THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 393/2020

In the matter between:

PRIDE MILLING COMPANY (PTY) LTD **APPELLANT**

and

MARTHINUS JACOBUS BEKKER N O **FIRST RESPONDENT**

EDWARD GNANAPARGARSUM

SEBASTIAN N O **SECOND RESPONDENT**

Neutral citation: *Pride Milling Company (Pty) Ltd v Bekker NO and Another* (Case no 393/2020) [2021] ZASCA 127 (30 September 2021)

Coram: PETSE AP and PONNAN, WALLIS, MOKGOHLOA and CARELSE JJA

Heard: 20 August 2021

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Summary: Company law – s 341(2) of the Companies Act 61 of 1973 – disposition by a company of its property after commencement of winding-up – such disposition void ab initio – court nevertheless retaining discretion to declare disposition valid – discretion to be exercised judicially in light of all of the facts of the case – company effecting one payment to a creditor prior to grant of provisional order of winding-up – court refusing to validate – three payments made after grant of provisional order – payments constituting void dispositions in terms of s 341(2) read with s 348 of the Companies Act – court has no discretion to validate such payments.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Strijdom AJ, sitting as court of first instance):

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

JUDGMENT

Petse AP (Ponnan, Wallis, Mokgohloa and Carelse JJA concurring):

[1] This appeal concerns the question whether, and the circumstances in which it would be appropriate for a court to validate a disposition made by a company that is being wound up. And more particularly whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order. This question arises against the following backdrop.

[2] A detailed exposition of the factual narrative is not strictly necessary. For present purposes it is sufficient to state the following. On 29 June 2017 Irfan Sohail Trading (Pty) Ltd (Irfan), a private company carrying on business as a general trading store at Ga-Masha Village in Limpopo, was placed under provisional winding-up at the instance of Eendag Meule Bothaville (Pty) Ltd (Eendag Meule).

[3] The application for the liquidation of Irfan – presented to the court on 5 May 2017 – was founded on the contention that Irfan was indebted to Eendag Meule in the sum of R144 165 in respect of goods sold and delivered for which Irfan had failed to pay because it was unable to pay its debts as contemplated in s 345(1) of the Companies Act 61 of 1973 (the Companies Act). Irfan was placed under final liquidation on 14 September 2017. During the period 7 June 2017 and 8 August 2017 Irfan made four payments to Pride Milling Company (Pty) Ltd (Pride Milling), the appellant in this appeal, in settlement of amounts owing in respect of goods sold and delivered by Pride Milling to Irfan. The following were the payments made to Pride Milling: (i) R70 000 on 7 June 2017; (ii) R75 000 on 7 July 2017; (iii) R130 000 on 7 August 2017; and (iv) R20 000 on 8 August 2017. (In total the payments amounted to R295 000.)

[4] As a sequel to Irfan's final liquidation, a dispute arose between Pride Milling, on the one hand, and Messrs Marthinus Jacobus Bekker and Edward Gnanapargarsum Sebastian NNO (the respondents in this appeal, who were appointed initially as provisional joint liquidators and finally as joint liquidators), on the other hand. For convenience, I shall refer to Messrs Bekker and Sebastian as joint liquidators. The joint liquidators questioned the propriety of the four payments made to Pride Milling, contending that they constituted void dispositions and were thus hit by the prohibition in s 341(2) of the Companies Act. Consequently, the joint liquidators asserted that these payments were liable to be set aside because they were made after the effective date[1] of the winding-up application.

[1] This is manifestly a reference to s 348 of the Companies Act. More about this later.

[5] As a result of this dispute, the joint liquidators instituted legal proceedings on notice of motion, citing Pride Milling as the respondent, in which they sought an order directing it to repay the amount of R295 000 together with interest, and ancillary relief. As already alluded to above, reliance was placed on s 341(2), which reads as follows:

'Dispositions and share transfers after winding-up void

(1) . . .

(2) 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.'

