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**THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE PROVINCIAL DIVISION**

**Case No: 2412/2023**  
**REPORTABLE: YES/NO**

In the matter between:

**REMITTO (PTY) LTD**  
**(Registration number: 2005[...])**

Applicant<sup>1</sup>

And

**BRESLER BOERDERY (PTY) LTD**  
**(Registration number: 2021[...])**

First Respondent<sup>2</sup>

**THE MASTER OF THE HIGH COURT**

Second Respondent

**Coram:** Opperman, J

**Heard:** 28 July 2023

**Delivered:** 3 August 2023. This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 3 August 2023. The date and time of hand-down is deemed to be 15h00 on 3 August 2023

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<sup>1</sup> "The liquidators" or "Remitto". The company was placed under final liquidation in the meanwhile. The Master of the High Court did not participate in the application.

<sup>2</sup> "Bresler Boerdery".

**Judgment:** Opperman, J

**Summary:** Application for leave to appeal

## JUDGMENT

[1] This is an application for leave to appeal a judgment and an order made on 24 May 2023 following an urgent application on 19 May 2023. This is the order:

### [25] ORDER

1. The court is satisfied that the abridgement of times and the deviation from the Uniform Rules are justified by the circumstances of the case; and if the matter is not heard immediately, that the applicant will not be afforded substantial and effective redress at a hearing in due course. Condonation is thus granted to the applicant to have the matter enrolled in terms of Rule 6(12) of the Uniform Rules of this court.

2. The relief sought in the notice of motion is granted and as per the alternative prayer to prayer 2:

2.1 It is ordered that the first respondent make payment to the applicant in the amount of R1 300 000.00 plus interest calculated on the said amount at 10,5% interest per annum *a tempore morae* and immediately on the service of this order on the first respondent.

2.2 The first respondent to pay the applicant's costs.

[2] The atmosphere of this case cautioned and directed this court to the words of the Constitutional Court in *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007

(2) SACR 28 (CC) that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an Appellate Court.

[3] The Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021 ruled that:

[10] ... If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

[4] The crisp facts of the case are that Bresler Boerdery erroneously paid monies into the account of the then provisionally liquidated bank account of Remitto. This was proven beyond any doubt by the founding affidavit<sup>3</sup> of Mr Bresler as supported by his

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<sup>3</sup> It is imperative for the reader of this judgment to read the founding affidavit. I quote on the issue of interdict from page 20 to page 22 of the Bundle:

**INTERDICT:**

41. I have been advised that, in order to obtain a final interdict, there are certain requisites the Applicant needs to prove on a balance of probabilities:

**A clear right:**

42. I respectfully submit that the Applicant has a clear right to, and repayment, of the amount in question, R1 300 000.00.

43. Such money was paid into an incorrect account, due to a bona fide error, to purchase and obtain herbicide, already delivered to the Applicant, which the supplier now wants to repossess.

44. At no stage was the Applicant a debtor, with money outstanding, to the First Respondent, there is no need to drag the Applicant into liquidation proceedings.

wife in her confirmatory affidavit. It was accepted by Mr Smith, one of the liquidators, in his reply to the state of affairs under oath on pages 52 to 54 of the Bundle adduced in support of the application *a quo*:

9.6.1 Upon being informed by the applicant of the purported erroneous payment into the liquidated estate, I requested the applicant to provide the facts and circumstances relevant thereto in order to take instructions and obtain the necessary permission from the creditors of the liquidated estate;

9.6.2 Upon being provided with the applicant's version of events and documentation relevant thereto however, it would appear as if the sole director of the liquidated estate has been conducting the business, and servicing the customers of, the liquidated estate through another juristic entity namely Remitto Grow Smarter (Pty) Ltd, which is of course impermissible.

