IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 1916/2023

In the matter between:

JOHANNES ZACHARIAS HUMAN MULLER N.O. First Applicant

TARYN VALERIE ODELL N.O. Second Applicant

and

CULTIGRAIN (PTY) LTD Respondent

Coram: Justice Holderness
Heard: 19 November 2024
Delivered electronically: 17 March 2025

JUDGMENT

Introduction

[1] The two related issues in this matter are, firstly, the consequences of this court failing to exercise the discretion under section 341(2) of the Companies Act, 1973, to declare a disposition of a company's assets, made after the commencement of winding up, not to be void, and secondly, whether this discretion should be exercised based on the facts of this case.

[2] The applicants, in their capacities as the joint liquidators (the liquidators) of Wheatcor (Pty) Ltd (Wheatcor), seek a declarator that payments made by Wheatcor and received by the respondent, Cultigrain (Pty) Ltd (Cultigrain), in the aggregate amount of R4,797,374 are void in terms of section 341(2) of the Companies Act No. 61 of 1973 (the Act). Furthermore, they are seeking judgment against Cultigrain in this amount.

[3] Cultigrain launched a counter application in terms of which it seeks a declaration that the payments made by Wheatcor to Cultigrain from the commencement date of Wheatcor's winding up (the effective date) until the granting of the provisional order of liquidation (the dispositions) should be declared valid and not void in terms of section 341(2) of the Act.[1]

[1] Section 348 of the Companies Act provides that a winding-up of a company shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.

Factual matrix

[4] At all material times, Wheatcor conducted business as a miller of grain and seller of grain related milled products, particularly, various types of flour.

[5] Wheatcor was effectively controlled by members of the Theodoulou family, the directing mind being Mr Dino Theodoulou (Mr Theodoulou). Beginning in 2007, Wheatcor was a trading partner of Bester Feed and Grain (Pty) Ltd (Bester).

[6] In May 2020, Wheatcor was indebted to Bester in an amount of R8,939,678 for supplies of grain purchased from Bester. On 6 May 2020 Bester addressed a written demand to Wheatcor in terms of section 345(1)(a) of the Act. It appears that Wheatcor was in a dire financial position at that time and was unable to meet its financial obligations as they fell due.

[7] The liquidators contend that the directing minds of Wheatcor, in response to an embargo on the further supply of grain by Bester due to non-payment and in circumstances where Wheatcor itself had acknowledged that it would be compelled to close its business without supply. The directing minds of Wheatcor embarked on a stratagem to transfer the business of Wheatcor to a related entity, Nelspruit Milling (Pty) Ltd (Nelspruit Milling), an entity controlled by the Theodoulou family.

[8] According to the liquidators, this so-called scheme was executed as a result of Bester's threat to initiate liquidation proceedings against Wheatcor. In the process the business of Wheatcor converted from that of a milling company to a

brokerage, buying grain from Cultigrain and selling it to Nelspruit Milling at a 1% margin, otherwise described as a ‘brokerage fee.’

[9] Put differently, the liquidators contend that Wheatcor was sacrificed in order to create a trading history for Nelspruit Milling, which subsequently assumed control of its core business operations. This was due to the fact that Nelspruit Milling lacked the necessary trading history to secure the extensive line of credit that Wheatcor required for its milling operations.

[10] Arising from the foregoing, the liquidators contend that the procurement of grain by Wheatcor from Cultigrain was not in the ordinary course of Wheatcor’s business, as it involved a fundamental transfiguration of that business.

The forward sale agreements

[11] From about 6 May 2019, Cultigrain and Wheatcor entered into a number of forward sale agreements (the agreements). Deliveries were made to Wheatcor by Cultigrain pursuant thereto during the period from 7 May 2019 until 6 October 2020. The last invoice number 109767 was issued by Cultigrain to Wheatcor on 6 October 2020 (the October invoice).

[12] The agreements were entered into for specific periods which included the agreed tonnage in respect of a particular period of supply and the price to be applied. Thereafter orders were placed to fill the contract.

[13] Upon receipt of the proofs of delivery, which would reflect loading details and dates, along with the delivery date and proof of delivery in respect of that invoice, Cultigrain would issue an invoice to Wheatcor on the same date. . Wheatcor was then required to settle the invoice within a period of fourteen days.

