THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 866/2013

In the matter between:

PMG MOTORS KYALAMI (PTY) LTD
(IN LIQUIDATION) **FIRST APELLANT**

PMG MOTORS WESTVILLE (PTY) LTD
(IN LIQUIDATION) **SECOND APPELLANT**

and

FIRSTRAND BANK LTD, WESBANK DIVISION **RESPONDENT**

Neutral citation: *PMG Motors v Firstrand Bank* (866/2013) **[**2014] ZASCA 180 (24 November 2014)

Coram: Lewis, Ponnan and Willis JJA and Mathopo and Gorven AJJA

Heard: **5 November 2014**

Delivered: **24 November 2014**

Summary: Companies in liquidation – Jurisdiction – operation of s 84(2) of the Insolvency Act on claim under the *condictio indebiti* where payment made in respect of cancelled instalment agreements and vehicles returned pursuant to cancellation – whether factual dispute raised – appropriateness of application proceedings for claim under *condictio* – whether application premature in light of objection to account in terms of s 111 of the Insolvency Act.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mayat J sitting as court of first instance)

The appeal is dismissed with costs to be paid by the appellants jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent on the employment of two counsel.

JUDGMENT

Gorven AJA (Lewis, Ponnan, Willis JJA and Mathopo AJA concurring):

[1] The appellant raised five issues in this appeal, all raised in the court below as well: First, whether the court below had jurisdiction to entertain the application. Secondly, whether s 84(2) of the Insolvency Act 24 of 1936 (the Insolvency Act) applied to the claim. Thirdly, whether there were material factual disputes which should have resulted either in a referral to oral evidence or the dismissal of the application. Fourthly, whether the money claim under the *condictio indebiti* should have been brought by way of action rather than by application. Fifthly, whether an objection in terms of the provisions of s 111 of the Insolvency Act precluded the grant of relief before the objection was resolved.

[2] The respondent, Firstrand Bank Ltd, Wesbank Division (Wesbank), which was the applicant in the court below, launched an application in the Gauteng South High Court, Johannesburg for confirmation of the cancellation

of agreements and repayment of three sums of money under the *condictio indebiti*. The appellants were two of the three respondents in that court, PMG Motors Kyalami (Pty) Ltd and PMG Motors Westville (Pty) Ltd respectively. The third respondent was PMG Motors Alberton (Pty) Ltd (in liquidation) which has not appealed. All of the companies in liquidation functioned as motor vehicle dealerships. Where I refer to more than one of the companies in liquidation, I shall refer to them as the dealerships.

[3] The payment of the amounts claimed arose from the following common cause facts. Floor plan agreements (the agreements) were concluded by Wesbank with each of the dealerships, as well as with a fourth such company in the same group which was not joined in the application.[1] The agreements reserved ownership in the vehicles sold under them to Wesbank until full payment had been made. The registered address of all of the dealerships was in KwaZulu-Natal. PMG Westville had its principal place of business in KwaZulu-Natal but the other dealerships had their principal places of business within the jurisdiction of the court below.

[4] Wesbank took a decision to cancel the agreements. There is no dispute that it was entitled to do so in the circumstances. To that end, Wesbank prepared a number of letters which communicated its decision to cancel the agreements and demanded the return of all the vehicles subject to them. The letters were dated 22 January 2009 and were addressed to people in each of the dealerships. Wesbank planned to deliver these to all of the dealerships on 23 January 2009 at the same time. The letters were delivered to the dealerships and subsequently Wesbank collected all of the affected vehicles with the permission of the dealerships. Wesbank thereafter sold the vehicles. On 26 January 2009, all of

[1] It was explained that because the letter cancelling the floor plan agreement with PMG Motors Fourways (Pty) Ltd was not delivered on 23 January 2009, the provisions of s 84 of the Insolvency Act applied which is why this company was not included in the application.

the dealerships presented *ex parte* applications to the KwaZulu-Natal High Court, Durban to place themselves in liquidation. This is the date recognised by the Companies Act 61 of 1973 as the date of commencement of the liquidations.[2] Provisional liquidation orders were granted on 27 January 2009, which were made final on 9 March 2009.