9.6.2.1 Consequently, there is a reasonable apprehension that the business of the liquidated estate has been unlawfully hi-jacked with commensurate effect that an enquiry to determine the true owner of the funds is both necessary and unavoidable. The business to which I which to refer is *inter alia* that of the sale and distribution of herbicides, which was previously

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- An injury actually committed or reasonably apprehended:
45. The Applicant will suffer tremendous loss, if it cannot utilise the herbicide currently in its possession, when such is repossessed by the supplier thereof, due to non-payment.
  46. The whole planting season, for the Applicant – being the 2023-2024 season - would not be economically viable without the herbicide.
  47. The Applicant **will not survive the financial loss, and does not have the cashflow** to obtain herbicide from an alternative supplier, while the First Respondent's liquidators bickers regarding the R1 300 000.00 to which the First Respondent never had any claim.
- The absence of similar protection by any other remedy:**
48. I respectfully submit that the Applicant, through an affidavit by myself, communications to the provisionally appointed liquidators, exhausted each and every remedy in trying to get repayment of R1 300 000.00.
  49. There is no other remedy available to the Applicant, other than approaching this Honourable Court for the relief sought.
  50. As stated, the Applicant cannot obtain easily obtain another supply of herbicide, if by chance herbicide is obtained - such would be at a much higher price, the Applicant simply does not have the cashflow to absorb a double payment for herbicide, which is needed for a successful planting season. (Accentuation added)

conducted by the liquidated estate and which now appears to be conducted by an entity known and (sic) described Remitto Grow Smarter (Pty) Ltd;

9.6.2.2 In the current circumstances, Maredi and I, as the duly appointed provisional liquidators of the liquidated estate, are statutorily obliged to investigate the true ownership of the funds paid to the liquidated estate by the applicant in order to protect the interests of the general body of creditors which interests are substantial; and

9.6.2.3 This has necessitated the simultaneous prosecution of an urgent application, in terms in which we shall apply for the extension of our powers and the authorisation of an urgent commission of enquiry. That application will, together with the service and filing of this affidavit, be issued and enrolled to be heard immediately prior to the hearing of this application. The commission of enquiry will furnish us with an extremely effective platform to ascertain the truth and for which exercise a period of approximately 3 months is required. (Accentuation added)

**[5]** Bresler Boerdery was forced to court when Remitto Grow Smarter (Pty) Ltd (“Remitto Grow Smarter”), a supplier of herbicide, threatened them with repossession of the herbicide on 11 May 2023. They had to start planting their crops within the then impending weeks and ran the severe risk of losing the income from their harvest and the R1 300 000.00. They were also hesitant to use the herbicide to prepare for the planting in the midst of the ongoing litigation and then to run the risk of liability towards Remitto Grow Smarter or any other parties; and further expensive litigation.

**[6]** The reason why they did not refer the matter to the court immediately was because they awaited the response of the liquidators to their plight. An email was already sent to Mr Smith, one of the liquidators, on 13 April 2023 alerting him to the situation. The matter clearly became urgent abruptly. Remitto, with the same information also only brought their separate application before court on 19 May 2023

with a claim of urgency that was granted. They could have done so earlier and so expedited their investigations.

**[7]** It must, again, be reiterated and emphasised that Bresler Boerdery, whilst doing business with Remitto Grow Smarter (Pty) Ltd, paid its monies due to Remitto Grow Smarter into a wrong bank account. The dispute between Remitto and Remitto Grow Smarter may not be adjudicated in this case; it is not the cause of the action. The injustice that Remitto under liquidation wants to cause to Bresler Boerdery for a *bona fide* mistake is unacceptable. The law in relation to the payment of monies into a mistaken bank account is applicable. This is the cause that led to the litigation and the legal principles that had to be applied was and is clear.

**[8]** The applicant in the leave to appeal could and may not expect from the court to adjudicate on a dispute that exists between the director of the company, Remitto (Pty) Ltd under then, provisional liquidation, and the liquidators in this case. At the time of the hearing of this application the allegations of untoward conduct by Remitto were just that and nothing more.