[14] Cultigrain asserts that the payments were made in the ordinary course of business and not to the detriment of creditors, nor with an intention to prefer Cultigrain as a creditor.

[15] Cultigrain maintained that it was *bona fide* and legitimate in its ongoing delivery of products to Wheatcor, and was unaware of any liquidation proceedings being launched until it ceased supply during early October 2020. The liquidators acknowledged that Cultigrain was unaware of the application. They do however, contend that Cultigrain was aware of Wheatcor's indebtedness to Bester and that Dino had transferred Wheatcor's business to Nelspruit Milling.

The effective date

[16] On 8 September 2020, the application for the liquidation of Wheatcor was presented to the Gauteng Division of the High Court, Johannesburg, by the petitioning creditor, Bester Feed and Grain (Pty) Ltd (Bester).

[17] It is common cause that the effective date of the liquidation of Wheatcor is 8 September 2020 (the effective date), by reason of the operation of section 348 of the Companies Act, 1973. It is on such date that the *concursus creditorum* was formed.

[18] Wheatcor was provisionally wound up on 19 October 2020, and the final winding up occurred on 8 December 2020.

[19] Delivery of bulk wheat by Cultigrain to Wheatcor took place in respect of the October invoice on 6 October 2020. The payments which the liquidators claim are void pertain to the invoices rendered up until 23 September 2020 (invoice 109640). Invoices rendered thereafter to Wheatcor were settled by Nelspruit Milling.

[20] The agreements were concluded almost simultaneously with the credit application of Nelspruit Milling to Cultigrain. It appears that at the time of the deliveries in respect of which the impugned payments or dispositions were made, Mr Kobus Kitshoff, the managing director of Cultigrain, (Mr Kitshoff) was aware of the fact that that there was a risk of Wheatcor's financial collapse. .

[21] Wheatcor increased its grain purchases from Cultigrain after Bester refused to continue supplying it unless its account was settled. The purchases in question include the disputed transactions, for which the applicants, acting as the duly appointed liquidators of Wheatcor, are now seeking repayment in accordance with section 341(2) of the Act

[22] During the period from 9 September 2020 to 23 September 2020 ('the relevant period') Wheatcor paid Cultigrain amounts in aggregate of R4,797,374 for grain delivered. The payments for the relevant period were made in respect of invoices issued between 28 August 2020 to 11 September 2020. The payments

made after the effective date (8 September 2020), but before the date of the provisional order (23 September 2020), constitute the dispositions giving rise to these proceedings.[2]

The grounds of opposition

[23] Initially, Cultigrain contested the authority of the first applicant, Mr Johannes Zacharias Human Muller N.O., on the grounds that he failed to prove that in instituting this application, he acted jointly with his co-liquidator, the second applicant, Ms Taryn Valeria Odell N.O. However, Cultigrain subsequently abandoned this ground of opposition during the hearing.

[24] A further basis of opposition was that Wheatcor was wound up on the basis that it was unable to pay its debts, and that the winding up application was instituted under the Act on the basis that Wheatcor was deemed to be insolvent in terms of section 345(1)(a) of the Act, as read with Section 344(f) of the Act, and / or is both factually and commercially insolvent as contemplated by section 345(1)(c) of the Act. Additionally, Wheatcor is liable to be wound up on the grounds that it is just and equitable as contemplated by section 344(h) of the Act. Consequently, A winding up order would accordingly only have been granted if Wheatcor was found to be insolvent.[3]

[2] The original amount of R5,297,179 claimed by the applicants was reduced by a total amount of R499,804, after the deduction of two disputed payments made on 8 September 2020 of R349,804 and R150,000 respectively, which the applicants concede they cannot prove were made after the effective date. Accordingly, the amount claimed is R4,797,374 in respect of payments which arose from the sale of grain by Cultigrain to Wheatcor.
[3] The transitional provisions contained in the Companies Act 71 of 2008 ('the 2008 Companies Act), which retains the application of Chapter 14 of the Act, excludes the application of section 344 of that Act except in the case of insolvent companies. (Emphasis added).

[25] Cultigrain asserts that Wheatcor was neither factually, nor commercially insolvent at the time the provisional order was granted, and on this basis denies that section 341(2) is applicable. It contends that the liquidators have failed to demonstrate that Wheatcor is unable to pay its debts, and that it was their responsibility to allege and substantiate this claim at the time they filed the application.

