IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 07/ 5121

In the matter between:

GAINSFORD N.O., GAVIN CECIL	First Plaintiff
FOURIE N.O., JACQUELINE	Second Plaintiff
GROENEWALD N.O., BEATRIX ELIZE	Third Plaintiff
MASILO N.O., MICHAEL MMATHOMO (in their capacity as the duly appointed liquidators of Tuscan Mood 1224 (Pty) Limited (in liquidation))	Fourth Plaintiff

and

GULLIVER'S TRAVEL (BRUMA) (PTY) LTD	Defendant

J U D G M E N T

SALDULKER, J:

A. INTRODUCTION

[1] The plaintiffs, the duly appointed joint liquidators of Tuscan Mood 1224 (Pty) Limited ("*Tuscan*"), have instituted an action against the defendant in

terms of the provisions of section 340 of the Companies Act, No. 61 of 1973 ("*the Companies Act*") read with section 26(1) (b) of the Insolvency Act, No. 24 of 1936 ("*the Insolvency Act*"), for the setting aside of alleged dispositions not made for value.

[2] The plaintiffs alleged that during the period 5 January 2004 to 30 July 2004, Tuscan, duly represented by Roger Brett Kebble (*Kebble*)and George William Poole (*Poole*) made the following payments to the defendant:

3.1	5 January 2004	R 120 096,00
3.2	6 July 2004	R 650 000,00
3.3	30 July 2004	R4 000 000,00
	TOTAL	R4 770 096,00

[3] The plaintiffs contend that these payments by Tuscan to the defendant should be set aside as dispositions of the property of Tuscan, not made for value.They were made within two years of Tuscan's winding-up and fall to be set aside in terms of section 26(1)(b) of the Insolvency Act read with Section 340(1) of the Companies Act in that Tuscan has been wound-up and is unable to pay all its debts. It is not in dispute that an application for the winding-up of Tuscan was issued by the Registrar of the High Court (South Gauteng High Court- Johannesburg), on 2 November 2005.

[4] The defendant disputes the plaintiffs' claims and raises the issue of indemnity under Section 33 of the Insolvency Act.

[5] In raising its defence, the defendant pleaded that in the event of it being found that Tuscan made the dispositions as alleged, and that same were not made for value, that :

5.1 immediately after the (alleged) disputed dispositions were made, the assets of Tuscan exceeded its liabilities, alternatively the liabilities of Tuscan at one or more times after the making of the dispositions exceeded its assets by less than the value of the amounts disposed of;

5.2 in any event:

5.2.1 the defendant, in return for the alleged dispositions acting in good faith, parted with its money by making payment of disbursements and rendering travel agency services on account of which the dispositions had been made to the defendant;

5.2.2 the defendant is accordingly not obliged to restore the money received under the alleged dispositions, unless the plaintiffs shall have indemnified the defendant for parting with such money as contemplated in section 33 of the Insolvency Act.

[6] During the course of the trial, the defendant made the following admissions:

6.1 That an application for the winding up of Tuscan was issued by the

registrar of the above Honourable Court on 2 November 2005. That a final winding-up order of Tuscan was granted by the above Honourable Court on 4 November 2005.

6.2 That the effective date of the winding-up of Tuscan is 2 November 2005.

6.3 That Exhibit “G” (pp 9 to 15) is a copy of the application to open a bank account for Tuscan, but without admitting the authenticity of Mr Bawden’s signature.

6.4 That Exhibits “G16” to “G118” are copies of the bank statements of Tuscan as well as the entries contained therein.

6.5 That the plaintiffs were appointed as the joint liquidators of Tuscan in terms of Annexure ”A” to the particulars of claim, and were duly authorised to institute and proceed with the action against the defendant.

6.6 That the resolutions, copies of which are annexed to the particulars of claim as Annexure ”B”, were duly adopted at the second meeting of creditors and members of Tuscan held before the Magistrate on Wednesday, 7 June 2006.

[7] It became common cause during the proceedings that Tuscan Mood CC was converted to a company.

[8] Section 340 of the Companies Act reads as follows:

"*340* ***Voidable and undue preferences –***

1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of its insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition."

(2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be -

(a) in the case of a winding-up by the Court, the presentation of the application …"

[9] Section 2 of the Insolvency Act defines "*property*" as:

"*movable or immovable property, wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fideicommissary heir or legatee.*"

[10] "*Disposition*" is defined in section 2 of the Insolvency Act as:

"*Any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of Court; and 'dispose' has a corresponding meaning.*"

[11] Section 26(1)(b) of the Insolvency Act provides as follows:

"*26.* ***Disposition without value***

1) Every disposition of property not made for value may be set aside by the Court if such disposition was made by an insolvent –

> *(a)* …
>
> *(b)* *within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:*
>
> *Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.…*"

[12] What follows is a summary of the evidence that was presented in court.