**[9]** Due regard was given to the Plascon Evans - dictum and the allegations of the first respondent in their answering affidavit. The liquidators did not doubt the *bona fides* of Bresler Boerdery as is clear from the above. In their own words: "9.6.2 Upon being provided with the applicant's version of events and documentation relevant thereto however, it would appear as if the sole director of the liquidated estate has been conducting the business, and servicing the customers of the liquidated estate through another juristic entity namely Remitto Grow Smarter (Pty) Ltd, which is of course impermissible." This underscores the version of Bresler Boerdery.

**[10]** The commitment of the liquidators towards the general body of creditors is laudable. But, Bresler Boerdery would have been forced into severe losses if they had to wait for three months for the investigations to be finalised and then to start planting their crops; this due to a dispute that was and is not theirs. Parallel to this case and in

the same sitting in an *ex parte* urgent application by the liquidators in case 2477/2023 it was ordered by this court that:

5. A commission of enquiry into the business, trade dealings and affairs of the liquidated estate be held in terms of the provisions of section 417 and 418 of the Act.

6. His Lordship the Honourable Justice SPB Hancke is appointed as commissioner in terms of section 417 and 418 of the Act and that he be authorised to determine the process, times and places of the holding of the enquiry and the manner in which it shall be conducted, as he in his sole discretion deems fit.

**[11]** The alleged irregular conduct of the director of the company is to be resolved between the liquidators and the director of Remitto, and that is in litigation for another day on another cause of action with different parties cited; and different principles in law applicable. The above order aided the liquidators to a legal, appropriate and fair solution.

**[12]** If Standard Bank does not want to comply with the instruction of court to the liquidators *in casu* it remains, again, a case for another day and is irrelevant here and now. Standard Bank was not a party to the litigation; there exists no order against them. Bresler Boerdery will have to take responsibility for this alleged neglect to cite Standard Bank and they will have to accept the consequences or initiate further litigation. If Standard Bank, as the alleged owner of the money, refuses the instruction of their account holder, Remitto (Pty) Ltd under liquidation, the matter ends there. Care must be taken that the money is not misappropriated.

**[13]** Counsel for Remitto mentioned that the liquidators might be prosecuted for contempt of court. There is no risk that the liquidators may be in contempt of the court order here if Standard Bank refuses to repay the monies to Bresler Boerdery. In

particular, the applicant in an order for contempt of court must prove the requisites of contempt; the order, service or notice, non-compliance and wilfulness and *mala fides* beyond reasonable doubt.

**[14]** Of concern is that the applicant in this application for leave to appeal do not want to grasp the issue in dispute; that is the erroneous payment of monies into the Standard Bank account and not the First National Bank account. A version that Mr. Smith accepted. The fact that they as an afterthought, disputed the *bona fides* of Bresler Boerdery; does not change the issue to be adjudicated. The dispute was argued during the hearing and stated in the papers that supported the application. They now claim in their Notice of Application for Leave to Appeal that:

5.1 The authorities on which the findings of the Court were premised are all distinguishable from the facts of the present matter. In this regard on the applicant's own version under oath (**FA8** to the founding affidavit) it contracted with, and intended to pay, the first respondent.

5.2 Furthermore, none of the authorities nor any of the legal principles on which reliance was placed therein, were raised during the hearing of the matter. The respective parties were consequently not afforded an opportunity to make submissions in respect of the applicability thereof.

5.3 As result of this, the first respondent was not afforded a fair opportunity to be heard which commensurately prejudiced the first respondent and infringed upon its right to a fair trial guaranteed by section 34 of the Constitution.

**[15]** The interpretation of annexure FA8 presented in the Notice of Application for Leave to Appeal is completely out of context and wrong. This is what is stated in full in FA8 and under oath with supporting documents such as the invoice issued by Remitto Grow Smarter and commissioned on 18 April 2023:



1.

Op 27 Februarie 2023 het ek 'n bestelling geplaas by Remitto Grow Smarter van Kroonstad. Ek het 'n faktuur ontvang met verwysing D52120 vir die bestelling gemaak met die bedrag betaalbaar as R1 300.000.00. Die genoemde faktuur word hierby aangeheg en gemerk Aangangsel "GD1".