Applicable law

Was Wheatcor insolvent at the time of the winding up?

[26] The Supreme Court of Appeal in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*[4] has confirmed that for a company to be wound-up in terms of either section 80 or section 81 of the 2008 Companies Act (the 2008 Act), it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the Act.[5]

[27] It is self-evident that the Court which granted the provisional and final winding up orders would not have done so if it did not find that Wheatcor was insolvent, as contemplated in 345(1)(a) and (c) of the Act, read with Section 344(f) and (h) of the Act.

[4] *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) at para 22.
[5] As is provided for in sub item 9(i) of schedule 5 of the new Act.

[28] Cultigrain failed to provide any positive evidence to rebut the aforementioned allegations. Moreover, it appears from the report of the liquidators that there is an apparent shortfall of R10,386,741 between Wheatcor's assets and liabilities, and that it is commercially insolvent.

[29] In my view Cultigrain's argument that the applicants did not demonstrate that Wheatcor was unable to pay its debts at the time of its winding up is unsustainable.

The *concursus*

[30] The Supreme Court of Appeal in *Pride Milling Co (Pty) Ltd v Bekker N.O and Another*[6] (*Pride Milling)* cited De Villiers CJ in *Walker v Syfret NO* (*Walker*),[7] regarding the effect of a winding-up order, which 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:[8]

> '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.'

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[6] *Pride Milling Co (Pty) Ltd v Bekker N.O and Another* (*Pride Milling)* 2022 (2) SA 410 at para 24, citing the factors listed in Lane NO (fn 4 *supra)* at at 386D-387B.
[7] *Walker v Syfret NO* (*Walker*),[7] 1911 AD 141 at 160.
[8] Ibid at 166.

[31] In *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation*[9] Goldstone AJA stated:

> 'As between the estate and the creditors and as between the creditors *inter see* their relationship becomes fixed and their rights and obligations become vested and complete.'[10]

The discretion of the court to validate the payments

[32] In terms of section 341(2) of the Act:

> '(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.'

[33] The purpose of section 341(2) is to safeguard and prevent the dissipation of the assets of the company in liquidation (the company) pending the winding-up application is pending, and to ensuring that creditors are receive equal treatment without preference according to their ranking; while taking into account any securities or preferences they may enjoy under the Insolvency Act 24 of 1936.[11]

[34] If payments are made by the company after the effective date but prior to the grant of the provisional order, the onus is on the person or entity seeking an order validating the transaction to establish circumstances justifying the making of a

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[9] *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation* [1990] ZASCA 85; 1990 SA 798 (A).
[10] Ibid at 803. And as cited in *Pride Milling* at footnote 4. 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.
[11] See *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) at 678 ("Herrigel").

validating order. If that onus is not discharged, there is no basis for the exercise of the court's discretion in section 342(1).[12]

[35] The applicants are required in terms of section 341(2) to show that:

35.1 There was a disposition made by Wheatcor;

35 .2 That Wheatcor was unable to pay its debts; and

35.3 That such dispositions were made after the commencement of its winding up.

[36] It is undisputed that the payments totalling R4,797,375 were dispositions made by Wheatcor after the effective date of its liquidation (from 9 September 2020 – i.e. excluding payments made on 8 September 2020) and prior to the granting of the provisional order of liquidation.

[37] The Supreme Court of Appeal in *Pride Milling*[13] affirmed that the primary purpose of s 341(2) 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.

[38] The consequence is that the payments are potentially invalid at the moment they are made, because the granting of a winding-up order will render

[12] *Lane NO v Olivier Transport* 1997 (1) SA 383 (C) *('Lane NO')*.
[13] *Pride Milling* at para 30.

s341(2) operative.'[14] The Court in *Pride Milling* emphasised that the default position established by s 341(2) is that all such dispositions are devoid of legal force and effect in law.'[15]

The counter-application

[39] In the counter application, the respondent seeks an order declaring the dispositions to be 'valid and not void' in terms of section 341(2) of the Act.