B. THE EVIDENCE FOR THE PLAINTIFFS

[13] The following witnesses testified for the plaintiffs:

13.1 Ms T Veldtman;

13.2 Mr G C Gainsford; and

13.3 Mr B D Bawden.

[14] Ms Veldtman testified that the transcript of the record of the Insolvency Enquiry held in terms of Section 417 of the Companies Act was transcribed accurately and that she did the recording in the matter. Although she could not remember who the typist was, she checked the typed record and confirmed that the transcript is a true reflection of what was said by the witnesses at the proceedings. The record was admitted as being a correct transcript of the evidence given by Ms Fernandes at the enquiry.

[15] Mr Gainsford testified that he is one of the appointed liquidators of Tuscan and as a joint liquidator had conducted certain investigations into the

affairs of Tuscan. He explained that Tuscan's assets comprised a house in Inanda, over which a mortgage bond was registered in favour of Standard Bank , and that there was bank account in the name of "*Tuscan Mood 1224 CC"* at Standard Bank in Alberton (bank account).

[16] The outcome of forensic investigations into the affairs of Tuscan revealed that an amount of approximately R170 million was deposited into the bank account. Of that amount, R125 million constituted the proceeds of misappropriated shares. The balance of approximately R45 million came from various other sources, and included R20 million from Kebble.

[17] He identified the First Liquidation and Distribution account of Tuscan as presented by the joint liquidators in Exhibit B.[1] The deficiency in the estate of Tuscan as indicated in the Liquidation and Distribution Account was R1 988 860 021,00. From their investigations, the joint liquidators "established" that the bank account was that of Tuscan and that all transactions related to Tuscan.

[18] He identified the various payments of R120 096,00, R650,000 and the R4 million made by Tuscan to the defendant in Exhibit A as follows:

18.1With regard to the payment of R120 096,00:-

18.1.1 Exhibit "A17" is a copy of a tax invoice addressed to JCI Resources

1 Exhibit B, p112-143

from Gulliver's Travels dated 24 December 2003 for the amount of R120 096,00 .

18.1.2 Exhibit "A18" is a statement from the Standard Bank of South Africa to the members of Tuscan dated 14 January 2004 and shows a payment, being a transfer to Gulliver's Travels, in an amount of R120 096,00 on 5 January 2005.

18.1.3 Exhibit "A32" is a Gullivers Travel's detailed debtors account listing, indicating receipt of the amount of R120 096,00 on the same date as the date of transfer from the bank account. Exhibit "A97" is a statement of the defendant's bank account indicating receipt of this amount;

18.2With regard to the payment of R650 000,00 :

18.2.1 As reflected in Exhibit "A24", a bank statement dated 14 July 2004, indicating payment of R650 000,00 on 6 July 2004;

18.2.2 Exhibit "A23" is a statement of the defendant's bank account, indicating receipt of the aforesaid amount on 6 July 2004;

18.3With regard to the payment of R4 000 000,00 :

18.3.1 As reflected in Exhibit "A27", a bank statement dated 14 August 2004 indicating a transfer to the defendant of R4 000 000,00 on 30 July

2004;

18.3.2 The bank statement of the defendant at Exhibit “A152” shows receipt of this amount. An extract from the books of account of the defendant indicates receipt of the R4 000 000,00 in respect of the ANC Youth League Conference;

18.3.3 Gainsford identified that on 7 December 2004 there was an entry indicating a payment of R231 763,89 into the bank account.(Exhibit A 143)

[19] Gainsford identified the certificate of indebtedness from Standard Bank in respect of the mortgage bond over the property and identified a variety of payments made by Tuscan in respect of this bond.

[20] In cross-examination he testified that he had never met or spoken to Mr Bawden and acknowledged that, as a prudent liquidator, he should have done so. He explained that he had understood that Bawden knew nothing of the affairs of Tuscan. From affidavits and his enquiries it appeared that Bawden was merely a “front” and that Tuscan’s affairs and management were conducted by Kebble and/or Poole. Bawden was the director of Tuscan and was paid R2 000,00 per month for the use of his name. Forensic investigations confirmed monthly payments of R2 000,00 were made to Bawden.

[21] He confirmed that “there is no evidence of Tuscan Mood ever having

done anything to generate money"[2]. Tuscan's only asset was the property registered in its name and the bank account. The immovable property was registered as a Close Corporation on 2 April 2003 and converted to a company on 4 June 2004. The bank did not amend its records to reflect this. The liquidators found "absolutely no records, no financial statements, no books of account, not a piece of paper evidencing any transactions in this entity".[3] The indications were that the account was "used as a receptacle into which to deposit the proceeds from thefts".[4] He stated that Tuscan had a bank account because of the various bank statements in the name of Tuscan. From his investigations, although Tuscan itself did not operate or trade and was not renting out the house, there were a lot of payments that went into and out of the bank account.

[22] None of the payments on the list in Exhibit A[5] could be related to anything that Tuscan itself did.[6] Tuscan only borrowed money for the mortgage bond on the house. The R125 million which came into the bank account came from the proceeds of the sale of stolen shares. Gainsford was also one of the liquidators of the entity "Paradigm Shift" and as far as he knew, "Paradigm Shift" did not have a bank account and nor did Tuscan and Paradigm share a bank account.