2.

Op 28 Maart 2023 is die betaling vir die bedrag van R1 300.000.00 elektronies gemaak in die rekening besonderhede wat op ons rekenaar gestoor is vir Remitto met bankbesonderhede te Standard bank (sic). Bewys van betaling word hierby aangeheg as Aangangsel "GD2".

Die bankbesonderhede gebruik ek al 'n geruime tyd vir betaling aan Remitto en het ek nie opgemerk dat die faktuur besonderhede verander is nie.

Die betaling is verkeerdelik gemaak in die ou rekening van Remitto waarin wel betalings gemaak kan word.

Ek het nie kennis gedra van die Likwidasië van Remitto en versoek hiermee die Likwidateurs om my behulpsaam te wees en die bedrag alreeds inbetaal terug te betaal in my rekening.<sup>4</sup>

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<sup>4</sup> English translation:

1.

On 27 February 2023 I placed an order with Remitto Grow Faster from Kroonstad. I received an invoice with reference D52120 for the order I placed and with an amount payable as R1 300.000.00. The invoice is attached herewith and marked Annexure "GD1".

2.

On 28 March 2023 I made the payment to the amount of R1 300.000.00 electronically into the account particulars of which were stored on our computer for Remitto with bank particulars at Standard bank (sic). Proof of the payment is attached herewith as Annexure "GD2".

The bank particulars were used by me for some time for payment of Remitto and did I not notice that the particulars on the invoice had changed.

The payment was made erroneously into the old account of Remitto wherein payment could be made.

I did not have knowledge of the Liquidation of Remitto and request herewith the Liquidators to assist me and to repay the amount already paid into my account.

**[16]** “FA3” filed in the Bundle at page 27 is proof that Bresler Boerdery did business with Remitto Grow Smarter. It is the invoice issued on 27 February 2023.

**[17]** From the arguments in court, it was clear that counsel for Remitto understood the issue and that it pertains to the erroneous payment of monies into the account of Remitto. There was not any dispute on the fact that Standard Bank is the owner of the monies. The fact that the law and judgments of the Supreme Court of Appeal were not known to the first respondent is no fault of the court. They had more than ample access to court and to state their case; ignorance of the law is not an excuse. It is in fact worrisome that they did not even deem it necessary to prepare on the issue. The above shows that the first respondent was correctly ordered to carry the costs of the application. Costs must also follow the cause and there was not any justification to deviate from the general rule.

**[18]** On the law Remitto under provisional liquidation ran the risk of misappropriating funds that were not meant and intended for their use. They were issued with a solution and relief in law for the dilemma in the order in case 2477/2023 where they were also granted access to the court in terms of section 34 of the Constitution of the Republic of South Africa, 1996.

**[19]** Advocate van Rensburg’s frustration was clearly justified when he contended in his heads of argument<sup>5</sup> that the assertion that a fair opportunity was not afforded to the first respondent *a quo* regarding the legal principles referred to in the judgement, “is absurd to say the least, ...”.

**[20]** I will unfortunately have to weight this judgment down by quoting from the judgment *a quo* to put the reality in perspective.

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<sup>5</sup> At paragraph 22.1.

[1] The real truth of this case is that an innocent bystander was unknowingly drawn into possible illegal conduct committed by the director of a company under provisional liquidation.

[2] The *lis* on the untoward conduct lies between the director of the company under provisional liquidation and the provisionally appointed liquidators.<sup>6</sup>

[3] It is prudent to introduce the parties involved at this stage of the judgment:

1. Remitto (Pty) Ltd (Remitto), the first respondent, is a company under provisional liquidation. The first respondent was apparently registered as such in 2005. On the 3<sup>rd</sup> of February 2023 the business rescue proceedings in respect of Remitto was converted into liquidation proceedings and the company was placed under provisional liquidation in the hands of the Master of the High Court: Free State.

