THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 828/2021

In the matter between:

VAN WYK VAN HEERDEN ATTORNEYS **APPELLANT**

and

STEPHEN MALCOLM GORE NO **FIRST RESPONDENT**

SELBY MUSAWENKOSI NTSIBANDE NO **SECOND RESPONDENT**

Neutral citation: *Van Wyk Van Heerden Attorneys v Gore NO and Another* (828/2021) [2022] ZASCA 128 (30 September 2022)

Coram: VAN DER MERWE, MAKGOKA and GORVEN JJA and GOOSEN and MASIPA AJJA

Heard: 13 September 2022

Delivered: 30 September 2022

Summary: Insolvency – deposit into attorney's account – application to set aside under s 26(1)*(b)* of Insolvency Act 34 of 1926 – test whether attorney benefits or not – if so, onus to show solvency on attorney.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Magona AJ, sitting as court of first instance):

1 To the extent set out in paragraph 2 hereof, the appeal is upheld with costs, including costs of two counsel.

2 Paragraphs 2 and 3 of the order of the high court are set aside and substituted with the following:

> '2 It is declared that the following payments made by Brandstock Exchange (Pty) Ltd to the respondent:
>
> 2.1 On 23 February 2018 in the sum of R75 000;
>
> 2.2 On 30 April 2018 in the sum of R200 000;
>
> are dispositions without value as contemplated by s 26(1)*(b)* of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973 and they are set aside.
>
> 3 The respondent is ordered to pay to the applicants the sum of R275 000.'

JUDGMENT

Gorven JA (Van der Merwe and Makgoka JJA and Goosen and Masipa AJJA concurring)

[1] This appeal concerns the application of the provisions of s 26(1)*(b)* of the Insolvency Act 24 of 1936 (the Act) to trust accounts of attorneys.[1] Three deposits were made into the trust account of the appellant, a firm of attorneys (the attorneys). Two were made on 23 February 2018 and one on 30 April 2018. The first two were of R1 250 000 and R75 000 respectively and the third of R200 000. All three were made from the account of Brandstock Exchange (Pty) Ltd (Brandstock). The sole director of Brandstock was one Bruce Robert Philp (Philp). Brandstock was provisionally wound up on 3 July 2018 and finally wound up on 20 August 2018. The deposits excited the attention of the respondents who are the liquidators of Brandstock (the liquidators). They applied to have them set aside under s 26(1)*(b)* of the Act. Their contention was that the deposits into the trust account amounted to dispositions to the attorneys.

[2] The application was brought in the Western Cape Division of the High Court, Cape Town (the high court). It found favour with Magona AJ, who declared the deposits to have been dispositions to the attorneys and set them aside. Pursuant to that declaration, the attorneys were ordered to pay R1 525 000 to the liquidators,

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[1] I shall refer to 'attorney' or 'attorneys' as a matter of convenience and consistency. As regards the trust accounts of attorneys, as will be seen, the Legal Practice Act 28 of 2014 (the LPA) refers mostly to the general term 'trust account practices'. These used to be the sole domain of attorneys but the LPA now allows certain legal practitioners functioning as advocates to operate trust accounts.

along with interest and costs. The high court dismissed an application by the attorneys for leave to appeal. The appeal is before us with the leave of this Court.

[3] The relevant parts of s 26(1)*(b)* of the Act read:

'Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

. . .

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities'.

It is clear that the deposits took place less than two years prior to the winding up of Brandstock. This would bring them within the ambit of s 26(1)*(b)*.

[4] The elements required to set aside a disposition under s 26(1)*(b)* are therefore:

a) A disposition;

b) by an insolvent;

c) not made for value;

d) within two years of liquidation; and

e) the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.

[5] It is necessary to sketch the plain, unvarnished,[2] material facts of the application. At the time of the deposits, the attorneys acted for Philp and another entity controlled by him, BRP Livestock CC (BRP). The attorneys neither

[2] In the papers and heads of argument, the liquidators sought to make out a case that the transaction described below was a sham one. Certain inferences were drawn and remarks made by the high court concerning the conduct of the attorneys. I mention these later. These were expressly disavowed in argument before us, correctly in my view.

represented, nor even knew of the existence of, Brandstock. BRP was provisionally liquidated on 3 November 2017 and finally wound up on 8 March 2018 by an order of court. At the time the three deposits were made, Philp was confronting a sequestration application.

[6] The insolvency proceedings against Philp and BRP were pursued by an acknowledged creditor, the Utexx Trust (Utexx). The attorneys were involved in negotiations for a person well-disposed to Philp to purchase its claims against BRP and Philp. Philp indicated to the attorneys that a certain Muir would be the purchaser. The attorneys were requested to draft a cession and sale agreement to that effect.