[5] After liquidation, five joint liquidators were appointed to two of the dealerships and six to the other two. Two of the liquidators, who both reside and conduct their business within the jurisdiction of the court below, were common to all four dealerships. Relying on s 84(2) of the Insolvency Act, the liquidators of the dealerships requested that Wesbank pay them the amounts realised from the sale of the vehicles. Wesbank acceded to this request and made the payments. It thereafter took the view that s 84(2) of the Insolvency Act did not apply to these amounts and that the payments had therefore been made in the mistaken belief that they were owing. The liquidators refused to repay the amounts and lodged accounts with the Master reflecting the amounts as assets of the dealerships. Wesbank objected to the accounts in terms of s 111 of the Insolvency Act on the basis that the amounts belonged to it and were thus incorrectly reflected as dealership assets. Wesbank then brought an application in the court below under the *condictio indebiti* to claim back the three amounts paid to each dealership.

[6] The court below, in a judgment which both addressed and rejected all of the issues raised by the dealerships, granted Wesbank an order declaring that the floor plan agreements with the dealerships had been cancelled on

[2] Section 348 of the Companies Act provides 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.'
It was common cause that, because the liquidation application was launched at a time when the Companies Act was still in force, it governed the application launched by Wesbank, including the issue of jurisdiction, even though, at the time, the Companies Act 71 of 2008 (the new Companies Act), whose general date of commencement was 1 May 2011, had come into effect.

23 January 2009, an order directing that the relevant dealership repay the moneys paid to it by Wesbank and an order that the dealerships pay the costs of the application jointly and severally, including the costs of two counsel. It is against this order that the appellant dealerships appeal, with the leave of the court below. I shall deal in turn with each of the five issues on which the dealerships relied in both courts.

Jurisdiction

[7] The first issue to address is that of jurisdiction. If this is decided against Wesbank, the appeal must succeed and the other issues fall away. In this regard, De Villiers JP in *Steytler NO v Fitzgerald*,[3] said that the enquiry was twofold:

'. . . a Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit, but also of giving effect to its judgment.'

Since there is no issue with giving effect to the judgment, it is only the first of these issues which arises; is there a recognised ground of jurisdiction?[4] Section 19(1)(*a*) of the Supreme Court Act[5] accords to a provincial or local division of the high court jurisdiction 'over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction'.

[8] Wesbank did not rely for jurisdiction on the cause of action having arisen within the jurisdiction of the court below. It relied on PMG Kyalami and PMG Alberton 'residing' within the jurisdiction of the court below. In relation to PMG Westville, Wesbank relied on s 19(1)(*b*) of the Supreme Court Act which gives jurisdiction in respect of a party 'who is joined . . . to any cause in relation to which such provincial or local division has jurisdiction . . . if the said person resides or is within the area of jurisdiction of any other provincial or local division'. The dealerships challenged the jurisdiction of the court below. They

[3] *Steytler NO v Fitzgerald* 1911 AD 295 at 346.
[4] *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 499E-F.
[5] Supreme Court Act 59 of 1959. This Act governed the application since the Superior Courts Act 10 of 2013 only came into effect on 23 August 2013, after judgment had been handed down.

contended that, because their registered offices were all in KwaZulu-Natal and the liquidation order issued from the KwaZulu-Natal High Court, Durban, that was the appropriate court with jurisdiction and the court below had no jurisdiction to determine the application.

[9] It has long been recognised as trite that artificial persons such as companies have no bodies and therefore cannot reside in a particular area.[6] They do, however, have directing minds and 'the residence of a corporation will be determined by the periodic, usual or habitual location of the directing mind'.[7] This has been held to be the company's 'seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business'.[8] To say that a company resides at its principal place of business is simply a convenient way of ensuring that the nerve centre of the operations of a company founds jurisdiction in proceedings taken against it. Although s 12 of the Companies Act refers to 'the main place of business', this amounts to the same thing for jurisdictional purposes.[9] The dealerships accepted that, on the above basis, the court below had jurisdiction over PMG Kyalami and PMG Alberton prior to their liquidation.