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<sup>6</sup> At pages 52 to 54 of the Indexed Bundle, it was stated by the liquidator, Mr Smith that:

“9.6.1 Upon being informed by the applicant of the purported erroneous payment into the liquidated estate, I requested the applicant to provide the facts and circumstances relevant thereto in order to take instructions and obtain the necessary permission from the creditors of the liquidated estate;

9.6.2 Upon being provided with the applicant’s version of events and documentation relevant thereto however, it would appear as if the sole director of the liquidated estate has been conducting the business, and servicing the customers of the liquidated estate through another juristic entity namely Remitto Grow Smarter (Pty) Ltd, which is of course impermissible.

9.6.2.1 Consequently, there is a reasonable apprehension that the business of the liquidated estate has been unlawfully hi-jacked with commensurate effect that an enquiry to determine the true owner of the funds is both necessary and unavoidable. The business to which I which to refer is *inter alia* that of the sale and distribution of herbicides, which was previously conducted by the liquidated estate and which now appears to be conducted by an entity known and described Remitto Grow Smarter (Pty) Ltd;

9.6.2.2 In the current circumstances, Maredi and I, as the duly appointed provisional liquidators of the liquidated estate, are statutorily obliged to investigate the true ownership of the funds paid to the liquidated estate by the applicant in order to protect the interests of the general body of creditors which interests are substantial; and

9.6.2.3 This has necessitated the simultaneous prosecution of an urgent application, in terms in which we shall apply for the extension of our powers and the authorisation of an urgent commission of enquiry. That application will, together with the service and filing of this affidavit, be issued and enrolled to be heard immediately prior to the hearing of this application. The commission of enquiry will furnish us with an extremely effective platform to ascertain the truth and for which exercise a period of approximately 3 months is required.”

2. The Master is the second respondent in this case. They did not oppose the application.

3. Parallel hereto did the sole director of Remitto, one Alexander, register a company Remitto Grow Smarter (Pty) Ltd, registration number 2015[...] (Remitto Grow Smarter), that conduct the same business as Remitto with, apparently, the same clients.

4. On 23 February 2023 the Master went forth and appointed Mr ER Smith and Mr CT Maredi as provisional liquidators.

5. Standard Bank is the applicant in the liquidation under case no.: 3538/2022 and also the bank that manages the account of Remitto and wherein the erroneous payment was made.

6. Mr Bresler is the single shareholder and a director of the applicant company, Bresler Boerdery (Pty) Ltd, that has its registration number as 2021[...].

[4] The calamity of the case has its origin on the farm Kroonland where Mr Bresler started to prepare for the 2023 planting season. He ordered herbicide from Remitto Grow Smarter.

[5] On 27 February 2023 he received a tax invoice from Remitto Grow Smarter to the amount of R1 300 000.00 under document D52120.

[6] The banking details on the invoice is for a First National Bank account wherein the payment was due.

[7] On 28 March 2023 his wife, that manages the payments for the applicant, made a payment of the amount due to Remitto Grow Smarter in the amount of R1 300 000.00 into the Standard Bank account of the first respondent, Remitto.

[8] It is common cause that the error was *bona fide*. The applicant did business with Remitto in the past and Mrs Bresler did not take cognisance of the details of the bank account of Remitto Grow Smarter.

[9] It is common cause that the applicant was not a debtor of the first respondent during February – March 2023 and did not owe any money to the first respondent, Remitto.

[10] In the meanwhile, Remitto Grow Smarter delivered the herbicide to the applicant on the farm Vierdehoek in the beginning of March 2023. The amount of R1 300 000.00 was paid for the product on 28 March 2023 into the account of Remitto.

[11] Mr Bresler received a call from Remitto Grow Smarter in April 2023 and he realised that the deposit of the monies was made into the wrong account. He was also later issued with a credit note from Remitto Grow Smarter and threatened with the repossession of the herbicide delivered to the farm Vierdehoek.