[7] On 13 February 2018, the attorneys transmitted the first draft to attorneys representing Utexx. They had been informed that Muir had not decided which of his corporate entities would purchase the claims and were to leave the identity of the purchaser blank. The purchase price was R1.25 million. Utexx's attorneys sent back an amended draft. This reflected (incorrectly, but the attorneys did not notice it) that the attorneys represented the purchaser. Utexx also required payment to be made from the trust account of the attorneys.

[8] On 23 February, the attorneys informed Utexx that the purchase price of R1.25 million had been deposited into their trust account. The agreement was signed by both parties on 26 February. It is unclear from the affidavit of the attorneys at what point they realised that the purchaser was one Sandra Pratt (Pratt) rather than Muir. They explained:

'On 23 February 2018, I advised [Utexx's attorney] that the purchaser was in Johannesburg and would only be able to sign the Agreement on 24 February 2018 and provide me with a copy of it by 26 February 2018. I pause to mention that, at this point in time, I was still under the impression

that Muir would be purchasing the claim of [Utexx]. On 21 February 2018, I transmitted an e-mail to Philp again requesting him to complete the details of the purchaser. On 23 February 2018, I addressed a letter to Philp requesting the aforesaid payment upon which Philp responded by confirming in writing that the purchaser disclosed in the Agreement had made payment of the purchase consideration and attached the proof of payment to his aforesaid letter. It was only upon receipt of the signed Agreement from Philp that I noticed that Muir was not the purchaser but instead Sandra Pratt's details were included as the purchaser.'

[9] After seeing the signed agreement, the attorneys sought clarification from Philp. According to them, 'he indicated that Pratt was his aunt and that she had offered to purchase the claim from [Utexx] and to then allow him some additional time to repay the indebtedness of BRP to her.' What is clear is that Philp misled, or at best for him failed to tell, the attorneys that the funds deposited into their trust account came from Brandstock. On the contrary, he informed them that the funds were those of the purchaser. The attorneys transferred the R1.25 million purchase price to Utexx on 27 February. It is accepted by the liquidators that the attorneys were entirely unaware of the existence or involvement of Brandstock at this time.

[10] The other two amounts of R75 000, deposited on 23 February, and of R200 000, deposited on 30 April, were used by the attorneys to settle their fees, counsel's fees and further disbursements. These all related to the attorneys' representation of Philp and BRP.

[11] It is against this factual backdrop that the claims by the liquidators against the attorneys under s 26(1)*(b)* fall to be considered.

[12] In support of their contention that the deposits amounted to impeachable dispositions to the attorneys, the liquidators relied on a line of cases. These cases

have held that, when attorneys operate on their trust accounts, they do so as principals and not as agents.[3] They submitted that this demonstrated that the dispositions were made to the attorneys as envisaged under s 26(1)*(b)*.

[13] On the other hand, the attorneys called in aid a dictum of this Court concerning a deposit into the trust account of an attorney who acted for the nominated payee.[4] In that matter, this Court held that 'the disposition was to Iprolog [the payee on whose behalf it was received] and occurred . . . when the money was paid into the attorney's trust account'.[5] They further relied on a series of cases where trustees or liquidators of insolvent estates sought unsuccessfully to contend that amounts deposited in bank accounts were dispositions to the banks.[6]

[14] I shall deal more fully with both sets of contentions with reference to the cases relied on. Before doing so, however, it is worth rehearsing some of the legal principles concerning the position of bank accounts in general and trust bank accounts of attorneys in particular. General banking principles are clear that the bank owns the money deposited into accounts held with it. A debtor-creditor relationship is established as was explained by Holmes JA in *S v Kearney*:[7]

'[I]t has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer . . .'.

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[3] See eg *De Villiers NO v Kaplan* 1960 (4) SA 476 (C) (*Kaplan*); *Wypkema v Lubbe* [2007] ZASCA 36; 2007 (5) SA 138 (SCA); [2007] 4 All SA 1224 (SCA) (*Wypkema*); and *Capricorn Beach Home Owners Association v H. E. S. Potgieter t/a Nilands and Another* [2013] ZASCA 116; 2014 (1) SA 46 (SCA) (*Capricorn*).
[4] *M and Another v Murray and Others* [2020] ZASCA 86; 2020 (6) SA 55 (SCA) (*Iprolog*).
[5] Ibid para 31.
[6] See eg *Zamzar Trading (Pty) Ltd (in Liquidation) v Standard Bank of SA Ltd* 2001 (2) SA 508 (W) (*Zamzar*); *Reynolds and Others NNO v Mercantile Bank Ltd* [2004] ZASCA 137; 2004 (5) SA 220 (SCA) (*Reynolds*); and the English law case of *Bank of Ireland v Hollicourt (Contracts) Ltd* [2001] All ER 289 (CA) (*Hollicourt*).
[7] *S v Kearney* 1964 (2) SA 495 (A) at 502H–503A.