[10] The dealerships submitted, however, that, after liquidation, they could no longer be considered to have a principal place of business. As a result, neither this nor any other ground of jurisdiction applied. For this submission, the dealerships relied on s 1 of the Companies Act. This defines a 'place of business' as 'any place where the company transacts or holds itself out as

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[6] *Estate Kootcher v Commissioner for Inland Revenue* 1941 AD 256 at 260.
[7] *Ibid.*
[8] *Bisonboard* at 496A-B. It was accepted in this matter, at 503D-E, that where the registered office was at a different place to the principal place of business, a company may be said to reside simultaneously at both places.
[9] The new Companies Act does not contain such a definition. This has led to conflicting judgments in some high courts as to the basis on which jurisdiction is founded under the new Companies Act but this does not apply in the present matter and the issue does not arise.

transacting business'. They pointed out that 'transacts' and 'holds itself out as transacting business' are used in the present tense. Therefore, they submitted, because the *concursus creditorum* brought about by liquidation 'freezes all trading and suspends all other civil proceedings' after liquidation, a company no longer transacts or holds itself out as transacting business and, therefore, no longer has a 'place of business'. No case was made out, it was submitted, that the dealerships continued to transact or hold themselves out as transacting business because the liquidators had not carried on any part of the business. Therefore jurisdiction could not be founded on the dealerships 'residing' within the area of jurisdiction of the court below because they had no principal place of business.

[11] The dealerships could cite no authority for this proposition and I could not find any. The approach of a company having a place of residence is based on a convenient fiction.[10] The reasoning underlying the fiction concerning the principal place of business being regarded as the residence of a company takes cognisance of at least the following factors. The company has established a physical presence there, it has located its senior management there, records relating to its business dealings with others (which are likely to be relevant to litigation arising from those dealings) are located there and, in many cases, the majority of the employees of the company are stationed there. All of these factors would make the court within whose jurisdiction the company has its principal place of business a convenient one in which to litigate. In most cases it would mean that decisions can be taken concerning the litigation, documents can be readily accessed, authority to litigate and instructions relating to the litigation can be obtained, and persons with knowledge of the transaction in

[10] Innes JA, in *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334 said:
'Now, the terms "reside" and "residence" can only be used in their true significance with regard to natural persons. The residence of a legal *persona*, like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law. . . The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on.'

question would be available to consult with legal representatives and attend court with minimal disruption and expense. Many of these factors, which make a principal place of business a practical place to regard as the place of residence of a company, are unaffected by the liquidation of that company.

[12] There are further relevant considerations. Section 386(4)(*f*) of the Companies Act envisages that in certain circumstances a liquidator will 'carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof'. In such a case, the principal place of business is unlikely to change. Even though in the present matter the liquidators testified that they had not carried on any part of the business of the dealerships, the potential remains for them to do so. In any event, at what point in time could it then be contended that the principal place of business ceases to be such? Is it immediately on provisional, or on final, liquidation? Is it on the appointment of provisional or final liquidators? Or after the liquidators have had a reasonable time to decide whether or not to request authorisation to carry on business and, if so, what must be considered a reasonable period? In addition to the possibility of liquidators conducting business, a company's liquidation may be set aside at a later date, in which case it will ordinarily resume trading. Further, in terms of the business rescue provisions of the new Companies Act 71 of 2008, a company in liquidation may be placed under business rescue by a court. Once an application to do so is launched, the liquidation is suspended until it is finalised. If an order is granted, the liquidation is suspended until the business rescue proceedings come to an end.[11] During the time the liquidation is suspended, the company will resume trading so as to enhance the possibility of the business being rescued.

[11] Section 131(6) of the new Companies Act.

[13] The response of the dealerships to these possibilities was that, immediately on liquidation, the company ceases to have a place of business. If any of these scenarios were to ensue, it would once again obtain a principal place of business because only then would the definition of 'place of business' in s 1 of the Companies Act be satisfied. Apart from the fact that this court had determined the question of residence without reference to the definition of 'place of business' in the Companies Act, this seems to me to be a highly artificial approach. It relies only on a strict linguistic approach without taking into account the use of the words in the context of the Companies Act as a whole and, in particular, the context of the practical exigencies in its provisions concerning companies in liquidation. The interpretation of a provision requires a consideration of the language used within its context taking into account the purpose of the provision and those factors which prompted and informed it.[12] Since the notion of residence of a company is, in any case, a fiction, the fact that a company has been liquidated does not, in my opinion, mean that it can no longer be said to 'reside' at its principal place of business. The jurisdiction of a court arising from the location of the principal place of business of a company is accordingly unaffected by its liquidation. In the present matter, therefore, the principal places of business of PMG Kyalami and PMG Alberton remained unchanged by liquidation and afforded the basis for jurisdiction in respect of the application.

