THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 526/2021

In the matter between:

MAZARS RECOVERY & RESTRUCTURING (PTY) LTD	**FIRST APPELLANT**
FENWICK NEIL MILLER	**SECOND APPELLANT**
BYRON NORMAN CHEVALIER	**THIRD APPELLANT**
STUART DANIEL TERBLANCHE	**FOURTH APPELLANT**

and

MONTIC DAIRY (PTY) LTD (IN LIQUIDATION)	**FIRST RESPONDENT**
[Registration No. 1949/035587/07]	
[Master's reference T1185/16]	
PETER CHARLES BOTHOMLEY N O	**SECOND RESPONDENT**
SALIM ISMAIL GANIE N O	**THIRD RESPONDENT**
ETHNE MARY VAN WYK N O	**FOURTH RESPONDENT**

Neutral citation: *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* (526/2021) [2022] ZASCA 135 (13 October 2022)

Coram: Ponnan, Makgoka, Gorven and Hughes JJA and Chetty AJA

Heard: 12 September 2022

Delivered: 13 October 2022

Summary: Company Law – business rescue – whether payments made to the business rescue practitioners after the conversion of business rescue proceedings to liquidation proceedings are void in terms of s 341(2) read with s 348 of the Companies Act 61 of 1973.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble J sitting as court of first instance):
The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Hughes JA:

[1] This appeal addresses the remuneration and fees of business rescue practitioners, specifically when payments are made to the business rescue practitioners in respect of their fees and remuneration, after an application to convert rescue proceedings to liquidation proceedings, but before the final winding-up order are void in terms of s 341(2) read with s 348 of the Companies Act 61 of 1973 (the Companies Act 1973).

[2] The Western Cape Division of the High Court, Cape Town (the high court) answered that question in the affirmative. It accordingly declared void the payments to the business rescue practitioners (BRPs), and ordered them to pay those amounts to the liquidators of the first respondent, Montic Dairy (Pty) Ltd. The high court subsequently granted the BRPs leave to appeal to this Court.

[3] Montic Dairy (Pty) Ltd (in Liquidation) (the company) carried on business as a dairy. On 2 November 2015 the company was placed under business rescue proceedings and the second to fourth appellants were appointed as BRPs. The BRPs were employees and directors of the first appellant, Mazars Recovery & Restructuring (Pty) Ltd (Mazars). It was through Mazars that they conducted their business as BRPs and received remuneration for their services.

[4] On 14 April 2016 and in the Gauteng Division of the High Court, Pretoria, Creighton Dairies (Pty) Ltd, a creditor of the company, together with eleven other creditors, commenced liquidation proceedings against the company (the Creighton liquidation application). Even though the BRPs had resolved on 28 April 2016 that there were no longer any reasonable prospects for the company to be rescued, they nonetheless, filed a notice of intention to oppose the Creighton liquidation application on 29 April 2016. Such opposition was later withdrawn on 12 May 2016 and the BRPs launched their application on an urgent basis on 16 May 2016. They sought an order to discontinue the business rescue proceedings and convert them to liquidation proceedings in terms of s 141(2)*(a)* of the Companies Act 71 of 2008 (the Companies Act 2008). The basis of their application was that there were no reasonable prospects for the company to be rescued. Their application for the winding-up of the company was granted by Tuchten J on 14 June 2016 and the second to fourth respondents were subsequently appointed as its liquidators (the liquidators). Meanwhile, on 23 May 2016 and 2 June 2016, while the conversion application was pending, the BRPs made two payments totalling R1,5 million in respect of their fees and expenses to Mazars.

[5] After the liquidators assumed office, they sought, and obtained, an order in the high court declaring void the payments made to Mazars in terms of s 341(2) and s 348 of the Companies Act 1973. Despite the repeal of that Act, these two sections are amongst those which remain applicable under the Companies Act 2008 by virtue of item 9(1) of schedule 5 of the Act.

[6] Section 341(2) 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.’

And s 348 provides that a winding-up is deemed to have commenced at the time of the presentation of the application for the winding-up to the court.

[7] The payments made by the company to Mazars took place after 16 May 2016, after the application to liquidate the company was presented to court. They are, by default void in terms of s 341(2), as no court had ordered otherwise. Thus, the BRPs

have to demonstrate why the payments fall outside the clutches of s 341(2). Before this Court, they relied on the following submissions. First, that although the payments were made within the prescribed period, they should not be treated as dispositions of the company because at that stage, business rescue proceedings had not terminated. Second, that the payments were not 'made' by the company and were therefore not dispositions of the company, as envisaged by the section. Third, that because the payments were made for the BRPs services to enable them to discharge their duties during business rescue proceedings, they should accordingly not be treated as dispositions for the purposes of s 341(2).