[12] Crucial is the fact that the planting season must commence within three weeks from the date of delivery of this application on 15 May 2023. Farmers nationwide are preparing fields for planting after having gathered the 2022-2023 harvest. The herbicide ordered by the applicant, and now in Mr Bresler's possession, is all but unobtainable currently due to the demand therefor. The price of the herbicide increased extensively and is almost 20% higher than what the applicant paid for it during March 2023. As result of the small profit margins in grain farming due to various factors such as inflation, fuel costs, equipment costs and other factors; the applicant's farming operations will be dealt a devastating

blow if it was forced to plant its fields without the necessary herbicide being used to prepare the fields. It is the case of Mr Bresler, that the applicant's cashflow and business will not survive the devastating blow of losing the R1 300 000.00 and not being able to plant the next season's harvest.

[13] Central to the application is also the fact that Mr Bresler at all times presented to this court that he wants to comply with the law and at all times do what was honourable and legal; hence the application.

[14] After the information that the monies were erroneously paid into the Standard Bank account came to his notice, Mr Bresler immediately contacted his attorney and they contacted the provisional liquidator, Mr Smith on 17 April 2023. Mr Smith investigated the situation and informed that they will give feedback to the applicant "by end of business on 12 May 2023". This was on 8 May 2023.

[15] On 11 May 2023 the situation turned dire when Remitto Grow Smarter issued a credit note and threatened with repossession of the herbicide.

[16] The applicant launched an urgent application on 15 May 2023 for the monies to be returned to their account and for the provisional liquidators to authorise the payment.

[17] The provisional liquidators maintained the refusal to release of the R1 300 000.00 to the applicant on the grounds that they are duty bound to investigate the conduct of Alexander. They opposed the application on urgency and merits.

[18] The Master is apparently not legally authorised to intervene or authorise any payments of monies that lie in the hands of the liquidators.<sup>7</sup>

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<sup>7</sup> Section 361(1) of the Companies Act, 71 of 2008 reads: "In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office." This necessarily implies that upon the appointment of the provisional liquidator the latter has custody and control of the company's property

[19] Lateral hereto the liquidators applied, on an urgent and *ex parte* basis, for an extension of their authority to investigate the conduct of the first respondent and its director. The cases were set down for 19 May 2023.

[20] Prayer 7 to the effect that the funds deposited with the liquidated estate in the amount of R1 300 000.00, to which Bresler Boerdery (Pty) Ltd has laid claim by way of the application launched under civil case cover number 2412/2023, to be kept in trust in an interest-bearing account up and until 24 August 2023, by which date the liquidators must inform Bresler Boerdery (Pty) Ltd whether or not they accept or reject the claim; was denied. The concession was made by advocate Tsangarakis that it would not be appropriate to grant prayer 7 due to the urgent application from Bresler Boerdery that had to be adjudicated first and foremost.

[21] The conundrum on the facts is that Bresler Boerdery will suffer a severe injustice should the urgent application for the release of the money from the Standard Bank account not be granted. An innocent bystander will definitely be punished for the suspected illegal conduct of the sole director of the first respondent. A dispute in which Mr Bresler has not an inkling of interest or fault.

[22] The facts have shown beyond any doubt that the application is urgent and that the applicant did all it could to expedite the events. The delay was with the provisional liquidators that took some time to reply to the request of the applicant. The prejudice to the applicant will be severe if the matter is not adjudicated immediately and this application is the only remedy.

[23] This brings me to the law that regulates the facts of the case.

1. The cases of *FirstRand Bank Limited v The Spar Group Limited* (1334/2019) [2021] ZASCA 20 (18 March 2021) (the Spar Group - case) and *Nissan South Africa (Pty) Ltd v Marnitz No and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) (the Nissan - case) dictates the law on the facts of this case.

