected by Landman J.

[13] At the time, the issue was open, with different High Court judgments in conflict as to whether a failure to comply with a requirement of ss 129(3) or (4) had the effect, by operation of law, of rendering the business rescue proceedings void.

[14] The divergence of views has now been resolved by this court in *Panamo Properties (Pty) Ltd & another v Nel & others NNO*.[4] Wallis JA held that non-compliance with s 129 did not visit nullity on the business rescue proceedings automatically. What was required in order to achieve this result

[4] *Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA).

was an application to court. As a result of *Panamo Properties*, this point was abandoned before us.

[15] The second argument was that the debt was not a pre-business rescue debt owed by Eravin to Ditona as it only arose – or became due – after the commencement of the business rescue proceedings. That being so, the argument proceeded, its recovery is not barred by s 154(2) of the new Act. Landman J found that this was indeed so and granted the liquidators' application on this basis.

[16] He identified the issue to be addressed as being the meaning of the word 'debt' in s 154(2). Counsel for the liquidators had argued that the word bore the same meaning in this context as in the context of the Prescription Act 68 of 1969. While Landman J held that this Act could provide guidance as to the word's meaning, 'one must be cautious in relying on this'.[5] Instead, with reference to 'the general context' of the new Act, he held that there was 'much to be said' for the idea that 'debt in a wide and general sense denotes "whatever was due . . . from an obligation"';[6] that a 'debt which is claimable is one which is due [and] payable'; and that a 'claim arises when the cause of action is complete'.[7]

[17] He concluded in respect of the disputed payment:[8]

'The payment although void (but capable of being validated in a sense) is not due and does not arise until, at least, a liquidator has been appointed and ascertains that the payment has been made and the close corporation in liquidation is unable to pay its debts. In addition the identity of the recipient of the disposition must be known. Until it becomes known the cause of action is incomplete. On this basis the debt only became claimable after 1 May 2013 when the applicants discovered the identity of the recipient.'

On this basis, he held that the debt was not a pre-business rescue debt and its recovery was enforceable.

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[5] Para 14.
[6] Para 15.
[7] Para 16.
[8] Para 19.

[18] Despite his own warning of the dangers of importing the concepts in the Prescription Act into the different context of the old and new Companies Acts, Landman J did precisely that. In so doing, he ignored a fundamental difference between the two.

[19] The Prescription Act is concerned with fixing a time when a debt falls due – when it may be claimed – because it has determined that to be the point at which prescription starts to run.[9] That point is only reached when the creditor knows 'the identity of the debtor and of the facts from which the debt arises'.[10]

[20] Section 341(2) of the old Act and s 154(2) of the new Act are different. They are not concerned with when debts are due and can be claimed, but when they are owed. On this account, the prescription analogy is not apposite and, as was demonstrated in this case, is apt to mislead.

[21] The question to be answered in this case is thus when the debt was owed. That must be answered in the first instance with reference to s 341(2) of the old Act. It states expressly that a disposition in the terms contemplated by it 'shall be void'. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.

[22] Section 154(2) of the new Act is as clear: if a debt was owed by a company 'before the beginning of the business rescue process' – before, in other words – the filing of the resolution when a company places itself under business rescue – then the creditor 'is not entitled to enforce' that debt.

[23] In this case, the payment was made on 21 October 2010 and, being void, its repayment was immediately owed by Eravin. Its business rescue proceedings began on 26 September 2012, being the date on which the

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[9] Prescription Act, s 12(1).
[10] Prescription Act, s 12(3).

resolution was filed with the CIPC. As the debt was owed prior to 26 September 2012, the debt may not be recovered.

[24] A further point was argued in this court, but was not raised in the court below. It was that s 154(2), properly interpreted, only applies to creditors who have been given notice of the business rescue proceedings.

[25] The argument arises in this case presumably because Eravin did not know that the payment of a judgment debt by Ditona was a void disposition and so did not know that the liquidators, who had then taken no steps to recover the debt, were creditors. As a result, it did not give the liquidators notice of the business rescue proceedings, and they obviously played no part in them.

[26] In these circumstances, it was argued that s 154(2), being draconian in the sense that it provided for certain debts to be rendered unenforceable against the company under business rescue, should be restrictively interpreted in order to minimise the prejudice to creditors.

[27] In my view, the argument has no merit. The meaning of the section is clear and unambiguous: all creditors – as opposed to creditors who had been given notice of the business rescue proceedings – are precluded from enforcing pre-business rescue debts. I can see no justification for reading into the section a limitation that the legislature would have provided for expressly, had it wished to.

[28] A creditor who has not been given notice, but who knows of the business rescue proceedings, has a remedy. He or she may apply to set aside the business rescue proceedings for want of compliance with the requirements of s 129 of the new Act. If he or she succeeds in doing so, s 154(2) would no longer be a bar to the recovery of the debt.

[29] To the extent that some creditors may not know about the business rescue proceedings until after they have been concluded, that may indicate a

defect in the provisions of the new Act concerning the giving of notice. If that is so, that is a matter for the legislature to attend to. It is not the proper function of the court to attempt to remedy such difficulties by means of interpretative sleight of hand.

[30] For the reasons that I have given, the appeal must succeed and the order of the court below must be set aside and replaced. It was argued on behalf of the appellant that as the case involved a novel point, the costs of two counsel was justified. I disagree. Novel as the point may have been, it was straightforward.

The order

[31] I make the following order.

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

‘The application is dismissed with costs.’

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C Plasket

Acting Judge of Appeal

APPEARANCES:

For Appellant:	AB Rossouw SC (with him J H A Saunders) Instructed by: George Loock Attorneys, Mahikeng McIntyre & Van der Post, Bloemfontein
For Respondents:	M P van der Merwe SC Instructed by: Couzyn Hertzog & Horak, Mahikeng Spangenberg Zietsman & Bloem Attorneys, Bloemfontein