[40] Cultigrain bears the onus of demonstrating that the court should exercise its wide discretion under section 341(2) in its favour and why it should depart from the statutorily mandated default position and validate the payments. This discretion is limited to payments that were made between the date of lodging of the application for winding-up and the grant of the provisional order.[16]

[41] It is helpful to consider the guidelines set forth in *Lane NO v Olivier Transport (Lane NO)*[17] cited with approval by the Supreme Court of Appeal in *Pride Milling:*[18]

> '*(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.)

[14] At para 13.
[15] At para 30.
[16] See *Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in Liquidation) and Others (Mazars*) 2023 (1) SA 398 (SCA) paras 28 to 31.
[17] *Lane NO v Olivier Transport* at 386D-387B.
[18] *Pride Milling* at para 24.

(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.

(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.

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets.

(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.

(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.

(j) Little weight should be attached to the hardship which will be suffered by the applicant (here the first respondent) if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions.

(l) Generally a Court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors.'

[42] In *Engen Petroleum Limited v Goudis Carriers (Pty) Ltd (in Liquidation)*[19] Sutherland J cautioned as follows:

> 'The scope for the discretion is itself a cue to limitation. It is exercised in favour of the ensnared creditor only if by so doing the general body of creditors is not disadvantaged by a diminution of assets to divvy up amongst them.'

[43] It is clear that a court has a wide and unfettered discretion to validate a disposition. However, this discretion must be exercised judiciously, with a particular focus on the facts of each specific case.

[44] It is common cause that Cultigrain was unaware that liquidation proceedings had been instituted. The liquidators however, contend that at the time the dispositions were made, Cultigrain was aware that Wheatcor was in financial distress.

[45] Cultigrain contended that the knowledge of a pending liquidation application by a party is not a determining factor. If all individuals cease trading with a company facing a pending liquidation, such an application would inevitably become self-fulfilling. Consequently, a company in financial distress would find itself unable to meet its obligations when it is effectively barred from continuing its operations.

[19] 2015 (6) 21 (GJ) at para [24].

[46] Furthermore, Cultigrain contends that the dispositions and the 'scheme' are not associated with the applicants allegations that Wheatcor's directors were involved.

[47] Cultigrain relied on the fact that the dispositions were associated with transactions in respect of which Wheatcor acquired the product it had ordered and paid for, and was able to on-sell such product for a 'profit' or brokerage fee to Nelspruit Milling.

[48] Cultigrain asserted that the disposition was accordingly made in the ordinary course of business, was intended to augment the assets of Wheatcor and was to the benefit of the company in liquidation and its creditors.

[49] According to Cultigrain, the Court in considering what is just and fair, can only strike a balance between the interests of the respondent and the creditors of the company[20] if the payments are validated.

[50] In *Sithole N.O and Another v Sachal & Stevens (Pty) Ltd and Another*[21] ('*Sithole')* Binns-Ward J, after referring to the decision of the SCA in *Pride Milling*, found that an exemption order will be granted only in extremely limited circumstances, as the creation of such an order is inconsistent with the objective of the subsection, which is to safeguard the interests of the *concursus creditorum* and ensure that the company's creditors are treated equally.

[20] As set out in *Lane N.O* at 386D-387B.
[21] *Sithole N.O and Another v Sachal & Stevens (Pty) Ltd and Another* ('*Sithole')* (14657/2019) [2021] ZAWCHC 194 (5 October 2021) at para 44.

[51] With reference to the SCA judgment in *Gainsford NO and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford NO and Others v Tanzer Transport (Pty) Limited and Others*[22] the learned judge (in *Sithole)* emphasised that the mere fact that a payment was allegedly made in the ordinary course of business will not, of itself, afford sufficient reason to have it declared valid and effective. Cultigrain is required to show good reason for this court to make an order exempting the payments made to it from the effect of s 341(2).

[52] I now turn to consider the nature of the agreements and how this affects whether payments in terms thereof are included in the *concursus* and should (or should not) be validated.

The executory nature of the agreements

[53] At the hearing of the matter I enquired of Mr Olivier SC, who appeared for the liquidators, whether the applicants would not have been obliged to tender the value of the goods in respect of deliveries made by Cultigrain after the effective date, for which payment was made by Wheatcor. This aspect was not canvassed in argument by either Mr Olivier or Mr van Eeden SC, who appeared on behalf of Cultigrain. In Mr Olivier's submission, there is no basis for such a tender to be made, as after the date of the liquidation, Cultigrain would not have a claim for specific performance and any claim it may have would form part of the *concursus.*

[22] *Others* [2014] ZASCA 32 (28 March 2014); 2014 (3) SA 468 (SCA).