[23] Gainsford accepted that Poole had forged the signatures on the account opening forms at Standard Bank.[7] He believed that this was a "classic money

2 Record 1/ 35, lines16-19
3 Record, 1/37, lines14-25
4 Record, 1/38, lines 10-13
5 Record1/39,lines 1-25;Exhibit A,page75-76 – List of Debtors Files
6 Record, 1/48, line25;1/ 49, lines1-6
7 Record, 1/48,lines 2-7

laundering situation" and acknowledged that the bank account had been used merely "to wash the money through".[8] From his investigations, the sole purpose of operating this bank account was "to hide the true identity of where the money came from."

[24] It was his understanding that the proceeds of stolen shares which were deposited into the bank account constituted a claim against Tuscan and that as soon as any amount was paid out from those proceeds, Tuscan would be insolvent.[9] On the assumption that the persons /entities entitled to monies standing to the credit of the bank account are not creditors of Tuscan, Gainsford confirmed that the estate would in such event be solvent. There was a surplus on the sale of the house.[10]

[25] He was referred to a letter written by Ms Klein to Mr Pearsey at RandGold and confirmed that an amount of R211 542,05 went into the bank account.[11] In re-examination Gainsford confirmed with reference to a Supreme Court of Appeal decision[12] that the Receiver of Revenue was a creditor of Tuscan, but stated that as yet no such claim had been approved.

[26] The next witness for the plaintiff was Mr Bawden who was called out of sequence after Mr Poole had already testified for the defendant.

[27] Bawden testified that he met Poole during 2000 when he started a

8 Record, 1/49,lines 7-20
9 Record1/60,lines3-14
10 Record, 1/55, lines 5-6
11 Exhibit A pg 29
12 MP Finance Group CC (In Liquidation) v Commissioner, South African Revenue Services 2007 (5) SA 521 (SCA)

Tomato farm in Bela-Bela, Limpopo Province. Poole expressed an interest in starting a company in a joint venture which he called "Hot House Investments"[13]. His role was to be that of a non-executive director. He was promised a gratuity of R2 000,00 per month which he received electronically from Poole. He signed a document, but "had no right to bank accounts, authorising money or anything like that".

[28] The first time he heard of Tuscan was a number of years ago when he received a summons from the Johannesburg City Council, in the name of Tuscan, for "the lights and water bill" of a property.

[29] He had only signed documents relating to Hot House Investments and did not sign any documents relating to Tuscan. He denied that the signature purporting to be his on the Standard bank account opening forms, in the name of "Tuscan Mood 1224 CC" at Exhibit "G1" was his signature.[14] He was not aware that he was a member of Tuscan nor was he aware that Tuscan had a business cheque account nor even that it existed.[15] Although a letter (Exhibit "G7") addressed to Standard Bank contained his particulars, he did not write it. The same held true regarding the "Resolution of Tuscan Mood 1224 CC" at Exhibit "G8". He testified that although his particulars appeared in the amended founding statement of Tuscan (CK2 form)[16], he did not consent thereto, nor did he sign it. He did not have anything to do with Tuscan.

13 Record 2/146,lines15-25;2/147,lines1-10
14 Record2/148,lines 20-25;2/149,lines 1-14
15 Record 2/149,line20 -25; 2/150,lines1-21; Exhibit G6
16 Exhibit G, G11 to G15

[30] Under cross-examination Bawden testified that the R2 000,00 per month was a complimentary fee that was given to non-executive directors of Hot House Investments. However he did not attend any board meetings for directors. It was put to him that the bank statements from the Standard Bank relating to the bank account reflected stop orders of R2000,00 each month to him. He thought that the R 2 000,00 per month was coming from Poole as this was reflected on his First National Bank statements every month.

[31] He had no knowledge that his signature was forged on the amended founding statement for the closed corporation in the name of Tuscan to reflect him as a member of Tuscan.[17] He also had no knowledge that the 'CC' had been converted to a (Pty) Ltd. He did not give any authority to either Poole or Kebble to use an entity bearing his name. He was shocked a few years ago when he was confronted by the police and the "Scorpions" in regard to his forged signature reflecting him as a member of Tuscan, of which he had no knowledge.

[32] The plaintiffs then closed their case.

C. THE DEFENDANT'S WITNESSES

[33] The following witnesses testified for the defendant:

33.1 Mr G W Poole; and

33.2 Ms K Fernandes.

17 Record 2/158, lines 9-13; 2/159,lines 9-25; 2/160, lines1-25

[34] Poole testified that he had met Kebble during 1997 when JCI had acquired an interest in Consolidated African Mines where Poole was at the time employed. Kebble asked him to "open various accounts with the idea that funds emanating from the sale of shares could be channelled through those accounts and in order to maintain anonymity and that the outside world at large would not know that those funds were emanating from Kebble/JCI , all the JCI group of companies."[18]

[35] He was instructed to split the share certificates of Rand Gold Resources (RGE) listed on 'NASDAQ' into more manageable amounts because they were rather large denominations of shares.[19] He sent those share certificates with the necessary transfer forms and resolutions to T-Sec, a stockbroker. In order to do this, he had to falsify signatures on the transfer forms and on the resolutions which were sent to T-Sec. T-Sec, then sent them to New York, to a firm called 'Barnard Jacobs Mellett', who in turn sold parcels of the shares at various intervals.