[14] As regards PMG Westville, the dealerships submitted that if any other court had jurisdiction over all of the dealerships, the doctrine of *continentia causae* could not be invoked. Since the KwaZulu-Natal High Court, Durban, was such a court due to the registered offices of all of the dealerships falling under its jurisdiction, the court below did not have jurisdiction to hear the

[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

application. DR Harms in *Civil Procedure in the High Court* points out that the *causae continentia* 'principle is now enshrined in section [19(1)(*b*)]'.[13] PMG Westville was a party 'who is joined . . . to any cause in relation to which such provincial or local division has jurisdiction . . . if the said person resides or is within the area of jurisdiction of any other provincial or local division'.[14] PMG Westville was joined in the application. The court below had jurisdiction to entertain the application in respect of PMG Kyalami and PMG Alberton. PMG Westville 'resided' within the area of another local division. This means that s 19(1)(*b*) of the Supreme Court Act applied in the circumstances. I agree with the author Pistorius in *Pollak on Jurisdiction*[15] that it is not necessary to consider issues of convenience when the provisions of s 19(1)(*b*) apply. If one had to have regard to such issues, however, the finding of jurisdiction was amply justified in the present matter. It avoided a multiplicity of applications along with the additional costs and the risk of discordant findings in a situation where the issues were essentially the same for each dealership.

[15] The submission of the dealerships to the effect that the doctrine of *continentia causae* applies only where no other forum has jurisdiction in respect of all of the respondents does not need to be decided since jurisdiction was founded on the provisions of s 19(1)(*b*).[16] It is also unnecessary to decide whether the court below was correct in finding that the domicile of certain of the liquidators of the dealerships provided a basis for jurisdiction.

Factual dispute

[16] Wesbank alleged that the cancellation letters were delivered to all three of the dealerships on 23 January 2009. The significance of this averment is that

[13] At A4.19. See also its successor s 21(2) of the Superior Courts Act 10 of 2013.
[14] Section 19(1)(*b*) of the Supreme Court Act.
[15] D Pistorius *Pollak on Jurisdiction* (2ed, 1993) at 26.
[16] This submission appears to be based on an assertion made by Pistorius at 26. That assertion likewise does not need to be considered.

cancellation of the agreements took place only when Wesbank's decision to cancel was conveyed to the dealerships.[17] Wesbank's case was based on cancellation having taken place before the commencement of the liquidations. As regards PMG Kyalami and PMG Alberton, delivery on 23 January 2009 was not seriously disputed. The answering affidavit was deposed to by one of the liquidators who claimed no personal knowledge of what had taken place. In response to the averment that the cancellation letters had been delivered on 23 January 2009, he simply said 'as is clear from the affidavit of HANS JURIE LOUW . . . there is a clear and substantial dispute of fact as regards what transpired on 23 January 2009'. He then went on to say that he did not 'accept that the letters of cancellation were delivered on the days as alleged'. Mr Louw, whose affidavit dealt only with events at PMG Westville, was, at the time, the Dealer Principal there. No affidavit was put up from persons able to testify as to what took place at the other two dealerships. The averments of Wesbank as regards PMG Kyalami are therefore uncontested and it must be accepted that the agreement in question was cancelled on 23 January 2009. This accordingly took place prior to the commencement of the liquidations.

[17] The dealerships contended that there was a factual dispute as to whether the cancellation letters delivered to PMG Westville were delivered prior to the commencement of the proceedings leading to its winding up.[18] It was submitted that this led to one of two possible outcomes. It either required the application to be referred to oral evidence so as to resolve this factual dispute or to be dismissed on the basis that the dispute, if adjudicated on the papers, should be resolved in favour of the dealerships as respondents on well-established principles.[19]

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[17] *Swart v Vosloo* 1965 (1) SA 100 (A) at 105G.
[18] It is not disputed that the windings up commenced some time on 26 January 2009 in terms of s 348 of the Companies Act 61 of 1973 (see note 2). The actual time of presentation on that day was not alleged.
[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

[18] Wesbank put up an affidavit by Warren Penery who claimed to have delivered nine letters to PMG Westville on 23 January 2009. He said that he was called by his manager to the Nissan Regional Office that day to collect an envelope containing letters of cancellation. Having collected them, he went to deliver them to Mr Louw at the principal place of business of PMG Westville. He arrived there at 09h00 and, at about 10h00, was instructed to serve the letters on Mr Louw, which he did. Of the nine letters, one was addressed to PMG Westville and eight were addressed to other people at PMG Westville. All were delivered to Mr Louw at the same time. Mr Penery testified that, after delivering the letters to Mr Louw, he secured all the floor plan stock and that this was voluntarily handed back to Wesbank. He did not indicate what he meant by 'handed back' or when this took place, and, in particular, if it took place on 23 January or on a day thereafter. Although Mr Penery did not say so, three of the letters put up as annexures to the main affidavit appear to contain the signature of Mr Louw against the date 23 January 2009. The other six letters put up as annexures contain no signatures.