[8] In support of these submissions, they sought that s 341(2) be read with Chapter 6 of the Companies Act 2008, as in a reading together of the provisions of the old and new Companies Act. A reading together is permissible in terms of s 5(4)*(a)* of the Companies Act 2008 in circumstances where there are inconsistencies between the new Companies Act 2008 and any other national legislation. They argued that such an interpretational exercise of s 341(2) is desirable, sensible and results in a business-like interpretation supported by judicial precedent.

[9] The BRPs argued that as they are obliged to continue with their duties, even during this period after the commencement of liquidation proceedings but before a winding-up order, they were entitled to be paid for their services. The payments are thus 'statutorily mandate[d]',[1] and as such fall outside the ambit of dispositions under s 341(2). In addition, to the aforesaid, the BRPs argued that these payments should not be considered as dispositions by the company because they had made the payments and not the company.

[10] Plasket JA in *Eravin Construction CC v Bekker N O* pointed out that s 341(2) '. . . states *expressly* that a disposition in the terms contemplated by it "shall be void"'.[2] (My emphasis.) Recently this Court adequately dealt with s 341(2) and dispositions

[1] In terms of the Companies Act 2008, reliance was placed on s 143(1) which deals with charging an amount for remuneration and expenses of a practitioner;
section 135(3) which deals with post-commencement finance situation specifically related to having paid the remuneration and expenses of the practitioner in terms of s 143; and
section 143(5) which deals with the scenario where the practitioner' remuneration and fees are not paid fully.
[2] *Eravin Construction CC v Bekker N O and Others* [2016] ZASCA 30; 2016 (6) SA 589 (SCA) para 21.

made by a company being wound-up in *Pride Milling Company (Pty) Ltd v Bekker N O and Another*[3] (*Pride Milling*) holding that:

'The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.'[4]

[11] In my view, the BRPs conspicuous failure to refer to the recent decision of this Court is telling. Petse AP in *Pride Milling* could not have said it more explicitly that the 'predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void.'[5] If that is the existing position then these payments are rendered invalid *ex tunc* at the time that they are made. Further, had they referred to *Pride Milling* they would have appreciated that they had the proviso in s 341(2) available to them. The BRPs did not dispute this and did not seek to make out such a case. They reasoned that not engaging the proviso was an issue of inconvenience, as they would have to go to court to seek such an order. By not engaging the proviso, they, in essence, sought that this Court grant them special preference without having a court exercise its discretion to endorse the payments sought, as is provided by s 341(2).

[12] In *Pride Milling*, Petse AP went on to explain that persons such as the practitioners are not without a remedy :

'As to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. As already discussed, this discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding-up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition. It bears mentioning that the consequences of visiting dispositions of the kind

[3] *Pride Milling Company (Pty) Ltd v Bekker N O and Another* [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA).
[4] Ibid para 30.
[5] Ibid para 13.

dealt with in s 341(2) with voidness, will not always be harsh. This is so especially when the potential countervailing harshness of allowing the disposition, which would invariably denude the company of its assets in proportion to the value of the disposition to the prejudice of its creditors, is borne in mind. . . '. (References omitted)[6]

[13] This Court and the Constitutional Court had the opportunity to pronounce on the status of remuneration claims of BRPs. In *Diener N O v Minister of Justice and Correctional Services and Others* this Court dealt with the status of a claim for remuneration and expenses by a practitioner, when business rescue had failed and was converted into liquidation proceedings. Practitioners' claims for remuneration were not given 'super-preference' and this Court stated that the preference conferred on a practitioner's claim 'after the conversion of business rescue proceedings into liquidation proceedings, [was] no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.'[7] The Constitutional Court confirmed this position[8] and there is thus clear and direct authority on the point.

[14] It must be pointed out that the case argued by the BRPs evolved and was in total contrast to that set out in their heads of argument. Either way, I am not persuaded that the BRPs made out a case that the disposition made are not void *ex tunc*. They had available to them the proviso in s 341(2) but did not make out a case for such order. As such, it follows that the high court correctly held that the dispositions were void and set them aside.

[15] The BRPs, having failed to persuade this Court with their submissions, were forced to concede that the payments emanated from the company's bank account and as with payments of other company expenses by the BRPs, the payments in question

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[6] Ibid paras 31 & 32.
[7] *Diener NO v Minister of Justice and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) para 49.
[8] *Diener N O v Minister of Justice and Correctional Services and Others* [2018] ZACC 48; 2019 (4) SA 374 (CC) paras 21, 44, 67 and 68.

were made on behalf of the company and therefore amounted to dispositions of the company.