[36] Poole testified that although it would appear from the transfer forms that the sale of shares had been authorised, in reality the sale of shares had not been authorised. All movement of shares and funds had to be kept confidential. For that purpose it was necessary to open up bank accounts to "channel these funds through these bank accounts to various entities, and wherever Brett wanted these monies to be."[20]

18 Record 1/67, lines 15-20
19 Record 1/69, lines1-25
20 Record 1/70, lines 8-13

[37] Poole, on the instructions of Kebble, then opened the accounts and did the necessary administration and paperwork to ensure that this happened. He explained that “in order to open a bank account, you have to have an entity to open an account and that entity whether it be a CC or company or whatever would need a representative, either a member or a director.”[21]They required a shadow director for this purpose. A meeting was held with Bawden where it was agreed that he would be appointed as a director of Tuscan and that he would be paid a fee of R2000, 00 per month in lieu of his name being used as a director. Bawden was unaware of the purpose for which his name was being used and Poole did not discuss with him that a bank account was being opened.

[38] Poole obtained the necessary forms from the Standard Bank in Alberton, completed the forms and, in doing so, falsified Bawden’s signature on the account opening documents.[22] He provided the bank with an address to ensure that the statements were sent to him rather than to Bawden.

[39] Poole testified that ”Well essentially Brett just needed an account to channel money through. And if you really want to be specific, it was money that was flowing through an account a bank account”.[23] The bank account was also used for the funds that were transacted through “Paradigm Shift” an entity which existed in name only and was used as an account at T-Sec.

21 Record 1/71, lines 1-8
22 Record 1/71, lines 21-24
23 Record 1/75, lines 22-25

[40] Poole conceded that he had misrepresented the position to the bank and had perpetrated a fraud thereby. He explained that "My factual position was that I was opening a bank account with the name Tuscan Mood and I basically falsified who was the member of that CC at the time".[24] Although Bawden was the member of the 'CC', Poole was opening the account on behalf of Kebble.

[41] Poole explained that Kebble had requested that the immovable property at which Kebble resided also be registered in the name of an entity as Kebble did not want it to be known that the property belonged to him. For this reason, Poole caused the property to be registered in Tuscan's name, and also arranged a bond in the name of Tuscan, in favour of Standard Bank. The instalments on such bond were funded "from the proceeds of the sale of shares, wherever I could get money". [25]

[42] Poole testified that "The intention of Tuscan Mood as I have said, was essentially to have a bank account and channel money through that account. The intention was certainly not to conduct any business through Tuscan Mood or Paradigm Shift at all".[26] The funds in the bank account were not funds that belonged to Tuscan but were proceeds from the sale of shares. He confirmed that Tuscan itself had no business and that the bank account was nothing other than a 'conduit' through which to channel monies derived from the misappropriation of shares.[27] More than one bank account was opened so that the large amounts of money would not attract attention. The names of

24 Record 1/76,lines 8-17
25 Record 1/76,lines18-23;1/77, lines1-6
26 Record 1/77, lines 9-12
27 Record 1/77,lines 16-21

some of the other accounts were “New Heights” and “HotHouse Investments.”

[43] Under cross-examination he testified that he had been at some stage a director of the defendant. The R650 000,00 loan paid by Tuscan to the defendant was paid for a share in the defendant. This loan had not been repaid. The shareholder was the Pacific Gas Share Trust (PGST), of which he, his wife and a certain Mr Burger were the trustees. Poole himself was a beneficiary of the Trust.

[44] Poole explained that in addition to the proceeds from stolen shares, the bank account held proceeds of legitimate share transactions of Kebble estimated at about R20 million, proceeds of shares of JCI Gold, and of Consolidated Mining Management Shares (CMMS) shares.

[45] He confirmed the contents of his affidavit at Exhibits “B74” to “B88” wherein he described Tuscan as a joint wrongdoer with other persons or entities in a grand scheme of theft.[28] He explained that his reference to Tuscan in this manner was because the bank account had been used as a “conduit”.

[46] Although Bawden was a member of Tuscan, he did not sign any documents to become a member of the CC. Poole forged Bawden’s signature on the CK2 .[29] It was necessary to falsify the documents, because, although Bawden had agreed that his name would be used, Bawden did not know what

28 Record 1/86, lines 4-25 ; 1/87, lines 1-18;Exhibit B74,para1.4
29 Record 1/87,lines19-25; 1/ 88, lines 1-12; 1/99, lines 22-25 ; Exhibit A, pg 12

Tuscan was going to be used for. Bawden had agreed to be a "shadow director" and hold that "position on anonymity". [30]

[47] He stated that the controlling minds of Tuscan or to manage the bank account was Kebble and himself.[31] He admitted that Tuscan acted as represented by himself or Kebble who "hijacked and registered Tuscan for the purpose of channelling the proceeds of stolen shares amongst legitimate transactions."[32] Bawden never had anything to do with the control or the management of Tuscan.