[19] Mr Louw put up an affidavit. This forms the basis of the contention by the dealerships that a factual dispute existed. In dealing with the averments that the letters were delivered on 23 January 2009, he stated that he had been 'referred to' the affidavit of Raylene Meyer and two paragraphs in it had been brought to his attention which he set out as being:

'20. In respect of PMG Motors Westville, the letters of cancellation were delivered by Warren Penery . . . of the Applicant at the address of the dealership, 1134 Jan Smuts Highway, Westville, KwaZulu-Natal on 23 January 2009 at 10h00.

21. The letter was delivered by Penery to the Dealer Principal, Hansie Louw . . . and all vehicles were, with the consent of the dealership, removed by the Applicant on 23 January 2009.'

Significantly, Mr Louw nowhere stated that he had been shown the rest of the founding affidavit, the annexures to the founding affidavit or the affidavit of Mr

Penery. All he had been shown was the two paragraphs quoted by him and a single document. Mr Louw went on, variously, to say:

'The letters of cancellation in question were never delivered on 23 January 2009';

and

'I specifically recall that it was on Monday, 26 January 2009 that I first became aware that there was a liquidation in progress';

and

'I deny that the signature on [annexure RM 6.3] is my signature or that it was dated in my presence';

and

'I accordingly deny that the letters of cancellation referred to in the affidavit of RAELENE MEYER and the affidavit of PENERY were served on 23 January 2009 and specifically recall that the vehicles were only returned to the Applicant on 26 January 2009 more particularly as 26 January 2009 was supposed to have been payday, and I never received my salary for that month.'

[20] In reply, Wesbank put up an affidavit by Alec Labuschagne where he said that he met Mr Penery at the premises of PMG Westville on 23 January 2009. His affidavit continued as follows:

'9. Penery had in his possession a voluminous envelope containing all the cancellation letters to the various directors of [PMG Westville] and [PMG Westville] itself. These letters were in triplicate and were handed by Penery directly to Louw who, in my presence, signed copies of these letters, dated them and handed them back to Penery. Louw retained the originals.

. . .

11. After having received the letters, Louw and certain employees of [PMG Westville] assisted with the moving of vehicles and with preparing them for the carriers . . . .'

These averments elicited no application by the dealerships to put up a fourth set of affidavits.

[21] In the light of the above, it must be determined whether the assertion of Mr Louw that '[t]he letters of cancellation in question were never delivered on 23 January 2009' gives rise to a genuine factual dispute. The only two averments in his affidavit of specific recollections on his part were that he first became aware of a liquidation on 26 January and that the vehicles were removed that day. The denial that the letters were delivered on 23 January was followed immediately, as if by way of explanation, by an assertion that he only became aware of a liquidation the following Monday. The letters do not, however, refer to liquidation. As mentioned above, Wesbank did not apply for liquidation of the dealerships, the dealerships themselves did so. The letters deal only with the cancellation of the floor plan agreement and the demand for return of the vehicles which were subject to it. His other assertion, denying having signed a specific letter or that it was dated in his presence, relates to a single document which he said he had been shown prior to deposing to the affidavit. There were eight other letters put up as annexures, two of which were signed and contained the handwritten date of 23 January 2009 alongside his signature. Mr Louw did not deal at all with these eight annexures. In addition, he nowhere denied that the letters were at some stage delivered to him. Despite not having said that he had been shown the rest of the founding affidavit or that of Mr Penery, he purported to deny the averments contained in both of these affidavits concerning the cancellation letters.