[6] It is helpful at this juncture to also make reference to s 348 of the Companies Act. It is headed 'Commencement of winding-up by Court' and reads 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.'

[7] It bears mentioning that Pride Milling not only resisted the application brought by the joint liquidators but also brought a counter-application seeking an order that the impugned payments be validated in accordance with the rider to s 341(2) and costs occasioned by its counter-application.

[8] The matter came before Strijdom AJ in the Gauteng Division of the High Court, Pretoria (high court). The high court granted the relief sought in the main application with costs but dismissed the counter-application with costs. In coming to this conclusion, the high court held:

'On a conspectus of the evidence before me and having considered the guidelines, I am not persuaded that the general body of creditors is not disadvantaged by the dispositions. Little

weight should be attached to the hardship which will be suffered by the respondent as the focus ought to be on the body of creditors.

When regard is had to the interest of creditors, in the exercise of striking a balance between their interests and those of the respondent, the scales of fairness tilt in favour of refusing validations.'

The high court also refused the application by Pride Milling for leave to appeal. However, leave was subsequently granted by this Court.

[9] The fate of this appeal hinges on the proper interpretation of s 341(2) of the Companies Act, read with s 348. The principles relating to statutory interpretation are well-established. Almost a decade ago they were restated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA). There, Wallis JA, at para 18, said:

'[T]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . . The process is objective not subjective. 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.' (Citations omitted.)

That the text, context and purpose of the legislation must be considered together when interpreting a statutory provision, has been affirmed in various decisions of the Constitutional Court.[2]

[10] The material facts set out by the joint liquidators in their papers were not placed in issue by Pride Milling. The case presented by the joint liquidators was that the payments in issue were made after the effective date and therefore hit by s 341(2). This assertion was not disputed by Pride Milling. Instead, Pride Milling asserted that the disputed payments should be validated in accordance with the rider to s 341(2).

[11] In support of its case, Pride Milling alleged that the payments: (a) were made in the ordinary course of business and in good faith; (b) were not to the 'detriment of the general body of Irfan's creditors; (c) had 'the effect of increasing the asset value of Irfan to the benefit of the body of the creditors'; (d) were received at a time when Pride Milling was not aware that Irfan was in financial distress; and (e) were made when it had no knowledge of the fact that Irfan was being wound-up. So much for the factual background to the dispute.

[12] Before the high court it was common cause between the parties that although the provisional winding-up order against Irfan was granted on 29 June 2017, the effective date of Irfan's winding-up was in actual fact 5 May

[2] See for example: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90 (the judgment of Ngcobo J) quoted with approval in *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) para 38; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) para 21; *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) para 129; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 77-8.

2017, which is the date on which Eendag Meule's application for Irfan's liquidation was presented to the court. Thus, Pride Milling unequivocally accepted that all of the disputed payments were made at a time when Irfan was being wound-up as contemplated in s 341(2) of the Companies Act. And the fact that at the time Irfan was deemed to be unable to pay its debts was not seriously disputed.

[13] In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (In Liquidation)* [2015] 1 All SA 324 (GJ); 2015 (6) SA 21 (GJ) the court held that the 'primary purpose of s 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid'. This statement is not entirely correct. What s 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. 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.

[14] Dealing with s 115 of the 1926 Companies Act that was couched in identical terms as s 348, Snyman J pointed out in *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) that the mischief that the section was designed to obviate was: '. . . 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'[3] by, for example, dissipating the assets of the company or, as it happened in this case, preferring one creditor above another to the prejudice of the *concursus creditorum*.

[15] The effect of a winding-up order, said De Villiers CJ in *Walker v Syfret NO* 1911 AD 141 at 160, 'is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'. In the same case Innes JA succinctly stated the legal position as follows (at 166):

'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

[16] In *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation* 1990 (4) SA 798 (A) Goldstone AJA stated:

'As between the estate and the creditors and as between the creditors *inter se* their relationship becomes fixed and their rights and obligations become vested and complete.'[4]

[17] Turning to the crux of the appeal, it is convenient to deal first with the three dispositions made during the period between the grant of the provisional order on 29 June 2017, and the final order of liquidation on 14 September 2017.