[48] Poole testified that the property was purchased without Bawden's knowledge and consent. Bawden did not sign any documents relating to the purchase of the property. The property was registered in the name of Tuscan, as the company "happened to be there" and the bond documents were signed not by Bawden, but by, either Poole or Kebble, "again falsifying it."

[49] Poole explained that he and Kebble had understood that Tuscan was a bank account through which money was going to be channelled and that "Tuscan Mood was created and utilised as an integral part of the scheme which were devised to commit (sic) for the misappropriation of the resources shares and for the filtration of certain of the funds arising from the sale thereof into its bank account." [33]

30 Record 1/93, lines 1-18
31 Record 1/89, lines1-17
32 Record 1/92,lines17-25
33 Record 2/103, lines 10-23; Exhibit B,p 83, para32

[50] He confirmed the payment of the amount of R120 096,00 by Tuscan to the defendant, which was a payment on behalf of JCI Resources. He also confirmed the payment of the amount of R650 000,00 and the payment of R4 000 000,00 by Tuscan to the defendant which was paid to facilitate an ANC Youth League Conference. At that stage he was a director of Gullivers Travels and was aware that the funds were being channelled through the bank account. His co-directors were unaware that the funds were from the proceeds of stolen shares.

[51] Under re-examination he confirmed that the payment of R650 000,00 was a loan and not a payment of shares. PGST had lent and advanced this amount to the defendant in the form of an interest free loan account with no fixed terms of re-payment.

[52] Ms Fernandes testified that she is currently the managing director of the defendant and as at the date of the payments was the travel consultant responsible for the reservations in respect of which the monies were transferred. She was appointed as a director of the defendant on 1 June 2004 and became a 10% shareholder at that point in time. Through Poole she met Kebble.

[53] She explained the relationship that formerly existed between Poole and the defendant. Poole's family trust, PGST was a co-shareholder together with Fernandes, MG Levitas ("*Levitas*"), P Sharma ("*Sharma*") and the Rusandar Trust (of which Morris Joselowsky ("*Joselowsky*") was a trustee), in the

defendant. This relationship was regulated by a written shareholders' agreement in terms of which PGST was required to lend and advance an amount of R650 000, in the form of an interest free loan account to the defendant.

[54] The Rusandar Trust at that time held 35% of the shareholding, PGST similarly 35% and Sharma, Levitas and Ms Fernandes, 10% each. Poole was a non-executive director and was not involved at all in the business or the day-to-day affairs. Joselowsky and herself attended Board meetings and Ms Klein was part of the management team.

[55] In approximately March 2004 the defendant (represented by Fernandes) was invited to tender for the "account" of Consolidated Mining Management Services (CMMS) which she understood to be the "holding company or an umbrella company for a whole host of companies operated by one Brett Kebble". This group comprised, according to her recollection, the JCI Group, Rand Gold Holdings, Western Areas, Simmer and Jack and others. She explained that "…there were a whole lot of companies that we dealt with at that point, on getting the account, we dealt with many such companies of Mr Kebble's stable, if you will".[34]

[56] The tender was successful and the defendant thereafter from time to time rendered travel agency services for Kebble and the various companies with which he was associated. The name of the account through which such services were identified was "Consolidated Mining Management Services",

34 Record 2/111, lines 17-20.

abbreviated to “CMMS (Pty) Limited”.

[57] The background to the transactions in issue in this action was a telephone call received by Fernandes from Kebble on 27 July 2004 in which Kebble told her that he needed her assistance in “sorting out payments in respect of an ANC Youth League Conference which was to be held a little bit later in August”.[35] His words were “… please can you sort out the money because I do not trust them with this. Inferring potentially that it was that maybe somebody in the ANC would not do as they had been requested to do. Deposits needed to have been paid by, I believe it was Friday, 31 July”, in respect of hotel accommodation and other matters related to the conference. Mr Eddie Xhosa had procured approximately 1000 beds. She was given the task of paying for those reservations procured by Xhosa and other reservations still to be made.

[58] She told Kebble that they did not have sufficient cash to facilitate payment of what was required and unless they received payment, they could not assist.[36] The defendant then received a payment from Standard Bank, Alberton. Upon being directed to the schedule in Exhibit A (Exhibit “A152”), she identified the payment of R4 000 000,00 from Lunga Ncwana of the ANC Youth League.

[59] She had ‘huge respect’ for Kebble and was honoured to assist. She was not aware where the money was coming from and did not question it. To her

35 Record 2/114,lines 7-25
36 Record 2/116, lines 1-25

understanding Kebble was arranging for the payments to be made. She knew nothing about the name "*Tuscan Mood*". Such an entity was not her client. She had only dealt with CMMS.