[22] Mr Louw's affidavit appears to have been carefully crafted so as not to pertinently deal with a number of crucial averments. As mentioned, he did not deny signing two of the letters or receiving the other six. His denial that he signed annexure RM 6.3 and that it was not dated in his presence stands alone. Apart from not having said that he had seen the affidavit of Penery, he certainly did not deal with any of the specific averments in it. One such significant averment was that, between 09h00 and 10h00 on 23 January, Mr Louw was

aware of the presence of Mr Penery at the principal place of business of PMG Westville. The dealerships also did not put up a further affidavit by Mr Louw to contradict the affidavit of Mr Labuschagne. The latter was clearly put up in circumstances where Wesbank did not anticipate a denial of the averments in the founding affidavit concerning delivery of the cancellation letters on 23 January 2009.

[23] This court has held that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed'.[20] It has also held that where a 'version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or . . . clearly untenable' the court is justified in rejecting it merely on the papers.[21] Against these yardsticks, Mr Louw's general assertion that the letters of cancellation were not delivered on 23 January 2009 must be held to amount to a bare denial where proper and detailed treatment was required addressing what was said by the Wesbank witnesses about the events of that day. He failed to 'seriously and unambiguously' address the averments of Mr Penery and Mr Labuschagne. I am therefore of the opinion that his affidavit does not give rise to a genuine factual dispute as to delivery of the letters of cancellation on 23 January 2009.[22] Accordingly, the court below correctly found that cancellation of all the floor plan agreements, including that with PMG Westville, took place prior to the commencement of the winding-up proceedings. It is also undisputed that the cancellation letters were acted upon

[20] Per Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.
[21] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.
[22] This involves a prior, and different, exercise to one where there are two positive versions before the court. In such a case, it is not open to a court to decide the matter on the probabilities, even where one version appears improbable. The approach, as set out in *National Scrap Metal (Cape Town) (Pty) Ltd & another v Murray & Roberts Ltd & others* 2012 (5) SA 300 (SCA) para 21 is that '[a]n attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence'.

by the dealerships inasmuch as the vehicles comprising the floor stock were handed over to Wesbank.

Section 84(2) of the Insolvency Act

[24] The dealerships contended that even if it was found that the agreements were cancelled prior to the commencement of the liquidations, the provisions of s 84(2) of the Insolvency Act applied to the moneys realised from the sale of the vehicles. This, in effect, amounts to a submission that the payments were not made *indebite* because a valid *causa* for them was provided by s 84(2). In order to evaluate this submission, it is necessary to set out the whole of s 84, which reads as follows:

'(1) If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction that is an instalment agreement contemplated in paragraph *(a)*, *(b)*, and *(c)* (i) of the definition of "instalment agreement" set out in section 1 of the National Credit Act, 2005 [Act 34 of 2005], such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and the provisions of section 83 shall apply.

(2) If the debtor returned the property to the creditor within a period of one month prior to the sequestration of the debtor's estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, subject to payment to the creditor by the trustee or to deduction from the value (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) shall apply.'

[25] It was not disputed that the agreements fell within the definition of instalment agreements under the National Credit Act 34 of 2005. It was also not disputed that the vehicles were returned to Wesbank within one month before

the commencement of the liquidations. The issue is whether s 84(2) applies to property which was the subject of such an agreement where ownership was reserved and where the agreement was cancelled prior to the commencement of the liquidation of a company. This depends on a construction of the section.

[26] The dealerships conceded that s 84(1) requires an agreement to be extant before it can be said to apply. This is clearly a correct concession. The wording talks of a transaction in which rights and obligations remain intact so that they can create 'in favour of the other party to the transaction . . . a hypothec over that property whereby the amount still due to him under the transaction is secured'. In other words, s 84(1) 'presupposes the existence of a contract binding on both parties'.[23] The agreement must be extant at the time the section is invoked. If it was cancelled before liquidation, as occurred here, the section clearly does not apply.