[53] In my view it is indeed necessary to draw a distinction between payments made by Wheatcor in respect of deliveries by Cultigrain after the effective date, and payments made in respect of deliveries made prior thereto.

[54] For the reasons set out below, it is necessary to make such a distinction in determining whether to exercise my discretion in favour of validating certain, or all, of the dispositions made between the effective date and the date of the granting of the provisional order, for the reasons set out below.

[55] As a starting point it is imperative to evaluate the nature of the agreements in question in the present matter, namely, that they are bilateral and executory. This is due to the fact that both parties have outstanding obligations to perform, and the agreement has not yet been fully executed, meaning that it has not yet been completed, unlike an executed contract where the obligations of all parties have been fulfilled.

[56] Certain contracts are terminated automatically by sequestration or liquidation under common law. For example, sequestration of the principal terminates the agent's authority, and a partnership terminates on the sequestration or liquidation of a partner.[23]

[57] Other contracts, executory or incomplete at the date of the institution of the *concursus creditorum,* are not terminated by the insolvency or liquidation of any

[23] See Meskin, *Insolvency Law,* p 5-56(1) and the authorities cited at notes 1 and 2.

party thereto. The contract continues and remains in effect, the trustee of liquidator having to accept it as it is. The effect of the institution of the *concursus* being that the other party cannot compel the trustee or liquidator specifically to perform it.[24]

[58] In *Ellerine Brothers (Pty) Ltd v McCarthy Limited*[25] (‘*Ellerine Brothers’)* the Supreme Court of Appeal, after considering various cases dealing with the approach to be adopted in relation to executory contracts, held that the case of an uncompleted or executory contract, the liquidator inherits the agreement in its entirety. The creation of the *concursus creditorum* therefore, does not terminate the continuous operation of an agreement to which the insolvent is a party:

> ‘The *concursus* neither alters nor suspends the rights and obligations of the parties thereunder and the liquidator, as the universal successor, steps into the shoes of the insolvent and does not acquire any rights greater than those of the insolvent. This means that the liquidator must perform whatever is required of the insolvent in terms of the lease, including unfulfilled past obligations of the lessee.’

[59] The court went on to state that:

> ‘The intended aim of the *concursus*, or as it has also been described, the ‘community of creditors’, created immediately upon the liquidation of the insolvent, is to give equal protection to all the creditors without undue preference and to preserve and distribute the estate to the benefit of all of them. To give effect to the *concursus*, the liquidator must decide whether it would be to the benefit of the community of creditors to continue to perform the inherited obligations of the insolvent under an uncompleted contract. He may elect not to do so. In that event a consequence of the *concursus* is that the other party to the contract cannot demand performance by

[24] See *Ellerine Brothers (Pty) Ltd v McCarthy Limited* 2015 (4) SA 22 (SCA) (‘*Ellerine Brothers’*) at para 10.
[25] Ibid at para 11.

the liquidator of the insolvent's contractual obligations. The statement, 'frequently encountered, that a trustee or a liquidator in insolvency has a "right of election" whether or not to abide by a contract' means no more than that by reason of the existence of the *concursus* 'the other party cannot exact specific performance against the trustee or liquidator if the latter should decide to abandon the contract'. The act of the liquidator in deciding not to continue the lease constitutes '. . . a repudiation of the contract, which would have afforded the lessor . . . the right, concurrently with other creditors, to claim from the liquidator the payment of damages for the non-performance by the company of its contractual obligations'. The claims of the other contractant are therefore reduced by the *concursus* to a monetary claim and participation in the insolvent estate as a concurrent creditor, where it is treated on the same basis as all the other creditors in the insolvent estate.'[26]

[60] The court in *Ellerine Brothers*[27] reiterated the finding of r Friedman J in *Smith & another v Parton NO,*[28] namely that there is 'really only one legal principle involved and that is that there is nothing in the law of insolvency which affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any way altered by the insolvency of one of the parties except in one respect, and that is that, because of the supervening *concursus*, the trustee cannot be compelled to perform the contract.'