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[3] At 347B-C.

[4] At 803. This abiding principle has been consistently applied by this Court in several cases. See, for example, *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (In Liquidation)* 1969 (1) SA 660 (A) at 671; *Cohen NO and Others v Verwoerdburg Town Council* 1983 (1) SA 334 (A) at 345-347.

The joint liquidators contended that in relation to these payments the court had no power to validate them. In my view they were correct in that contention.

[18] In dealing with the effect of dispositions made subsequent to the grant of a provisional winding-up order the learned authors M S Blackman et al in their Commentary on the Companies Act, after analysing the judgment in *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C),[5] and other decisions of this Court, sum up the position thus:[6]

'It would seem that the position is as follows. A company is being wound-up on the grant of a provisional order of liquidation. Once that stage is reached, the court (although it can ratify a disposition made before the winding-up order) no longer has the power in terms of s 341(2) to authorise a company to make a disposition of its property. Section 2 of the Insolvency Act is irrelevant . . . Consequently, where compliance with a court order constitutes a 'disposition', it is void in terms of s 341(2). . . After a winding-up order (whether provisional or final) has been made, the court cannot grant an order for specific performance; for, on the making of the winding-up order, a *concursus creditorum* is established and the creditor loses his right to specific performance (the provisions of s 359 are therefore not relevant).

. . . The court has no power to permit a company being wound up to make dispositions of its assets. After a winding-up order has been granted the court may validate disposition made before the provisional winding-up order was granted, but it cannot validate dispositions made after that order.'

[19] As noted earlier, once a court grants a provisional order a *concursus creditorum* is established. The effect of this is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted. (See, in this regard, *Walker* above at 160 and 166.) Accordingly, to order otherwise would not only render nugatory the operative part of s 341(2),

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[5] At 87C-D.

[6] M S Blackman et al *Commentary on the Companies Act* Original Service (2002) vol 3 at 14-55.

in terms of which dispositions made by a company being wound-up are void, but would also have the effect of undermining the essence of the *concursus creditorum* and indeed the substratum of insolvency law.

[20] In the context of the facts of this case, validating the payments would mean that Pride Milling would be left to enjoy the benefit of its claim being settled in full, whilst the other creditors would have to be content with whatever residue might still be available. In *Excellent Petroleum (Pty) Ltd (In Liquidation) v Brent Oil (Pty) Ltd* 2012 (5) SA 407 (GNP) Prinsloo J held, with reference to *Walker*, that whilst s 341(2) makes no express distinction, for purposes of validation of void dispositions, between payments made before the grant of the provisional order and those made thereafter, principle nevertheless dictated that dispositions made after the grant of a provisional order ought not to be allowed to stand.[7]

[21] Counsel for Pride Milling sought to persuade us that *Excellent Petroleum* is wrong and urged us to overrule it. The foundation for this contention was that when a court grants a provisional winding-up order it still retains the power on the return date of such order to discharge the provisional order. In that event, so counsel argued, the provisional order would be rendered ineffectual ie as if it had never been granted in the first place. The *status quo ante* would thus be restored. This argument is plainly unsustainable for it contains the seeds of its own destruction. Fundamentally, its flaw is that it seeks to compare the position when there is a winding-up with the position when there is not. These are no more alike than the proverbial apples and pears.

[7] Paragraphs 64 to 70.

[22] I now turn to deal with the single disposition made on 7 June 2017 ie before the provisional order was granted. Counsel were agreed that in determining the question whether to direct otherwise, the high court exercised a discretion in the true sense. In *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A), E M Grosskopf JA described a discretion in the true sense as follows:

'The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.'[8]

[23] A discretion in the true sense proceeds from the premise that a court exercising such a discretion may properly come to different decisions having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion, and, in the words of Hefer JA, 'particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security'.[9] An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.[10]

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[8] At 800E-H.
[9] *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045I-J.
[10] See, for example, *Benson v S A Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the authorities therein cited; *Hotz and Others v University of Cape Town* [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) para 28.