[27] It was submitted on behalf of the dealerships, however, that although s 84(1) did not find application, that this was not the case with s 84(2) and that it is intended to be a stand-alone provision, to be read separately from s 84(1). There are strong factors which militate against this approach. First, s 84(1) and s 84(2) are subsections of the same section headed 'special provisions in case of goods delivered to a debtor in terms of an instalment agreement'. There is no indication that they deal with different subject matter or distinctly different aspects arising from the same subject matter. Secondly, and related to this, s 84(2) is inextricably bound to s 84(1), for it is there that one derives the meaning for the expressions 'the property' 'the debtor' and 'the said transaction'. As to 'the property', s 84(1) describes it as 'any property [which] was delivered . . . under a transaction'. 'The debtor' is described as a person to

[23] Per O'Hagan J in *Epsom Motors (Pty) Ltd v Estate Winson* 1961 (1) SA 687 (E) at 692D-E. See also *ABSA Bank Ltd v Cooper NO & others* 2001 (4) SA 876 (T) at 881H-J & 882G-H.

whom property was delivered under a transaction. And '[t]he said transaction' refers to 'a transaction that is an instalment agreement' pursuant to which the property was delivered. Thirdly, s 84(2) in itself requires an extant agreement because it refers to an 'amount payable under the . . . transaction'. This presupposes that an amount remains payable under the transaction. On the same reasoning as applies to s 84(1), this requires 'the existence of a contract binding on both parties'.[24] Once an agreement has been cancelled, no amount remains payable under it. That would require enforcement of the agreement which cannot take place if it has been cancelled. This places s 84(2) on the same footing as s 84(1).

[28] It was submitted by the dealerships that the fact that the provisions of s 84(1) are made to apply only after property has been delivered under s 84(2) indicates that the two subsections must be read as stand-alone sections. But this does not assist the dealerships because s 84(1), as has been indicated above and was conceded by them, applies only to extant agreements. The fact that property must be dealt with in accordance with s 84(1) supports the conclusion that both subsections deal only with extant agreements.

[29] Accordingly, it is clear that s 84(2) applies only where an agreement remained in existence and the property in question was accordingly subject to the agreement as at the date of commencement of winding-up. By reason of the fact that the agreements in this matter were cancelled prior to the commencement of the liquidations of the dealerships, s 84(2) does not apply and the payments were made *indebite*. The court below was therefore correct in its conclusion in this regard. It should perhaps be mentioned that the application or otherwise of s 84(2) was the only defence raised as to whether the *condictio*

[24] *Ibid.*

indebiti applied to the payments. Other elements of that cause of action therefore do not arise for consideration.

Application or action proceedings

[30] The submission of the dealerships was that the claim ought to have been brought by way of action. This submission was premised on the need for an adjustment of the amounts admittedly paid by Wesbank in the manner provided for in s 84(2) of the Insolvency Act. It was submitted that the need for such evidence and adjustment rendered the claim illiquid. This submission cannot succeed if s 84(2) did not apply as was the case in this matter. In the light of my finding on that issue, nothing further need be said on this submission.

Section 111 objection

[31] Finally, the dealerships contended that, because Wesbank had objected to the account in terms of s 111 of the Insolvency Act on the basis that the moneys paid should not have been reflected as an asset of the dealerships, this precluded Wesbank from approaching a court. They submitted that, '[h]aving so elected it is obliged to await the outcome of its said objections'. During argument before us they submitted that Wesbank could also have withdrawn the objection. It is certainly the case that an approach to the court under s 111(2)(*a*) to set aside the decision of the Master cannot be brought before the Master has given his ruling on the objection. This was not such an application, however. First, it did not seek to set aside any ruling or to require the Master to take any steps in relation to the objection. Secondly, Wesbank had made payments to the liquidators after the *concursus* had taken place. Wesbank does not regard itself as a creditor of the dealerships as regards the claim under the *condictio*. In fact, there is no indication on the record that Wesbank lodged any claim against the estates. The procedure under s 111 does not appear to bear on the application in question at all. The contention of the dealerships would be correct where, for example, a

claim had been lodged against the estate but excluded from the account but this was not such a situation.

[32] In the peculiar facts of this matter, therefore, it would be artificial to require Wesbank to await the outcome of the objection before making a case in court based on the *condictio indebiti*. This must not be understood as opening the door to objectors under s 111 to approach a court prior to the objection having been ruled on by the Master. In the circumstances of this matter, however, Wesbank was entitled to bring the application.

[33] In the result, the appeal is dismissed with costs to be paid by the appellants jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent on the employment of two counsel.

T R Gorven
Acting Judge of Appeal

Appearances

For Appellants:	A K Kissoon Singh SC (with him G M Harrison) Instructed by: V Chetty, La Lucia Lovius Block, Bloemfontein
For Respondent:	A Gautschi SC (with him P W Belger) Instructed by: Lanham Love Attorneys, Johannesburg Symington & De Kok, Bloemfontein