[61] The existence of the *concursus*, does not, on this principle, in any way affect the continued existence of the rights and obligations of the respective parties to an uncompleted contract. There is accordingly nothing that 'excuses the trustee from performing the insolvent's obligations which fall due to be performed between the

[26] *Ellerine Brothers* at para 11, and the authorities there cited,
[27] Ibid at para 12.
[28] *Smith & another v Parton NO* 1980 (3) SA 724 (D) at 728H-729A and the authorities there cited.

date of sequestration and the date upon which the trustee makes his election' to abide the contract.[29]

Recovery of Void Dispositions

[62] The provisions of section 341 (2) say nothing about the recovery of the void disposition but merely avoids the disposition itself. The invalidation of a disposition of the company's property and the recovery of the property disposed of are logically two distinct matters.[30] Ordinarily, it follows that a disposition that is void may be recovered, as a matter of course by a claim for restitution. Ordinarily when claiming restitution there should be a reciprocal tender of restitution.[31] However, to require a trustee or liquidator to tender restitution of what was received by the insolvent prior to the inception of the concursus, would disturb the concursus and have the effect of preferring one creditor above the others.

Dispositions in respect of deliveries made to Wheatcor before the effective date

[63] The agreements in which delivery took place before *concursus* and payment had not yet been made (before the effective date) by Wheatcor, can only be said to have been unilaterally performed. Put differently, these agreements were executory

[29] *Ellerine Brothers* at para 12.
[30] Herrigel at 680 and *In Re Leslie Engineers Co Ltd (in liquidation)* [1976] 1 WLR 292 at 298, in respect of the English equivalent, 227 of the English Companies Act of 1948.
[31] *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 732B – C.

or incomplete only in respect of payment due by Wheatcor to Cultigrain, which was due within 14 days after the date of delivery.

[64] In respect of these agreements, Cultigrain's claim for payment falls within the *concursus creditorum,* as delivery had already been made before or at the effective date.

[65] There is accordingly no rational, or legal justification for Cultigrain to retain the payments made after the effective date in respect of deliveries that were made prior to the establishment of the *concursus.* To allow it to do so would have the effect of preferring Cultigrain over other creditors. In my view these payments therefore should not be validated in terms of section 341(2) of the Act.

Dispositions in respect of deliveries made after the effective date

[66] The dispositions or payments made by Wheatcor to Cultigrain in respect of grain delivered after the effective date are, in my view, on a different footing.

[67] These agreements are executory from a bilateral perspective. Both Wheatcor and Cultigrain performed or were due to perform after the effective date.

[68] If these transaction are to remain void, attention must be given to the consequence.

[69] The liquidators wish to reclaim the payment as a restitution on the basis of the invalidity in terms of section 341(2) of the Act.

[70] If a liquidator had already been appointed to the insolvent estate of Wheatcor, he would have the election to abide by the agreement by accepting the delivery, or to repudiate it by refusing to accept same. He could not however have insisted on delivery without tendering payment.

[71] If he repudiated, he would be obliged to tender restitution and return what was delivered. Put differently, Cultigrain could not, post-*concursus* accept delivery and decline to counter perform by effecting payment of the amount due in terms of the agreements.

[72] Ordinarily trustees and liquidators are exempt from this requirement, when dealing with a creditor in the *concursus*, as a tender of restitution to such a creditor would prefer that creditor.

[73] Where dealing with voidable dispositions under the Insolvency Act, 24 of 1936 made before commencement, a recipient in good faith of the disposition is entitled, under section 33(1), to an indemnification from the trustee for what was given in consideration for the disposition.

[74] In this instance, both the disposition and the value provided (the grain delivered) were post *concursus.* Leaving the dispositions void and allowing the liquidators to claim without tendering the grain or its value would have the effect of

putting Cultigrain into the *concursus* for a claim for restitution which only arose after the concursus.

[75] The position would have been clearly defined if the deliveries had occurred prior to concursus but the dispositions had occurred afterwards. Even if paid in the ordinary course of business Cultigrain would have been preferred. At *concursus* it had an executory contract – which required it to be delivered in order to receive payment. The liquidators would have to make payment during the administration in order to receive the benefit of delivery, as they were frozen at that time. This would allow them to earn the 1% benefit.

[76] The liquidators objective is to maintain the benefit of the grain acquired after *concursus,* thereby increasing the net assets to more than they were at *concursus,* which will simultaneously introduce Cultigrain into the *concursus*. This flies in the face of the freezing principle.