2. In the Nissan - case the court was required to decide whether a bank can unilaterally reverse a credit without the consent of the recipient. In answering this question, the Supreme Court of Appeal held that payment in these scenarios is a bilateral act and requires the meeting of two minds. In the circumstances where Nissan did not intend transferring R12.7 million into the recipient's account, there was no meeting of minds and consequently no valid transfer of funds. On the facts, the recipient's conduct in using the funds for its own purposes' amounts to appropriation and fraud.

3. Nissan South Africa (Pty) Ltd (Nissan) instructed its bank, FNB, to make certain payments to its creditors. One of the creditors that had to be paid an amount of R12 767 468.22, was TSW Manufacturing. However, due to a clerical error, the wrong banking details were furnished. This resulted in the payment being made into a third party's account namely, Maple.

4. At no point in time was any amount due to Maple by Nissan. Once Maple realised that the money was deposited to its account, it transferred R12 700 000.00 from its Standard Bank account to its FNB receipts account. Soon thereafter Maple transferred the money to its payments account. Here the funds were being utilising in conducting the day-to-day business of Maple.



5. Twenty days later TSW made enquiries about the payment. Nissan now became aware of the erroneous payment and demanded that the funds be returned. Maple indicated that they were prepared to comply with the demand subject to it retaining the interest earned thereon and a lavish “administration fee” of 4% of the amount concerned.

6. Nissan obtained a court order to freeze Maple’s account. This, according to the sole member of Maple; Stanley, placed considerable financial strain on Maple. It caused the voluntarily liquidation of Maple.

7. Similar to the situation in *casu*, Stanley and Maple’s liquidators contended that this amount formed part of Maple’s insolvent estate and is therefore subject to the *concursum creditorum*.

8. Nissan therefore applied to court for an order declaring that the money and any interest that accrued thereon did not form part of the insolvent estate of Maple Freight CC (in liquidation) and directing the first and second respondents to pay the amount to the appellant, alternatively, FNB.

9. The Supreme Court of Appeal held that a bank which had unconditionally credited its customer’s account with an amount received was not liable to pay the amount to the customer on demand where the customer came by such money by way of fraud or theft. If stolen money were paid into a bank account to the credit of the thief, the thief had as little entitlement to the credit as he had to the money itself.

10. It further held that payment was a bilateral juristic act which required there to be a meeting of two minds. There was no meeting of the minds in this scenario, therefore Maple had not become entitled to the funds erroneously credited to its account.

11. Accordingly, the Supreme Court of Appeal upheld the appeal and held that the order of the Court *a quo* had to be replaced with an order declaring that the funds did not form part of the insolvent estate of Maple (in liquidation) and directing the release of the funds to Nissan.

12. The Supreme Court of Appeal in 2021 delivered judgment in the matter of *FirstRand Bank Limited v The Spar Group Limited* (1334/2019) [2021] ZASCA 20; [2021] 2 All SA 680 (SCA); 2021 (5) SA 511 (SCA) (18 March 2021) and it was ruled that:

i. A customer with no entitlement to monies deposited into its account and who knows that it enjoys no such entitlement, may not pay out monies against the credit to the account and if the customer does so, it amounts to theft;

ii. a third party whose monies are deposited into the customer's account enjoys a claim against the customer's bank for the amount so credited if the bank is aware that the monies belong to the third party; and

iii. a bank that knows that its customer enjoys no entitlement to funds deposited into the customer's account, but still allows the customer to pay out those funds, renders itself a joint wrongdoer. In these circumstances, the bank owes the third party whose funds were wrongly paid into the customer's account, a legal duty. Such third party can claim any loss suffered as a result of the bank permitting the withdrawal of the funds wrongly paid into the customer's account.

13. The question that now arises is when can a credit transfer be reversed from an account?

14. The general principle regarding the reversal of credit transfers is that a bank may not reverse a credit from a customer's account without that customer's authority.