Under the banker-customer relationship, the bank is indebted to the customer. The bank owns the money but is obliged to comply with instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf.

[15] This holds no less true of trust bank accounts held by attorneys. Money deposited into attorneys' trust accounts gives rise to the same relationship with the bank as with any account holder. The bank owns the money, but becomes obliged to give effect to instructions by the attorney holding the account. It is indebted to the attorney and to no other party. No one else is entitled to instruct the bank on how to deal with it.

[16] At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular clients. A similar debtor-creditor relationship obtains between the attorney and the client. The attorney is obliged to give effect to instructions of clients concerning the credit balance held for them. But vis-a-vis the bank, the attorney has the power of disposal over credit balances in the trust account. This is at least partly why our courts have held that, when attorneys deal with funds in a trust account, they generally do so as principals and not as agents.

[17] Section 86(2) of the Legal Practice Act 28 of 2014 (the LPA) applies to attorneys:

'Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63(1)*(g)* and must deposit therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person.'

Trust accounts of attorneys held with banks have, for a considerable time, enjoyed special characteristics. Chief among these is that reflected in s 88(1) of the LPA, which provides:

'*(a)* Subject to paragraph *(b)*, an amount standing to the credit of any trust account of any trust account practice-

(i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34(2)*(b)*; and

(ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph *(a)*, and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.'

This echoes similar provisions in prior legislation governing attorneys' trust accounts.[8] It can be seen that these provisions circumscribe the rights of attorneys and their creditors in relation to trust accounts.

[18] The rights of banks are similarly curtailed by s 91 of the LPA, the relevant part of which reads:

'. . . a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank

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[8] Section 33(3) of Act 23 of 1934, as substituted by sec. 17 of Act 18 of 1956, provides:
'No amount standing to the credit of such trust account in the bank shall form part of the assets of the attorney, notary or conveyancer concerned and no such amount shall be liable to attachment at the instance of any creditor of such attorney, notary or conveyancer: Provided that any excess remaining after payment of the claims of all persons whose moneys have, or should have, been deposited in such trust account, shall be deemed to form part of the assets of such attorney, notary or conveyancer.'
And s 78(7) of the Attorneys Act 53 of 1979, the immediate predecessor to the LPA, reads:
'No amount standing to the credit of any practitioner's trust account shall be regarded as forming part of the assets of the practitioner, or may be attached on behalf of any creditor of such practitioner: Provided that any excess remaining after payment of all claims of persons whose money has, or should have, been deposited or invested in such trust account, and all claims in respect of interest on money so invested, shall be deemed to form part of the assets of such practitioner.'

not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money standing to the credit of that account.'

[19] With that in mind, I turn to the cases called in aid by the parties. The first, relied on by the liquidators was *Kaplan*,[9] where it was held:

'Sec. 33(3) of Act 23 of 1934, as amended, while providing that an amount standing to the credit of an attorney's trust account shall not form part of the assets of such attorney, left unimpaired the right of the attorney to direct the bank at which the trust account is kept to dispose of the amount standing to the credit of that trust account in a manner as directed by him . . . Indeed as between himself and the bank, unaware of the fact that he was acting in conflict with his trust obligations, he could direct the bank to pay the amount standing to the credit of his trust account to his personal creditors or to himself.'[10]

This is a straightforward application of banking principles as applied to trust accounts. It simply explains that banks must give effect to instructions of an account holder.

[20] In *Kaplan*, an attorney, Katz, had made payments of his personal gambling debts from his trust account. His trustees sued his gambling creditor, the respondent. The latter excepted to the particulars of claim on the basis that, because the credit balance in the trust account was not an asset belonging to Katz, the payments were not dispositions of Katz's property. The exception was upheld by the court of first instance. Reversing this finding on appeal, Van Winsen J held:

'In effect, therefore, even although the amount in the trust account was not, while it was still in such account, an asset belonging to Katz, he had a right of disposal over such amount which right empowered him to deal with it in such a way as to make it, or an amount equivalent thereto, part

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[9] *Kaplan* fn 3.
[10] Ibid at 478H-479B.

of his assets . . . In the case where he directed the money to be paid to his trust creditors he would be released from his obligations to them. Where he directed the payment of the excess in the account to his personal creditors or to himself his estate would thereby be benefited.'[11]

Here one sees operating the two sets of relationships governing a trust account: that of the attorney with the bank and that of the attorney with the client. Katz had a right of disposal with the bank. But he also had an obligation to the clients on whose behalf he held the moneys in the trust account. He breached the latter obligation by abusing his right of disposal of the funds held for them for his own benefit. The element of benefit is central to the reasoning in the judgment that these were dispositions by Katz.