[16] Consequently, for the reasons set out above, there is no basis to upset the high court's finding and the appeal must fail. There is no reason to depart from the general rule that the losing party should pay the costs.

[17] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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W HUGHES

JUDGE OF APPEAL

Ponnan JA (Makgoka and Gorven JJA and Chetty AJA concurring):

[18] I have had benefit of reading the judgment of Hughes JA and whilst I agree with her conclusion that the appeal must fail, I write separately because I see the case somewhat differently to my learned colleague.

[19] The facts fall within a fairly narrow compass. In chronological sequence they are: Business rescue proceedings commenced in respect of the first respondent, Montic Dairy (Pty) Ltd (In Liquidation) (the company) on 2 November 2015. The business rescue practitioners (the BRPs) (the first, second and third appellants), all of whom were then in the employ of the first appellant, Mazars Recovery & Restructuring (Pty) Ltd (Mazars), were appointed with effect from that date. On 14 April 2016, a number of the company's creditors commenced liquidation proceedings against the company.

[20] Those proceedings were opposed by the BRPs, ostensibly because a certain Cesare Cremona (Cremona) had made an offer in January 2016 to purchase the business of the company for R10 million. However, nothing came of that offer. In February 2016, Cremona doubled his offer. Nothing came of that offer either. On 26 April 2016, the BRPs resolved that there was no longer any prospect of the company being rescued and on 16 May 2016, the BRPs made their own application to convert the business rescue proceedings into liquidation proceedings on the grounds that there was no reasonable prospect of the company being rescued.

[21] Thereafter, on 23 May, and again on 2 June 2016, two payments to the tune of R1 500 000 were made to Mazars, by the BRPs in respect of their fees in the business rescue. On 14 June 2016, the high court ordered that the business rescue proceedings be discontinued and the company be placed in liquidation. The second to fourth respondents were appointed the liquidators of the company. In October 2018, the liquidators launched an application in the Western Cape Division of the High Court, Cape Town, challenging the payments made to Mazars. They sought a declaration that both payments were void in terms of s 341(2) of the Companies Act 61 of 1973 (the

1973 Act) and an order that the monies be repaid, together with interest, by Mazars, alternatively the BRPs. The application succeeded with costs before Gamble J. The appeal is with the leave of the learned judge.

[22] In terms of Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 (the 2008 Act) certain provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies.[9] These include s 341(2), which 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.'

In terms of s 348 of the 1973 Act:

'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.'

[23] It was not in dispute that: (i) in view of s 348 of the 1973 Act, the deemed commencement date of the winding-up of the company was 16 May 2016 (when the application to convert the business rescue into liquidation proceedings was lodged by the BRPs); and, (ii) the payments made by the BRPs to Mazars were accordingly made after the commencement of the winding-up of the company. It thus came to be accepted by the appellants that the provisions of ss 341(2) and 348, if applied according to their terms, would render the payments void. That ought to be the end of the matter because as this Court recently observed in *Pride Milling* 'the provisions of s 341(2) could not be clearer'.[10] The 'predominant purpose [of s 341(2)] is to decree that all dispositions made by a company being wound-up are void'.[11] It explained:

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[9] Item 9(1) provides:
'Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).'
Subitems (2) and (3) provides:
'(2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2. (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails'.

[10] *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA).

[11] Ibid para 13.

'The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding up order will render s 341(2) operative. This is different from saying that they are rendered invalid retrospectively, or that they were initially lawful and valid. That suggests that the invalidation of all such payments is presumptively harsh or undesirable, which is not the case.'[12]

[24] However, the appellants contend that 'the two payments do not constitute dispositions by the company of its property' and that the interpretation of s 341(2) must be informed by the more recent provisions in the 2008 Act relating to business rescue, more particularly those 'providing for the practitioners' statutorily recognised preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings'. Accordingly, so the contention goes, despite the clear and unambiguous language of s 341(2), three provisions of the 2008 Act, namely ss 143(1),[13] 135(3)[14] and 143(5)[15] entitle them to payment. What requires consideration in this matter therefore, is whether these three provisions constitute something in the nature of a statutory carve-out from the operation of s 341(2) for the payments in question.

[25] None of the provisions relied upon by the appellants (ss 143(1), 135(3) or 143(5) of the 2008 Act) support the contention sought to be advanced by the appellants. Section 143(1) does no more than make provision for a fee, whilst s 143(5) merely deals with what is to occur if the fee is unpaid. Neither specifies that a BRP is entitled to payment, nor when. Section 135(3) is concerned with post-commencement finance

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[12] Ibid.

[13] Section 143 is headed 'Remuneration of Practitioner'. Subsection 1 provides:
'The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).'