[24] In *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) the court was confronted with an action instituted by a liquidator who sought to recover payments made by a company being wound-up a day after the grant of the provisional winding-up order. The court enumerated several factors that a court called upon to exercise its discretion to order otherwise under s 341(2) of the Companies Act should bear in mind. The factors are useful guides, but only in relation to payments made before a provisional order is made. Beyond that, there is no discretion to be exercised. These factors were usefully summarised by Pincus AJ in *Lane NO v Olivier Transport* 1997 (1) SA 383 (C) at 386D-387B. The learned Acting Judge listed the following:

'(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. (See *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 (Ch) at 25.)

(b) Each case must be dealt with on its own facts and particular circumstances.

(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.

(d) The Court must be free to act according to what it considers would be just and fair in each case. See *Herrigel's* case supra at 678 and see *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA) at 490 and 492 ([1970] 1 All ER 353 at 356 and 357-8).

(e) The Court, in assessing the matter, must attempt to strike some balance between what is fair *vis-à-vis* the applicant as well as what is fair vis-à-vis the creditors of the company in liquidation.

(f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation. See *Re Wiltshire Iron Co; Ex parte Pearson* (1868) LR 3 Ch App 443 at 447.

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets. See *Herrigel's* case supra at 679-80.

(h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or

with the intention of giving a particular creditor a preference and which latter factor may be decisive. See *Wiltshire's* case *supra* at 447.

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties. See *Re Tellsa Furniture (Pty) Ltd* (1984-85) 9 ACLR 869 (NSW).

(j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. See *Herrigel's* case *supra* at 680.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. See *Herrigel's* case *supra* at 680.

. . .'

[25] It is necessary to emphasise that it is near impossible to catalogue exhaustively the factors to be borne in mind by a court exercising its discretion under s 341(2). Suffice it to state that a court confronted with this question is enjoined to keep at the forefront of its mind that the legislature has ordained that all dispositions by a company of its property whilst it is being wound up are void. But at the same time a court must be alive to the fact that in an appropriate case it may order otherwise. And, I daresay, that when sanctioning a departure from the statutorily ordained default position, ie voidness of the disposition, a court must guard against a result that would undermine the underlying purpose of the provision.

[26] To conclude on the nature of the discretion under consideration in this case, it is necessary to make reference to two leading textbooks on the Companies Act. In P M Meskin et al *Henochsberg on the Companies Act 61 of 1973* vol 1 5ed (1994), the learned author discusses the topic at 676-681. Insofar

as the discretion of the court to order otherwise is concerned, the learned author says the following:

'The Court's discretion is controlled only by the general principles which apply to every kind of judicial discretion: the Court must decide what would be just and fair in the circumstances of the case, bearing in mind the purpose of the subsection. . . . A disposition valid when effected and only retrospectively invalidated by virtue of the operation of the provisions of section 348 . . . ordinarily will be validated by the Court if it amounts to no more than the result of the *bona fide* carrying on of the company's operations in the ordinary course . . . but the court ordinarily will refuse to validate a disposition where it was made e g with the object of securing an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference.'[11]

[27] In their discussion of the same topic, the learned authors M S Blackman et al *Commentary on the Companies Act* Original Service (2002) vol 3, state the position as follows:

'The court's discretion to validate a disposition is absolute and is controlled only by the general principles which apply to every kind of judicial discretion. It is free to act according to the judge's opinion of what is just and fair in each case. In assessing what is just and fair the court must of necessity strike some balance upon looking at what is fair *vis-a-vis* the applicant as well as what is fair vis-a-vis the creditors. Each case is dealt with on its own facts and particular circumstances, special regard being had to the question of the good faith and honest intention of the persons concerned. All the cases in this area indicate useful guidelines, but they are no more than that, for the courts have had to consider the use of the validating power in a very wide variety of circumstances and will no doubt in future have to consider further and different combinations of the possibilities inherent in commercial situations involving insolvent companies. The different factual combinations are, as a matter of possibility, so varied that any attempt to state binding rules would be highly likely to find the courts concerned with factual situations for which the rules were inappropriate.'[12]

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[11] At 680.
[12] At 14-56.

