

Triumph for liquidators: Courts setting aside and declaring specious transactions void

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Added to the liquidators' responsibility and duty to investigate the financial affairs of the liquidated company as well as possible offences committed by the erstwhile directors thereto, the [Insolvency Act 24 of 1936](#) (Insolvency Act) and Companies Act 71 of 2008 read with the Companies Act 61 of 1973 together with the transitional provisions contained in Regulation 9 (Companies Act) empower liquidators to approach the court to set aside impeachable dispositions.

As the year 2022 is coming to an end, we reflect on the growth in insolvency jurisprudence. Significantly, in the last court term we witnessed the Gauteng High Court, Johannesburg and the Supreme Court of Appeal taking action in respect of impeachable dispositions by unveiling specious transactions.

The liquidators' successes in (i) *Van Wyk Van Heerden Attorneys v Gore N.O. and Another* (828/2021) [2022] ZASCA 128 (30 September 2022) (Gore N.O.), (ii) *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others* (526/2021) [2022] ZASCA 135 (13 October 2022) (Montic Dairy), and (iii) *Kullmann v Hill N.O* (A5077/2021) [2022] GJP (28 October 2022) (Kullmann) are powerful judgments to be added to the arsenal of liquidators seeking to set aside impeachable transactions.

In brief, in *Gore N.O.* and *Montic Dairy*, the liquidators were successful in having the attorneys' and business rescue practitioners' (BRPs) remuneration declared void dispositions in terms of the Insolvency Act and Companies Act respectively. The full bench in *Kullmann* unveiled a purportedly arm's length disposition in favour of the joint liquidators of Muga Design CC.

These three judgments redeem and reinforce the powers of liquidators.

DISPOSITIONS

Section 2 of the Insolvency Act defines the term disposition as "*any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court*".

However, not all dispositions are voidable. Unfortunately, more must be done by liquidators to show that the relevant dispositions have been made to the detriment of the liquidated entity and its body of creditors.

IMPEACHABLE DISPOSITIONS IN TERMS OF THE INSOLVENCY ACT

The four relevant forms of impeachable dispositions are –

1. Section 26 governs **dispositions made without value**. The relevant provisions of section 26(1) of the Insolvency Act provide that

"[e]very disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent – [...]"

- *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 [...]"*

Recently, the SCA in *Strydom N.O and Another v Snowball Wealth (Pty) Ltd and Others* (356/2021) [2022] ZASCA 91 (15 June 2022) (Strydom) clarified the third criterion listed above, in finding that 'not made for value' in section 26(1) means *for no value at all*. Dr E Levenstein, Ms K Reddy, and Mr B Starr discuss the Strydom case in further detail [here](#).

2. Section 29 of the Insolvency Act governs **voidable preferences**. Section 29(1) reads –

"[e]very disposition of his property made by a debtor not more than six months before the sequestration of his estate [...] which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

3. Section 30 governs **undue preference to creditors**. Section 30(1) reads –

"[i]f a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition."

4. Section 31 of the Insolvency Act governs **collusive dealings before sequestration**. Section 31(1) reads –

"[a]fter the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another."

As is the case in *Kullmann*, a single disposition may satisfy the criteria of a number of the above impeachable dispositions. As such, it is prudent for liquidators to seek strategic legal input when deciding which of the relevant sections best suit their questionable transaction.

VOIDABLE DISPOSITIONS IN TERMS OF THE COMPANIES ACT

In terms of section 341(2) of the Companies Act

"[e]very disposition of its property [...] 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."

According to section 348, the winding up of a company is deemed to have commenced when the application for winding up is made to the court. In *Nedbank Ltd v Cooper NO and Others* 2013 (4) SA 353 (FB), the court held that the purpose of section 348 of the Companies Act to nullify

"a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court".