[14] Section 135 is headed 'Post-commencement finance'. Subsection 3 provides:
'After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –
(a) in subsection (1) will be treated equally, but will have preference over-
(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
(ii) all unsecured claims against the company; or
(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.'

[15] Section 143(5) provides;
'To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.'

(that is in attempting to rescue the business). It too does not state that a BRP is entitled to payment. It seems to me that to get out of the starting stalls, the appellants had to contend that it is additionally implicit in ss 143 and 135 that BRPs have a right to be paid the fee post the commencement of the liquidation. The wording of the sections plainly do not confer any such right. In short, the argument advanced by the appellants that ss 143(1), 135(3) and 143(5) continue to apply after the business rescue had terminated, is inconsistent with the judgments of this Court and the Constitutional Court in *Diener N O v Minister of Justice and Others (Diener).*[16]

[26] As this Court made plain in *Diener* (para 43):

'Section 143 is not concerned with liquidation. Instead, it regulates the BRP's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP's are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP's claim for unpaid remuneration, which ranks 'in priority before the claims of all other secured and unsecured creditors'. The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors. Simply put, the preference operates within this limited context. . .'.

Similarly, in relation to s 135, this Court noted (para 42) that the section concerned itself with post-commencement finance, and that it is only in that context – whilst business rescue proceedings are in place – that it creates a set of preferences.

[27] Payments made to a BRP before the presentation of the application for the winding-up are unaffected by s 341(2). But, thereafter a BRP is in the same position as all other creditors. In this Court, counsel for the appellants had some difficulty in addressing why a BRP's fees fell to be treated as a special category. What of other payments made by a BRP in the relevant period? As they stood on a similar footing to a BRP's fees, it is unclear why they likewise did not fall to be excluded from the operation of s 341(2). Counsel was driven to accept that no warrant existed for any

[16] *Diener N.O. v Minister of Justice and Others* [2017] ZASCA 180; 2018 (2) SA 399 (SCA); *Diener N.O. v Minister of Justice and Others* [2018] ZACC 48; 2019 (4) SA 374 (CC).

such differentiation. Undaunted, however, he did not shrink from the logical consequence of his submission; he proceeded to argue that on that footing all payments made by the BRPs in the relevant period should be excluded. But, in the acceptance of the unavoidability of excluding all payments, lay the seeds for the destruction of counsel's argument.

[28] Section 341(2) dictates that every disposition made after the commencement of the winding-up is void, unless the court orders otherwise. Thus unless a creditor avails him or herself of the remedy provided in the proviso in s 341(2) (which the appellants chose not to do in this case), payments made after the commencement of the winding-up are void. However, a BRP is not remediless: First, and most obviously, a BRP may approach a court in terms of the proviso to s 341(2) to validate a payment. A court hearing such an application has a wide discretion. Second, and naturally, the BRP enjoys a preference in the ranking of creditors in the winding-up. That preference was considered in *Diener* - a BRP ranks after the costs of the liquidation, but before all other creditors. A BRP thus enjoys a substantial preference.

[29] These remedies cater entirely for any undue hardship (if such exists) that the appellants rely upon. The exercise of the court's discretion under the proviso in s 341(2) serves to balance all relevant interests. Thus, in a situation where a BRP may have raised excessive fees, a court can either refuse to validate the payments or may validate them in part. In either event, the BRP still has the remedy of a preference in the liquidation itself. This approach accords with that of this Court - as also the Constitutional Court - in *Diener*, in particular, once a BRP decides that a company can no longer be saved, the purpose of the business rescue comes to an end. At that point, all relevant interests need to be considered in the light of the applicable provisions of the 1973 and 2008 Acts and the Insolvency Act 24 of 1936.

[30] Accepting the argument advanced on behalf of the BRPs, would not only render nugatory the discretion conferred upon a court by the proviso in s 341(2), but also place all payments made by BRPs in the relevant period beyond judicial scrutiny. That could hardly have been the intention of the Legislature. On the other hand, the case of the

respondents is simple and relatively straightforward. It accords with the unambiguous provisions of the 1973 Act - that the payments are void and must be repaid.

[31] In view of the common cause facts, as well as the clear wording and object of s 341(2) of the 1973 Act, the high court cannot be faulted for having declared the payments void in terms of that section and ordering Mazars and the BRPs to make repayment. There is accordingly no merit in the appeal.

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V M Ponnan

Judge of Appeal

APPEARANCES

For the Appellants:	BM Gilbert
Instructed by:	Cox Yeats Attorneys, Johannesburg Symington Kok Attorneys, Bloemfontein
For the First to Fourth Respondents:	JC Butler SC (with him M Maddison)
Instructed by:	Reitz Attorneys, Johannesburg Phatshoane Attorneys, Bloemfontein