[21] That approach has been endorsed by this Court on more than one occasion and can be considered settled law. In *Wypkema*,[12] a summons for provisional sentence had been sued out against an attorney on the basis of a dishonoured cheque drawn on his trust account. A bank had undertaken to grant a loan to the attorney's client on registration of a mortgage bond over an immovable property he was purchasing. The appellant agreed to advance a loan to the client as bridging finance. Before the loan money was advanced, the attorney furnished the appellant with a cheque in the amount of the loan plus its fee. The cheque, drawn on the attorney's trust account, was dishonoured by non-payment when presented, and returned marked 'effects not cleared'. The court *a quo* refused provisional sentence against the attorney, holding that the cheque had been furnished by the attorney as agent for the client rather than as principal. This Court disagreed and granted provisional sentence against the attorney. After referring to *Kaplan*, it held:

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[11] Ibid at 479B-E.
[12] *Wykema* fn 3.

'The Court *a quo* failed to have regard to these basic principles and consequently erred in its conclusion. When an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity.'[13]

[22] The principle was further illustrated in *Capricorn*.[14] An attorney had transferred funds from his trust account to the Capricorn Beach Home Owners Association (the HOA) in error. He had intended to transfer them to his client, the Capricorn Beach Joint Venture (the JV). The JV owed the HOA money. Instead of repaying the attorney, the HOA claimed to have set off the money received by it against the debt of the JV on the basis that the attorney had acted as the agent of the JV in making the transfer. This Court upheld the attorney's claim against the HOA under the *condictio indebiti* with reference to the above principles:

'First, it is at odds with the judgment of this court in *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) para 7. That case held that, when an attorney draws a cheque on his trust account, he exercises his right to dispose of the amounts standing to the credit of that account and does so as principal and not in a representative capacity. In my view that puts paid to the submission that the first respondent, a duly admitted attorney, notary and conveyancer, was acting as an agent when, through his bookkeeper, he made the erroneous transfer of money to the appellant. It is true that in this case we are not concerned with the drawing of a trust cheque but in principle it makes no difference that the payment was made in the modern way by electronic transfer. The account from which the erroneous payment was drawn was a trust account controlled by the first respondent. Therefore the principle laid down in *Wypkema* applies.'[15]

[23] From the above examples, it is clear that attorneys operate on their trust accounts as principals and not as agents. This is because they, and only they, can

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[13] Ibid para 7.
[14] *Capricorn* fn 3.
[15] Ibid para 16.

instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. When attorneys operate on a trust bank account in accordance with their instructions, however, they may function at two levels. In the first place, because only they have the right to dispose of funds to the credit in that account pursuant to the banker-customer relationship, they do so as principal. In the second place, however, if they give effect to a mandate from the client in whose name the moneys are held in trust, they do so as agent. What is relevant for present purposes, however, is that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney. The contention of the liquidators to this effect must therefore be rejected.

[24] The matter of *Iprolog*[16] was invoked by the attorneys as authority for the contention that a deposit into an attorney's trust account amounted to a disposition to the payee to whom the attorney was instructed to make payment of those funds. It involved a claim by trustees of the insolvent estate of a husband who had obtained a divorce order shortly before being sequestrated. The trustees alleged collusive dealings between the husband and wife.[17] The funds were used to enable an entity called Iprolog to purchase an immovable property. On 23 June 2009, the husband transferred R3 500 000 of that amount into an attorney's trust account for the credit of Iprolog. The issue was framed by this Court as follows:

'It brooks no debate that the payments made by Mr M[…] to Mrs M[…] constitute "dispositions" within the meaning of the Insolvency Act. As I have already stated, there were two of those. The first was for R3 500 000 into an attorney's trust account for the credit of Iprolog on 23 June 2009 and used towards the purchase of property in Iprolog's name. The second payment was made

[16] Footnote 4.
[17] The cause of action implicated s 31 of the Insolvency Act as well as ss 29 and 26(1)*(b)*.

shortly after the divorce decree was finalised. It was submitted that despite the payment date for the R3 500 000 being June 2009, the money only accrued to Mrs M[…] on 26 August 2009, after the decree of divorce was granted and the property had been transferred into Iprolog's name. Thus, it was said that Mrs M[…] was only "paid" after the divorce order was granted, and "in terms" thereof.