15. In *Nedbank Limited v Pestana* (142/08) [2008] ZASCA 140; 2009 (2) SA 189 (SCA) ;(2009) 71 SATC 97; [2009] 2 All SA 58 (SCA) (27 November 2008), the Supreme Court of Appeal held that the bank intended to make an unconditional payment on behalf of its customer and intended to receive payment unconditionally on behalf of the recipient. In these circumstances, Nedbank was not entitled to reverse the transfer from the recipient's account despite receiving a section 99 order from the South African Revenue Services earlier on the day of payment. The Court however commented, albeit obiter, that payments may be validly reversed when a credit into an account is treated as provisional and is subjected to a hold in terms of standard banking practice, the recipient received the credit by way of fraud or theft, or where an account was erroneously credited.

16. In *Ixocure (Pty) Ltd v Firststrand Bank Ltd* (19619/2014) [2017] ZAWCHC 139 (30 November 2017) the Court took account of the fact that the bank's witness gave evidence to the effect that the credit entry into the recipient's account was provisional and the entry was not finalised before the hold was placed on the recipient's account because the transfer into its account was reported as fraudulent. The court ultimately held that the bank was entitled to reverse the credit transfer.

17. The above indicates that where a credit emanates from a valid and correct instruction; the recipient's consent is required before the reversal

of the transfer. Where the transfer is invalid or a *bona fide* error, it might be legal to argue that the reversal of that credit can be effected without the recipient's consent.

18. The circumstances of each matter will dictate whether the credit can be reversed and whether such reversal requires the recipient's consent.

[24] In the instance:

1. The monies that were transferred by bona fide error into the Standard Bank account was the property of Bresler Boerdery (Pty) Ltd before it landed into the account.

2. It is further clear that the payment had to be a bilateral juristic act which required "a meeting of two minds". There did not occur a meeting of the minds in this scenario. For this reason, Remitto as the provisionally liquidated estate, did not become entitled in any way to the funds erroneously credited to its account.

3. The liquidators may not lay claim to it; not even to finalise their investigations and in the interim. This is specifically pertinent in the light of the severe prejudice that the Bresler Boerdery will suffer.

4. The money may not be captured to ease the duties and investigations of the liquidators. They have the right and remedy to take action against Remitto Grow Smarter and to do so on an urgent basis at a suitable time in future. They may not use an innocent bystander to promote their cause. It is just not fair and equitable, no matter the noble intentions to protect the interest of the liquidated company's creditors. The right(s) of the one does not exceed the other. Bresler Boerdery may not be

held accountable for the suspected and not yet proven illegal conduct of Alexander from Remitto Grow Smarter.

5. The money is the *de facto* property of Bresler Boerdery to be appropriated as they see fit. In the instance the bank has *de iure* control awaiting the authorization of the liquidators to deal with it in whatever way they direct; this to play it safe.

6. The above said; the caveat is that the judgments of the Supreme Court of Appeal indicate that where a credit emanates from a valid and correct instruction; the recipient's consent is required before the reversal of the transfer. Where the transfer is invalid or a *bona fide* error, it might be legal to argue that the reversal of that credit can be effected by the bank without the recipient's consent.

7. The first respondent as represented by the provisional liquidators will have no option but to authorise the reversal of the monies to the account of the applicant.

8. The liquidators were not cited in the litigation but Advocate Tsangarakis gracefully pointed out that the Supreme Court of Appeal has ruled that an order against the estate in liquidation is an order against the liquidators. This in accordance with *Gainsford N.O. and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford N.O. and Others v Tanzer Transport (Pty) Limited and Others* (076/2013) [2014] ZASCA 32; 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA) (28 March 2014).

9. Standard Bank was not cited and is not a party to the litigation. They are however an applicant in the liquidation of Remitto.

10. Advocate van Rensburg for the applicant conceded to an interest rate of 10,5%.

**[20]** The applicant did not convince this court on a sound rational basis of any prospects of success on appeal. The prospects of success are almost non-existent. They will have to carry the costs for the application.

**[21] ORDER**

The application for leave to appeal is dismissed with costs.

**M OPPERMAN, J**

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On behalf of the applicant

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**ADVOCATE J DONNELLY-BORNMAN**

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On behalf of the respondent

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