[60] The defendant received monies to cover the disbursements and charges, except for the amount of "R211 000,00 odd" that was refunded to Tuscan. She had seen the name "Tuscan Mood" on a bank statement but had not dealt with a company by that name. She confirmed that the defendant had received payment of the R120 096,00 as well as the amount of R650 000,00. She also confirmed receipt of the R4 000 000,00 . The R650 000, 00 had come from PGST in respect of a loan account. The Rusander Trust had put in an equal amount and it required that the payment from PGST be to the same value. The R650 000, 00 was not repaid to Poole.

[61] The first occasion she was alerted to any problem was upon receipt of the letter of demand from the plaintiff's attorneys dated 17 August 2006.[37] As far as the defendant was concerned, they had disbursed monies which they received, for travel arrangements. Fernandes explained that a cheque had been drawn by JCI Resources (Pty) Limited in favour of the defendant on 24 December 2003 in the amount of R120 096,00 after a credit card payment for the same amount had been declined.

[62] A cheque was then deposited but it was dishonoured. Fernandes then telephoned Poole for advice. He informed her that she was not to worry and that he would "sort out the payment". A transfer of such amount was made

37 Exhibit A 88

into the defendant's bank account.

[63] Fernandes stressed that unless money had been received in advance the defendant would not have proceeded to make the reservations and disburse amounts payable in respect thereof.[38] She had no idea that there would be any difficulty or that any creditor would be prejudiced by virtue of the payments being made to the defendant. [39] She relied on Kebble in whom she had faith and that was "good enough for (her)".[40]

[64] Under cross-examination she stated that the dealings in respect of the ANC Youth League Conference were with Kebble as it was a completely independent reservation. The money for this conference had not come from CMMS. She was unaware that it had come from Tuscan. She had understood that in respect of all the relevant payments "that the monies were coming from Mr Kebble" or one of his 'stable' of companies and "it was not her job at the time to find out from which bank account things were coming''.

[65] She admitted to inflating an invoice "to cover for where we were not making on the other side".[41] She was aware of an application for summary judgment issued against the defendant, but denied being involved in the drawing up of the affidavit and had no knowledge of the contents of such an affidavit.

38 Record 2/128, lines 5-9
39 Record 2/128,lines 14-25
40 Record 2/129, lines 5-7
41 Record 2/134, lines 10-15

D. THE ISSUES

[66] In order to succeed in its claim, the plaintiffs are required to prove :

66.1 that there was a disposition by the company of its property;

66.2 that the company is being wound up and unable to pay all its debts;

66.3 that in the case of a claim based on Section 26(1)(b) of the Insolvency Act , that such dispositions were made by the company within two years of the liquidation of the company;

66.4that the alleged dispositions were not made for value.

[67] It is only if the plaintiffs discharge the *onus* of establishing all these requirements that the provisions of section 33 of the Insolvency Act arise.

[68] In terms of section 26(1)(b) of the Insolvency Act the defendant has the *onus* to prove that, immediately after each disposition was made, the assets of Tuscan exceeded its liabilities, alternatively that the liabilities of Tuscan exceeded its assets by an amount less than the amount of each disposition. The defendant also has the *onus* of proving its defence based on section 33 of the Insolvency Act.

[69] Both counsel, Mr Pretorious for the plaintiffs and Mr Subel for the

defendant have submitted incisive and detailed Heads of Argument for the assistance of the court. I am grateful to both of them.

[70] Mr Pretorious argued that the plaintiffs as liquidators were obliged to collect the assets of Tuscan and distribute it amongst its proved creditors. There was a court order winding up Tuscan and a Liquidation and Distribution Account. According to Mr Pretorius, Tuscan, was acquired as a shelf close corporation to own a property “anonymously “ and channel the proceeds of the sale of shares so that they could not be traced back to Kebble and /or JCI. The monies received from the sale of shares were used to pay various debts including the mortgage bond on the property. Kebble and Poole acted on behalf of Tuscan, and Tuscan controlled by Kebble and Poole was a joint wrongdoer, in that it had participated in the stealing of shares. It was always the intention of Tuscan to have a bank account and even though Bawden’s signature was forged on the bank account opening forms, this forgery according to Mr Pretorious, had no effect as Bawden was in fact a director of Tuscan. The bank account was opened by Tuscan controlled by Kebble and Poole and neither Poole nor Kebble were entitled to the money in that account but Tuscan was.

[71] Mr Subel for the defendant contended that the bank account was created by virtue of a misrepresentation. This was not Tuscan’s bank account but an account intended by Kebble and Poole to be their bank account to receive the proceeds of misappropriated shares. Both Kebble and Poole misrepresented to the Standard Bank that Tuscan was a customer of the bank when it was

not. Tuscan could not assert a right to the monies standing in the bank account as it was not the account holder and only its name was used. But even if Tuscan was the account holder, it did not mean that it alone was entitled to assert a claim to the funds standing in the bank account.

[72] Both counsel were agreed that the real question in this case is whether Tuscan is entitled to assert a claim to the funds standing to the credit of the bank account.