This submission has merely to be stated, to be rejected. It was contrived to bring the disposition within the ambit of the exclusionary provisions of the definition of "disposition" in s 2 of the Insolvency Act referred to above. As I have said, the disposition was to Iprolog and occurred on 23 June 2009 when the money was paid into the attorney's trust account. That Iprolog was only free to use it later is irrelevant. The exclusionary provisions of s 2 did not apply to this payment, and it was accordingly susceptible to being set aside in terms of one or other of the three sections of the Insolvency Act referred to above.'[18]

As was made plain, the deposit was to a trust account for the credit of Iprolog. Thus, the attorney was mandated by Iprolog to receive the payment as its agent. That distinguishes the present deposit which was to the trust account of the attorneys who did not receive them on behalf of Utexx but were instructed to pay them on. A different enquiry must determine to whom an impeachable disposition under s 26(1)*(b)* has been made in this matter.

[25] Matters concerning banks may shed some light on the essential enquiry to be made. In *Zamzar*,[19] Goldblatt J was confronted with an exception to particulars of claim brought by liquidators of Zamzar Trading (Pty) Ltd (Zamzar) against the respondent bank (the bank). The claim was that Zamzar and one Sferopoulos conspired in a fraudulent scheme. Pursuant to that scheme, Zamzar opened a current account with the bank. VAT repayments were made into the account and, on instruction from Zamzar that it had an obligation to Sferopoulos, the bank debited

[18] Footnote 15 paras 30-31.
[19] *Zamzar* fn 6.

the account in favour of Sferopoulos. The liquidation of Zamzar ensued and the liquidators sought to recover these amounts from the bank. There was no suggestion that the bank was in any way aware of the fraudulent dealings. In upholding the exception, the court said:

'Should plaintiff's cause of action be valid it would mean a commercial bank would in respect of each customer and each transaction have to ascertain where the customer's funds came from and the reason therefore and why such funds were being paid to a named payee. Thus the bank would only be permitted to safely execute its client's mandate if it could be satisfied it was not tainted in any way.

The whole scenario envisaged by the plaintiff is, in my view, repugnant to logic and law as it would create a situation where a principal could visit liability on his agent for performing precisely the mandate which it had given to its agent.'[20]

This reasoning strikes me as unassailable and equally applicable to an attorney who is merely instructed to make a payment.

[26] In *Reynolds*,[21] Mercantile Bank (Mercantile) did not have outlets in certain areas and, for the convenience of its clients, opened bank accounts in those areas with Standard Bank (Standard). As such, it became a client of Standard. Clients of Mercantile in those areas could deposit cheques into accounts of Mercantile with Standard without having to go to a branch of Mercantile. Within two years of being liquidated, Duchini (Pty) Ltd deposited two cheques made out to Mercantile into one of its accounts with Standard. That account with Standard was credited accordingly. On the instructions of one of the directors of Duchini, the amounts of the deposits were credited by Mercantile to accounts held by that director with Mercantile. This reduced the indebtedness of that director to Mercantile. Duchini was not indebted to

[20] Ibid at 515B-C.
[21] *Reynolds* fn 6.

Mercantile at the time. The liquidators of Duchini sued Mercantile, seeking to set the payments aside under s 26(1) of the Act. This Court held:

'Indeed a disposition without value which is liable to be set aside is one in which the person who benefited by the disposition runs the risk of having such disposition being set aside in certain specified situations. It is manifest that [Mercantile] benefited from the dispositions. First, as previously stated, it obtained the benefit of a credit to its account with the Standard Bank which it could immediately use. Secondly, it was thereafter able to reduce the debt which was owed to it by [the director in question] Makrides by the amounts of the two deposits making use of the transfer of the credit to its account at the Standard Bank.'[22]

Standard was not held to have benefited despite having become the owner of the moneys collected from Duchini's bank. This accords with the position of the bank in *Zamzar*. Not so in the case of Mercantile. This Court held that the effect was that 'Duchini paid Makrides' debt to the defendant.'[23] In arriving at that conclusion, this Court highlighted the need for the recipient to benefit from the disposition.

[27] This approach finds echo in English and Australian law. In the English case of *Hollicourt*,[24] the liquidators of Hollicourt (Contracts) Ltd (Hollicourt) sought to recover payments by the Bank of Ireland (the bank) to third parties from the account of Hollicourt. The claim of the liquidators was based on s 127 of the Insolvency Act, 1986 which provided:

'In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.'[25]

The court of first instance had accepted the contention of the liquidators that the bank was obliged to effectively repay the total amount of the payments in question.