[28] Professor M S Blackman elaborated on this in his work published in *Lawsa* and explained that:

'The central issue is whether the payments were made so as to allow the company to carry on business for the ultimate benefit of the creditors. The element of benefit to the company will usually be satisfied if the transaction relates to the need to continue business and earn income or save loss during the pendency of the application.

This will usually involve a counter-performance from the recipient after the date of the commencement of the liquidation. Thus, usually, if the payment is made honestly and in the ordinary course of business for the benefit of the company for goods or services supplied to the company after the commencement of the liquidation, a validation order will generally be made on the grounds that the delivery of goods or performance of the services increased the assets of the company. . . Even if no benefit actually accrued in the sense that the company's undertaking or assets were built up by the attacked transaction, the payments may still be validated if they were made in good faith for the benefit of the company. In the case where some form of commercial assessment is required, this will not involve an examination of minute detail such as the necessity or otherwise to make particular telephone calls; nor will it involve any element of reasoning by hindsight in an endeavour to determine whether the transactions provided actual benefit to the creditors. But at the very least the court should consider whether: *(a)* the company was carrying on business; *(b)* the continuation of the business might be considered to be in the best interests of the creditors; and *(c)* the provision of the services by the appellant (in this case the recipient of the payments) appeared, at the time of the transactions, to be necessary or desirable for the continuation of business operations. Knowledge at the time of the transaction by anyone of the parties that an application for the winding-up has been presented and that a winding-up order may be made is not fatal to the success of an application for validation of a transaction otherwise rendered void by the section.'[13]

[13] 4(3) *Lawsa* 2ed para 125.

[29] Reverting to the facts of this case, the record reveals that for some time Irfan had consistently purchased its maize products from Eendag Meule (the petitioning creditor in the winding-up application). In April 2017 it inexplicably ceased doing so and instead turned to Pride Milling. This was at a time when it was indebted to Eendag Meule for some R144 000 in respect of maize products sold and delivered to it for which it had failed to pay. Curiously, when it commenced dealing with Pride Milling, Irfan ensured that the former was paid regularly for the goods that it had supplied. And within a period of two months, Pride Milling was paid the total sum of R295 000 as set out in para 3 above.

[30] 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.

[31] 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[14] and those of the beneficiary of the disposition.

[32] It bears mentioning that the consequences of visiting dispositions of the kind 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. In this instance it was always open to Pride Milling to join the other creditors and prove a claim against Irfan with the joint liquidators. It deliberately elected not to avail itself of this opportunity but instead sought to retain the fruits of the impugned dispositions.

[33] Here Pride Milling asserted that the dispositions sought to be recouped from it by the joint liquidators were made in good faith in the ordinary course of business at a time when it was not aware that Irfan was being wound-up. A similar argument was advanced in *Gainsford NO and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford NO and Others v Tanzer Transport (Pty) Limited and Others* [2014] ZASCA 32; 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA) and given short shrift by this Court. Noting that s 341(2) 'of the Act is clear in its terms' this Court held that:

'The court will only order otherwise in terms of this section in limited circumstances. To have the defence proffered by Tanzer upheld in general terms would have the effect of avoiding the objects of the Act in that it would undoubtedly prefer one creditor above another.'[15]

[14] See P M Meskin et al *Henochsberg on the Companies Act 61 of 1973* vol 1 5ed (1994) at 680-681.
[15] Paragraph 27.