[73] Mr Subel has argued that a not too dissimilar situation was considered by the Supreme Court Of Appeal in the case of *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening*)[42], and that the case before this court was an *a fortiori* case. In *Nissan* it was contended on behalf of the liquidators that the funds had fallen into the payee's insolvent estate and that the appellant was not entitled to such funds. The Supreme Court of Appeal had little difficulty in rejecting these contentions and 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.

At 446, paragraph 16 Streicher JA stated :

"*I agree with Thirion J that our law would be deficient if it did not provide a remedy for recovery of stolen money direct from the bank which received that money to the credit of the thief's account, for as long as the amount stands to the credit of the thief.*"[43]

42 2005 (1) SA 441 (SCA).
43 This is a reference to Thirion J in Commissioner of Customs and Excise v Bank of Lisbon

And at 448, Streicher JA stated :

> "*[23] It follows that the submission by first and second respondents' counsel that, once the bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft, is not correct. If stolen money is paid into a bank account to the credit of the thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account."*
>
> *"[25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, i.e should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.*"

[74] According to Mr Subel, paragraph (23) of *Nissan (supra)* is the *ratio decidendi* of the case. However Mr Pretorious submitted that this was not a *ratio* but an *obiter dictum* and that the legal difficulty with the *obiter*, to the effect that stolen money in a bank account of a thief does not form part of his assets is, that it cannot be reconciled with a long line of other cases. Mr Pretorious relied on Professor JC Sonnekus' criticism of the *Nissan* judgment for this submission. The fundamental basis of Sonnekus' criticism is that South Africa has an abstract system for the acquisition of property. Professor

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International Ltd and Another 1994(1) SA 205 (N), where money was fraudulently obtained by one "Reob" from the commissioner of Customs and Excise by way of cheques that were deposited into Reob's bank account with the Bank of Lisbon. It was held that the circumstances under which Reob obtained the monies were such as to deprive delivery to Reob of any legal effect. See 208 I-J.

JC Sonnekus[44] addresses this in some detail, and writes:

" By virtue of the abstract principle the legal validity of the underlying agreement has no causal connection with the fortunes or misfortunes of the real agreement that constitutes the source of the duties to fulfil the obligations to convey and receive ownership. Since Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd 1941 AD 369 this principle has been repeatedly confirmed in South African judgments, among others in Bank Windhoek Bpk v Rajie 1994 (1) SA 115 (A) 141C-E; Krapohl v Oranje Kooperasie Bpk 1990 (3) SA 848 (A) 864E-H; Kriel v Terblanche NO 2002 (6) SA 132 (NC) 144C-D. In view of this overwhelming body of authority, the decision in Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA) should be approached with some circumspection, as it may possibly create the impression that the court applied the supposed turpitude attached to the underlying obligatory agreement to the question whether the bank, as bona-fide recipient of even stolen money, could for that reason not have acquired an original right to the transferred funds. This will be reverted to when the decision is discussed hereunder, but it cannot be accepted that by this formulation Streicher JA intended to deviate from the trite legal position on this point. "

And further on pg 374-375 he writes:

" It has been stated repeatedly that by virtue of its underlying relationship with its client, a bank has an obligation towards the customer with regard to the

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44 See: *Unjustified Enrichment in South African Law*; Lexis Nexis 2008 at p 22;footnote 121.

funds appearing to the credit in the client's account. It was in fact pointed out earlier that this principle formed the crux of the correct decision by Nugent J, among others, in Nedcor Bank Ltd v Absa Bank[45]*. That is the position irrespective of which relationship underlies the client's acquisition of the money deposited in the account".*[46]

[75] According to Mr Pretorious, the *Nissan's* judgment should be seen in its context. It is distinguishable from the facts in this case. If the defendant is directed to repay the amount of the disposition to the plaintiffs, it is not without a remedy as it could claim the monies paid by way of an enrichment action, as it had rendered services. He submitted that no doubt a person from whom monies have been stolen can claim payment from the thief of a sum equal to the amount stolen from him provided it was traceable.

[76] Mr Pretorious contended that monies paid from the bank account to third parties, whether they were bona fide or not, constitute a disposition of Tuscan's property as contemplated by the Insolvency Act,[47] and that, furthermore, monies standing to the credit of an insolvent estate in a bank account constitute property within the meaning of the Insolvency Act.[48]

E. ASSESSMENT OF THE EVIDENCE

45 1995 (4) SA 727 (W)
46 Page 374-375 , Prof Sonnekus, Unjustified Enrichment.(supra)
47 Geyser NO v Telkom SA Ltd 2004(3) SA 535 (T) and at p546, para27,28,and 30
48 Ormerod v Deputy Sheriff, Durban 1965(4) SA 670(D) at 673D-E; Ex Parte Estate Kelly 1942 OPD 265, at 272. See also De Villiers NO v Kaplan 1960 (4) SA 476 (C), at 477 E to F; De Hart NO v Kleynhans and Others 1970 (4) SA 383(O) at 387 D-E;Rousseau NO v Standard Bank of SA Ltd 1976(4) SA 104 (C) at 106A-C

[77] Tuscan was a non-trading entity. It was acquired to channel the proceeds of misappropriated shares so that it could not be traced to Kebble and/or JCI. Tuscan did not operate any business, the liquidators found "absolutely no records, no financial statements, no books of account, not a piece of paper evidencing any transaction in this entity".