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[22] Ibid para 8.
[23] Ibid para 11.
[24] *Hollicourt* fn 6.
[25] Ibid para 3.

On appeal, the bank made submissions on what was termed the 'double disposition point':

'This point turns on the identity of the relevant dispositions at which s 127 is aimed. The section refers to "*any*" disposition of the company's property. It is common ground that, where a company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company's property *in favour of the creditor* falling within s 127. But it is contended that the judge was not required by principle nor by authority to hold (and he was wrong in holding) that there was another relevant disposition of the company's property *in favour of the bank* when the Bank debited the Company's account with the sum paid to the creditor and that that disposition was avoided by s 127, so as to render the Bank liable to restore the Company's account to its pre-disposition condition.'[26]

This submission went home, causing Mummery LJ to hold:

'In our judgment the policy promoted by s 127 is not aimed at imposing on a bank restitutionary liability to a company in respect of the payments made by cheques in favour of the creditors, in addition to the unquestioned liability of the payees of the cheques.'[27]

[28] In this, he found support in other English law matters as well as in Australian law. He referred with approval to the Australian matter of *Re Mel Bower's Macquarie Electrical Centre Pty Ltd (in liq)*,[28] where Street CJ said:

'[The] paying by a bank of the company's cheque, presented by a stranger, does not involve the bank in a disposition of the property of the company so as to disentitle the bank to debit the amount of the cheque to the company's account. The word "disposition" connotes in my view both a disponor and a disponee. The section operates to render the disposition void so far as concerns the disponee. It does not operate to affect the agencies interposing between the company, as disponor, and the recipient of the property, as disponee . . . The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by s. 227.

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[26] Ibid para 19(1) at 293*h-j*. Emphases in the original.
[27] Ibid para 23 at 294*j*.
[28] *Re Mel Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 245.

. . . I consider that the legislative intention . . . is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponee that forms the basic legislative purpose of s. 227.'[29]

Mummery LJ also approved a dictum of McPherson J in the matter of *Re Loteka Pty Ltd (in liq)*:[30]

'The amount standing to the credit of the customer's account is simply diminished thus reducing *pro tanto* the indebtedness of the bank to the customer. It is the payee of the cheque that receives the benefit of the proceeds of the cheque. All that happens between customer and banker is an adjustment of entries in the statement recording the accounts between them . . . '[31]

[29] After having dealt with two further English law matters, Mummery LJ concluded:

'In summary, our conclusion, in the light of these authorities, is that section 127 only invalidates the dispositions by the Company of its property to the payees of the cheques. It enables the Company to recover the amounts disposed of, but only from the payees. It does not enable the Company to recover the amounts from the Bank, which has only acted in accordance with its instructions as the Company's agent to make payments to the payees out of the Company's bank account. As to the intermediate steps in the process of payment through the Bank, there is no relevant disposition of the Company's property to which the section applies.'[32]

It will be seen that Mummery LJ and the Australian courts invoked the purposive approach to legislative interpretation in ascribing meaning to the word 'disposition'. As has been seen, their findings largely accord with those set out above in the *Kaplan*, *Reynolds* and *Zamzar* matters.

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[29] Ibid at 258.
[30] *Re Loteka Pty Ltd (in liq)* (1989) 7 ACLC 998.
[31] Ibid at 1004.
[32] *Hollicourt* para 31 at 297.

[30] The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. It is now trite that, when it comes to interpretation:

'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . 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.'[33]

[31] As to language, it will be recalled s 26(1)*(b)* provides in its relevant parts:

'Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

. . .

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities'.

On a grammatical level, the position is clearer than that of s 127 of the English Insolvency Act. The phrase 'benefited by the disposition' is absent from s 127 of that Act. In arriving at the conclusion that impeachable dispositions were not made to those bankers because they were not benefited by them, the English and Australian courts were obliged to resort to a purposive interpretation of the section. In contrast, in our law the clear language of the provision includes a pertinent reference to benefit.

[32] At the heart of s 26(1)*(b)* is the requirement that the party to whom the disposition was made is put to the proof that 'immediately after the disposition was made, the assets of the insolvent exceeded his liabilities'. The person on whom that obligation rests is only one who 'benefited by the disposition'. The construction of

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[33] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

the section does not allow for liability to attach to one who did not benefit by it. The plain language requires the disponee to have benefited.