GORE N.O.: DISPOSITIONS NOT MADE FOR VALUE IN TERMS OF THE INSOLVENCY ACT

In *Gore N.O.*, Van Wyk Van Heerden Attorneys (the attorneys) received three payments into their trust account in respect of a transaction in terms of which an ostensible third party was purchasing a claim against one of the attorneys' clients, BRP Livestock CC (BRP Livestock). The attorneys, on the instruction of BRP Livestock, transferred the purchase price of R1 250 000 to the purchaser. The other two payments of R75 000 and R200 000 were used by the attorneys to settle their fees, counsel's fees, and other disbursements, which related to the attorneys' representation of BRP Livestock in the transaction.

It was later discovered that the company that had paid the purchase price together with the professional legal fees was a separate company, Brandstock Exchange (Pty) Ltd (Brandstock), which was not party to the instant transaction. Brandstock's sole director was, however, also the sole director of BRP Livestock. Upon Brandstock's liquidation, the liquidators applied to have the payments declared void and set aside under section 26(1)(b).

The court listed the following elements under section 26(1)(b) –

- A disposition;
- by an insolvent;
- not made for value;
- within two years of liquidation; 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.

The court highlighted the need for the recipient of a disposition to benefit therefrom for section 26(1) to be triggered. As such, the inquiry in respect of the payment of the purchase price rested on *who benefited from the disposition*. The court found that the attorneys in this regard acted as a mere intermediary or conduit in respect of the purchase price, and section 26(1) on a plain reading does not allow for liability to attach to one who does not benefit from the disposition. As such, the deposit of the purchase price was not a disposition in respect of the attorneys and was thus not impeachable under section 26(1)(b).

However, the SCA found that the two deposits of R75 000 and R200 000 in respect of the attorneys' professional legal fees were indeed impeachable dispositions under section 26(1)(b). In reaching its decision, the court noted that it was clear that the attorneys benefitted from these deposits. The deposits for the professional legal fees were made by Brandstock, which did not receive any value in return. Rather, it was BRP Livestock that received value in the form of the attorneys' professional services. Consequently, the SCA set aside the two payments in respect of the professional legal fees and ordered the attorneys to pay back an amount of R275 000 to the liquidators of Brandstock.

Although the attorneys' remuneration was set aside in *Gore N.O.*, the SCA went to great lengths to emphasise that the attorneys were not at fault for accounting to their client for fees and disbursements and then appropriating monies held in trust for that purpose. Indeed, the deposits were dealt with in accordance with principles governing trust accounts. Had the attorneys acted for Brandstock in any capacity, the deposits would have been made for some value and would not fall within the purview of section 26(1)(b).

MONTIC DAIRY: VOID DISPOSITIONS IN TERMS OF THE COMPANIES ACT 1973

In *Montic Dairy*, the BRPs of Montic Dairy (Pty) Ltd (in liquidation) (Montic Dairy company) made two payments totalling R1 500 000 in respect of the fees and expenses they had incurred while Montic Dairy company was still in business rescue. These payments, however, were made after the BRPs had themselves urgently applied to the court for an order converting the business rescue proceedings into liquidation proceedings.

Curiously, the BRPs made such application after opposing the creditors' application to commence liquidation proceedings, despite the BRPs having already – at the time of opposing – resolved that there were no reasonable prospects of the company being rescued.

It is clear that the above facts trigger sections 341(2) and 348 of the Companies Act as quoted above. The SCA held that Montic Dairy company is deemed to have commenced winding-up on 16 May 2016, and every disposition made after the 16th of May, including remuneration paid to the BRPs on 23 May and 2 June 2016, is void *ex tunc*. The SCA reasoned, in accordance with the Constitutional Court's judgment in *Diener N.O v Minister of Justice and Correctional Services and Others* 2019 (4) SA 374 (CC), that practitioners' fees and disbursements do not enjoy a 'super-preference'.

The proviso embedded in section 341(2) is that the payments are void *ex tunc*, 'unless the Court otherwise orders'. As such, had the BRPs in *Montic Dairy* approached the court, as they are entitled to do, the payment of their fees and expenses during the period post-commencement of winding-up may have been condoned by the court.