[34] The court continued:

'It is no defence to assert as Tanzer does that the dispositions were made by the company's staff in ignorance of the fact that the company had been placed under winding-up. Staff at a lower level carry out instructions and in any event that does not deal with the question of whether the dispositions were made at a time after the commencement of the winding-up. As has already been mentioned, the instances in which a court will validate a disposition are limited. Even where a disposition was alleged to constitute "a mere administrative rectification", the fact that the effect thereof was to remove a claim from the concursus and settle it in full in favour of the creditor concerned, to the prejudice of the general body of creditors, is impermissible. This is in accordance with the principle that "the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's creditors as at that date".'[16] (Citations omitted.)

[35] It bears mentioning that the words 'any company being wound-up' in s 341(2) of the Companies Act are not without significance. Notably, they are expressed in the continuous tense. Consequently, their import must be that after the commencement of and for as long as the winding-up process is in progress an affected company may not validly dispose of its property.

[36] I pause here to mention that given the effect of s 341(2), a party approaching a court and seeking that the court order otherwise would logically need to establish its entitlement to the relief sought. Thus, in that sense such a party bears the onus to persuade the court with clear evidence as to why a court should depart from the statutorily ordained default position and 'otherwise order'. This, Pride Milling failed to do.

[16] Paragraph 28.

[37] For all the foregoing reasons there is no tenable reason to interfere on appeal with the manner in which the high court exercised its discretion in relation to the disposition made on 7 June 2017 before the grant of the provisional winding-up order.

[38] It remains to consider the question of costs. Counsel for the joint liquidators requested us to allow costs of two counsel in the event of the appeal being unsuccessful. Counsel submitted that costs of two counsel were warranted not only because of the relative complexity of the matter but also due to the importance of the issues at stake which, although not novel, were not entirely free of difficulty. It must be said that lead counsel for the joint liquidators appeared alone in the high court. Counsel for Pride Milling took issue with this request in his reply. He argued that one counsel could have adequately dealt with the matter just as lead counsel had done in the high court.

[39] It is trite that a court enjoys a wide discretion in considering the question whether costs of more than one counsel in any particular matter should be allowed. And such discretion must be exercised judicially on a consideration of all the relevant factors. The question always is, as Colman J posited in *Koekemoer v Parity Insurance Co Ltd and Another* 1964 (4) SA 138 (T), '. . . whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary or proper for the attainment of justice or for defending the rights of the parties", and were not incurred through "over-caution, negligence or mistake"'.[17] The learned Judge went on to mention, amongst others, the following as being some of the relevant considerations: (a)

[17] At 144F-145. See also: *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 641E-H.

the volume of evidence (oral or written) dealt with by counsel or which she or he or they could reasonably have expected to be called upon to deal with; (b) the complexity of the facts or the law relevant to the case; (c) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case; (d) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel. This is by no means an exhaustive list. Ultimately, how a court should exercise its discretion is essentially a matter of fairness to both sides.

[40] Although the issues raised in this appeal are neither obscure nor novel, they are nevertheless not entirely free from a measure of complexity. In these circumstances it cannot be said that the costs occasioned by the employment of two counsel were incurred through over-caution or the employment of two counsel was merely luxurious. It was therefore a wise and reasonable precaution on the part of the joint liquidators, acting as they did to advance the collective interests of the general body of creditors of the company in liquidation, to employ two counsel. This is, in my view, a sufficient reason for allowing the costs of two counsel in this case.

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

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

X M PETSE

ACTING PRESIDENT

SUPREME COURT OF APPEAL

APPEARANCES

For the appellant:	A R van der Merwe
Instructed by:	JP van Schalkwyk Attorneys, Alberton
	Symington & De Kok Attorneys, Bloemfontein
For the respondents:	J Vorster (with him U van Niekerk)
Instructed by:	Delport van den Berg Inc., Pretoria
	Honey Attorneys, Bloemfontein