[33] This is buttressed by a sensible and businesslike approach. As Goldblatt J held in *Zamzar*, to hold a party liable who simply acted as an intermediary and gave effect to instructions by the client but did not benefit from the disposition gives rise to an absurd and unbusinesslike outcome. In that regard, an attorney would generally have the same lack of knowledge of the source of the funds deposited as would a bank. Where they on-pay those funds to a third party as instructed by their client, they also function purely as intermediaries.

[34] And the purposive approach articulated so clearly in *Hollicourt* lends further strength to this interpretation. This applies no less in our law since s 26(1)*(b)* is clearly aimed at only the person who benefits from (or claims under) the disposition. It is also not envisaged that there is a 'double disposition' where successive persons both become subject to the section. Where attorneys give effect to pay the third party nominated by their clients without themselves benefiting, it can be said that they simply function as conduits. This situation must be distinguished from that in *Kaplan*. There Katz did not give effect to instructions from clients when he appropriated moneys held on their behalf to pay his gambling debts. As a result of his having utilised those funds for his personal purposes, his estate was thereby benefited.[34]

[34] See *Kaplan* at 497E.

[35] Finally and decisively, this Court held in *Reynolds* that, 'a disposition without value which is liable to be set aside is one in which the person who *benefited by the disposition* runs the risk of having such disposition being set aside in certain specified situations'.[35] This forms part of the *ratio* of that judgment and, unless we are convinced that it is clearly wrong, binds us in this matter. On the contrary, that position accords with the above reasoning and interpretation.

[36] This then is the relevant touchstone for liability under s 26(1)*(b)*. In our law, the clear language of the provision requiring benefit fortifies the purposive approach to interpretation in the unitary interpretative exercise. This is consistent with the context of banking law and that relating to the operation of trust accounts of attorneys. It all points to the need for the person to whom the disposition is made for the purpose of s 26(1)*(b)* to have benefited from it.

[37] This brings into sharp focus the essential enquiry in the present matter. The attorneys were unaware of the source of the deposits into their account. A client had instructed them to pay the R1.25 million to Utexx as the purchase price under the agreement. They complied with that mandate. Moneys of whose origin they were unaware were deposited into their trust account as was the case with the bank in *Zamzar*. They paid them to Utexx as instructed by their client, Philp. They testified without challenge that it was 'common cause that [the attorneys] did not receive any benefit or retain any portion of the purchase consideration.'

[38] Who then benefited from the disposition? During argument, the parties were *ad idem* that Utexx benefited by the deposit of R1.25 million which was thus hit by

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[35] *Reynolds* para 8. My emphasis.

the provisions of s 26(1)*(b)*. This must be correct. Utexx received moneys of Brandstock without Brandstock receiving value since it was not party to the transaction. In turn, Utexx benefited by that amount since its claim for the purchase price under the agreement was satisfied.

[39] As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client. As was said of the bank in *Zamzar*:

'If the defendant was authorised to make the payments, then it was authorised and entitled to debit plaintiff's account with the moneys paid and was merely a conduit or 'neutral payment functionary' through which a disposition was made to Sferopoulos by the plaintiff itself.'[36]

In giving effect to their mandate, therefore, the attorneys acted as a conduit in the onward transmission to Utexx and for its benefit. The disposition of Brandstock was one to Utexx. Since the attorneys did not benefit, they did not attract the onus to show the solvency of Brandstock immediately after the deposit was made. The deposit into their account was not a disposition to the attorneys and was thus not impeachable under s 26(1)*(b)*.

[40] What, then, of the deposits of R75 000 and R200 000? They were not paid on to a third party. On the other hand, they were dealt with in accordance with the principles governing trust accounts. Unlike in *Kaplan*, there was no breach of mandate by the attorneys. Attorneys are entitled to account to their clients for fees and disbursements and to then appropriate moneys held in trust for that purpose. This is what was done by the attorneys. This does not, however, necessarily render them immune to the machinery of s 26(1)*(b)*. The same enquiry governs the outcome of these two deposits. Who benefited from those deposits?

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[36] *Zamzar* at 515I.

[41] The attorneys made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. As such, they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account. As between the attorneys, BRP and Philp, the application of these funds to settle fees and disbursements was lawful and appropriate. If BRP or Philp had deposited these amounts, they would have received value for them. But the deposit was made by Brandstock, which did not receive value. When applied to amounts due by BRP and Philp, these two deposits became dispositions which fall within the provisions of s 26(1)*(b)*. Before us the attorneys only argued faintly to the contrary.

[42] As regards those two dispositions, then, the onus rested on the attorneys to prove that, at the relevant times, the assets of Brandstock exceeded its liabilities. This is clearly a full onus and not a mere duty to adduce evidence. If unable to discharge the onus, the section provides that the disposition is void and must be set aside.