Ponnan JA, in writing the concurring majority judgment in *Montic Dairy*, summarises that –

"[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."

Indeed, sections 341(2) and 348 of the Companies Act are powerful tools available to liquidators when recovering monies, including professional fees, paid during the interregnum between application for winding-up and the final order.

KULLMANN: COLLUSIVE DEALINGS, UNDUE PREFERENCE OF CREDITORS, AND VOIDABLE PREFERENCES OF CREDITORS IN TERMS OF THE INSOLVENCY ACT

In *Kullmann*, the full bench of the High Court on appeal upheld the court *a quo*'s finding that dispositions made to the appellant by Muga Design CC (Muga) fell to be set aside. The appellant, Mr Kullman, was responsible for the management of Muga, held a 25% members' interest therein, and had sole access to the close corporation's bank account.

Muga was placed into liquidation by its members in November 2016. The liquidators of Muga instituted the application to have the dispositions declared void in terms of sections 31, 30 and 29 of the Insolvency Act, which pertain to collusive dealings, undue preference of creditors, and voidable preferences of creditors respectively.

The dispositions identified by the liquidators of Muga as being impeachable were the repayments of loans that were advanced by Mr Kullmann to Muga in terms of two loan agreements concluded in January and September 2016. Muga's financial statements for November 2016 reflected that its liabilities outweighed its assets from at least October 2016. Crucially, Mr Kullmann – as the exclusive operator of Muga's bank account – ensured that his loans were being serviced, while he negotiated indulgences with other creditors.

Moreover, it is a matter of fact that Muga was in financial distress, and Mr Kullmann's assertion that Muga's insolvency was not foreseeable because certain contracts were likely to be realised was not accepted by the court. Consequently, the court found the dispositions impeachable under sections 31, 30 and 29 of the Insolvency Act.

In finding that the dispositions constituted collusive dealings and were therefore impeachable, the court referred to *Pollock v Saqmcha Properties 2 CC* [12264/2010] [2010] ZAGPJHC 48 (4 June 2010) in that the onus of proving collusive dealings is discharged by the liquidator when it shows a scheme where the dispositions prejudice the creditors.

A fraudulent intention is present, says the court, when it can be shown that the parties (i) concluded the transaction knowing that the debtor is insolvent, and (ii) that the disposition would prejudice the creditors. These criteria were satisfied on the facts: Muga was commercially insolvent from February 2016 whilst dispositions were made to Mr Kullmann, and Muga – *through* Mr Kullmann – negotiated with Muga's other creditors to delay the payment of their debts, thereby necessarily prejudicing those creditors.

Furthermore, the court held that the payments also fell within the purview of section 29 of the Insolvency Act as the dispositions were made less than six months before Muga's winding up, they had the effect of preferring creditors, and Muga's liabilities exceeded its assets immediately after the dispositions. As such, the court set aside the dispositions as a voidable preference.

Interestingly, it appears from *Kullmann* that a criterion of both collusive dealings and a voidable preference would be the undue preference of creditors, which is a separate ground upon which to declare dispositions void. It follows that, where a disposition is found to be the result of collusive dealings or is a void preference, that disposition would also necessarily fall to be set aside as an undue preference of creditors. Such was the case in the instant matter.

It is clear therefore that there is an interconnectedness that surrounds impeachable dispositions in terms of the Insolvency Act. However, the courts should be wary of eroding the parameters of the defined grounds of impeachable dispositions under the Insolvency Act. Nevertheless, *Kullmann* is a valuable judgment for liquidators where they may rely on a number of provisions in declaring dispositions void.

CONCLUSION

The judgments of *Gore N.O.*, *Montic Dairy*, and *Kullmann* exhibit clear success on the part of liquidators in identifying void dispositions and having them set aside. These judgments should encourage liquidators to be alert to specious payments made, even in respect of practitioners' remuneration, as liquidators now have the support of three powerful judgments in having those dispositions set aside.

[The true meaning if dispositions 'not made for value' in the South African Law of Insolvency](#)



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