[77] For this reason the only payments which, in my view, should be validated in terms of section 341(2) of the Act, are those payments made in terms of the forward sale agreements made in respect of deliveries made after the effective date at the institution of the *concursus creditorum,* but before the date on which the provisional order was granted. The parties' respective rights and obligations become vested and complete on date specified.

[78] In my opinion, this factor is more significant than the other factors mentioned in Lane in the specific circumstances of this matter. Even if the dispositions were not

made in the ordinary course of business, they still fall to be validated if the deliveries were made after the effective date, for the reasons set out above.

[79] Moreover, the liquidators accept that Cultigrain was unaware of the liquidation application at the time the dispositions were made. Even if only by a 1% margin, the dispositions served to augment the assets of Wheatcor and its other creditors were better off than they would have been had the dispositions not been made.

[80] Proceeding from the departure point that the dispositions are void *ex lege* and it remains only for this court to determine whether in its discretion, I need to be satisfied that Cultigrain has shown good reason for a departure from the statutorily mandated default position.

[81] For all the reasons set out above, I am satisfied that the validation only of the dispositions in respect of which delivery was effected after the institution of the *concursus* is fair to both the liquidators, the creditors of Wheatcor and Cultigrain.

[82] A schedule of the impugned dispositions, which included the invoice / delivery date and the date of payment in respect of each transaction, was annexed to the applicants' heads of argument.

[83] I have calculated the total of all the payments made in respect of which delivery was made from 9 September 2020, in keeping with the concession made by the liquidators and their decision not to seek judgment for the payments made on the

effective date, on the basis that the delivery date is the same as the payment date in terms of the schedule as provided.

[84] The total amount of the payments made in respect of transactions where delivery was made on or after 9 September 2020 is R2,674,349.

[85] I have not incorporated the payments of R58,420 and R38,000, respectively, made by Wheatcor on 23 September 2020, the date on which the provisional order was granted, into this total amount. as it is clear from the authorities cited above that these amounts cannot be validated in terms of section 341(2).

[86] Having considered the factors set out in *Lane* and approved in *Pride Milling,* I am not persuaded that there is any basis upon which I should exercise my discretion in favour of validating these payments which in terms of section 341(2) are void *ex lege.*

[87] It follows that all payments in respect of which deliveries were made before the *concursus,* in an aggregate amount of R2,267,660, are void and that judgment should accordingly be granted in favour of the liquidators for this amount.

Conclusion

[88] In all the circumstances, I intend exercising my discretion in terms of section 341(2) of the Act in favour of declaring only the dispositions by Wheatcor in respect of deliveries made by Cultigrain after the effective date, in an aggregate amount of

R2,674,349, to be valid. The remaining dispositions are void *ex lege* and the liquidators are entitled to judgment in respect thereof.

[89] Both parties have enjoyed a degree of success in obtaining certain of the relief which they sought in the main application and the counter application respectively. For this reason, I believe that a just costs order is that each party should pay their own costs.

ORDER

[90] The following order shall issue:

1. The payments received by Cultigrain (Pty) Ltd from Wheatcor Milling (Pty) Ltd after 9 September 2020, in the aggregate amount of **R2,674,349,** are ordered not to be void in terms of section 341(2) of the Companies Act 61 of 1973.

2. The payments received by Cultigrain (Pty) Ltd from Wheatcor Milling (Pty) Ltd from the date of the commencement of the winding up, being 8 September 2020 in the aggregate amount of **R2,267,660** are void in terms of section 341(2) of the Companies Act 61 of 1973.

3. Judgment is granted against Cultigrain (Pty) Ltd in the amount of **R2,123,025.**

4. Cultigrain (Pty) Ltd is to pay interest on the amount of **R2,123,025** from 8 September 2020 to date of payment.

5. Each party is to pay their own costs.

M HOLDERNESS
JUDGE OF THE HIGH COURT

APPEARANCES:

Plaintiff's counsel:	Adv L Olivier SC
Instructed by:	Rufus Derecksen Inc
Ref:	H Teubes/B2953
Defendant's counsel:	Adv P van Eeden SC
Instructed by:	Werksmans Attorneys
Ref:	JJN/CULT35924.7