[43] Because the deposits were made on different dates, the onus operates for each such date. It was candidly conceded in argument that, as regards the R200 000 deposited on 30 April 2018, the attorneys could not discharge the onus. This concession was well made. At that time, the liabilities of Brandstock clearly exceeded its assets. This was clear from the claim of one Louw, the creditor at whose instance Brandstock was liquidated. That claim arose during April 2018.

[44] The attorneys submitted, however, that the position on 23 February 2018 was different. Both parties accepted that Brandstock had cash of R102 308 in its account

after 23 February 2018. The liquidators testified as follows concerning that date in the founding papers:

'Brandstock had no assets. . . Brandstock was indebted to Brodie Farming (Pty) Ltd at the date of the disposition, in the amount of R1 052 055.84 which indebtedness arose on 19 February 2018.

This was responded to by the attorneys as follows:

'I deny that Brandstock was factually insolvent on 23 February 2018 . . . Brandstock had livestock in its possession and had enough assets including its claims against BRP, Philp and Pratt and cash reserves which exceeded its liabilities which according to the Applicants were in any event only 1 (one) creditor being Brodie Farming (Pty) Ltd. This Honourable Court is reminded of the fact that Brodie Farming (Pty) Ltd is not an approved creditor of Brandstock and full legal arguments will be presented at the hearing of this application in this regard.'

None of these averments carries much evidential weight. Possession of cattle does not equate to ownership. One does not know what the financial relationships between Brandstock, BRP, Philp and Pratt were at the time. The fact that Brodie Farming had not proved a claim in the estate of Brandstock does not negate the existence of the claim testified to by the liquidators. There are any number of reasons why creditors refrain from proving claims in an insolvent estate. At least one is that the creditor might be required to contribute to the costs of the administration of the insolvent company instead of receiving payment of the whole or a portion of their claim.

[45] Before us the attorneys conceded that these averments did not amount to positive evidence that, on 23 February 2018, the assets of Brandstock exceeded its liabilities. They amounted to little more than surmise. They agreed that the best evidence of the state of affairs of a company is to produce and prove books of account showing the assets and liabilities of a company. Although they were not in possession of such books, the machinery of the Uniform Rules of Court was available to the attorneys to require discovery of any such books by the liquidators.

I do not believe that what was asserted by the attorneys gave rise to a factual dispute. But, if it did so, since the attorneys bore the onus and did not request that any such dispute be resolved by way of oral evidence or trial, it must be resolved in favour of the liquidators. This all means that the attorneys failed to discharge the requisite onus under s 26(1)*(b)*. It follows that these two dispositions, totalling R275 000, were correctly set aside by the high court, albeit for different reasons.

[46] Since the attorneys have succeeded before us in setting aside the order for repayment of R1.25 million, they are entitled to the costs of the appeal. The liquidators conceded that, in view of the complexity of the matter and the importance of the issues, the costs of two counsel would be warranted. I view that as a correct concession. As to costs in the high court, the liquidators were obliged to go to court to obtain payment of the R275 000 and were thus entitled to costs of the application. The costs order in the high court must therefore stand.

[47] It remains to mention a matter of grave concern which, if not corrected, could have serious adverse ramifications for the attorneys. In the judgment on both the application and the application for leave to appeal, the learned acting judge made strongly deprecatory comments and drew adverse inferences concerning the conduct of the attorneys. Counsel representing the liquidators made it plain before us that the papers did not support any such adverse remarks or inferences. I agree. There is nothing in the record which in any way warrants an adverse comment or inference of improper conduct on the part of the attorneys. It is important that this Court makes it clear that it dissociates itself from those undeserved criticisms.

[48] In the result:

1 To the extent set out in paragraph 2 hereof, the appeal is upheld with costs, including costs of two counsel.

2 Paragraphs 2 and 3 of the order of the high court are set aside and substituted with the following:

‘2 It is declared that the following payments made by Brandstock Exchange (Pty) Ltd to the respondent:

2.1 On 23 February 2018 in the sum of R75 000;

2.2 On 30 April 2018 in the sum of R200 000;

are dispositions without value as contemplated by s 26(1) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 71 of 1973 and they are set aside.

3 The respondent is ordered to pay to the applicants the sum of R275 000.’

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JUDGE OF APPEAL

Appearances

For appellant:	R G Goodman SC (with A Brink)
Instructed by:	Van Wyk Van Heerden Attorneys, Paarl
	Lovius Block, Bloemfontein
For respondent:	G W Woodland SC
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