[78] It owned Kebble's immovable property "anonymously" in Inanda, had a mortgage bond in favour of Standard Bank registered over the property and had a credit balance in the bank account with Standard Bank. The instalments on such bond were funded by the proceeds derived from the unauthorised realisation of the shares.

[79] Poole had been instructed to sell the shares in RGE, split these shares, give effect to the transfer of the shares and procure the remission of funds derived from the unauthorised realisation of such shares, to South Africa. In order to maintain confidentiality and secrecy, Kebble had instructed Poole to open a bank account which was a "conduit" to channel monies derived from the misappropriated shares.

[80] From Gainsford's testimony an amount of approximately R170 million had been deposited into the bank account and an amount of approximately R125 million constituted the proceeds of misappropriated shares. The balance of approximately R45 million was from various other sources and included R20 million from Kebble himself. However he stated that "there are certain monies there, I do not know where it came from, if they were entitled to it or not but

the proceeds of stolen shares, I do not believe they were entitled to receive the funds".[49] Tuscan had no money to start with nor did it have any basis on which to receive money.

[81] Gainsford testified that the payment into the bank account did not relate to the business of Tuscan. Gainsford acknowledged that the bank account had been used merely for money laundering to "wash the money through". Poole testified that apart from the proceeds of the misappropriated shares, the bank account held the proceeds of legitimate share transactions of Kebble, JCI Gold and CMMS and that the entity Paradigm Shift had also shared this bank account.

[82] According to Gainsford there was no indication that any of the funds deposited or transferred into the bank account at any time were intended to be monies belonging to Tuscan. Although the proceeds were received in the bank account under the name of "Tuscan Mood 1224CC", this bank account was operated by Kebble and Poole as a "conduit" through which funds would be channelled.

[83] In order to give an appearance of the account being properly opened, Kebble and Poole enlisted Bawden who agreed to be a director in consideration for a monthly payment of R2 000,00. However, Bawden testified that he was not enlisted as a director of Tuscan, but of HotHouse Investments. Bawden the sole registered member of Tuscan did not sign any documents on behalf Tuscan, nor the amending founding statement of the

49 Record,1/ 41, lines 7-25

company. Nor was he aware that Tuscan was to be used for any purpose, represented by either Poole and/or Kebble in any manner. Nor was he aware that his signature was falsified to open the bank account.

[84] Bawden was unaware that the Tuscan had even been established and was clearly unaware that there had been a falsification of documents both in relation to the establishment of Tuscan and the opening and operation of a bank account by Poole.

[85] Mr Pretorious has argued that Kebble and Poole were the controlling and directing minds of Tuscan. As to who is the controlling mind of a company, it is necessary to identify the natural person or persons having management and control on behalf of the company in relation to the transactions in question. In *Tesco Supermarkets Ltd v Nattras*[50] Lord Diplock identified those who are to be treated in law as being the company as "*those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company*".

[86] The learned authors of *Blackman*[51] write:

> "*The act will be considered to be that of the directing mind as long as it is performed by the person in question within the sector of the company operation assigned to him by the company, which sector may be the functional or geographic, or be the entire undertaking of a company.*"

50 [1971] 2 ALL ER 155 at h-I
51 Commentary on the Companies Act, Blackman et al,Vol 1, 4-130 citing Canadian Dredge & Dock Co Ltd v R (1985) at 330/1.

[87] However, in casu, Bawden was unaware that he was a director of Tuscan nor was he aware that there was an entity acquired for the purpose of channelling misappropriated shares and for which entity there was a bank account.

[88] There is no question of Bawden having delegated any authority to Kebble or Poole with regard to the company's business operations (there was no business). On all the evidence, there can be no question of Kebble and Poole being lawful "*directing minds*" of Tuscan because they could not by their own unlawful conduct constitute themselves as the directing or controlling minds of Tuscan.

[89] They also cannot be regarded as de facto directors of Tuscan. A de facto director in law and practice has a defined and ascertainable meaning.[52] Both Kebble and Poole were in fact and deed the "brains" controlling the bank account.

[90] The directing mind of a company has to be a lawful directing mind. Implicit in this, is that it would be in accordance with the law. In terms of the Companies Act a company is formed for a lawful purpose.[53] Axiomatically, only a lawful body of directors can delegate authority to persons who then become the controlling and directing minds of the company. There are no facts to support the conclusion by Poole that he and Kebble were the directing

52 Francis v Sharp and Others 2004(3) SA 230 (C) at 243.
53 Henochsberg , Company Law Vol 1, Chapter IV, page 53

and controlling minds of Tuscan.

[91] It does not matter that Kebble and Poole purported to be representatives of Tuscan. The question in casu is not who are the controlling minds of Tuscan, but what was the intention of Kebble and Poole in having monies transferred into the bank account. Was it ever their intention that Tuscan would be the entity entitled to the monies in the bank account or was the monies there for Kebble and Poole?

[92] In *Nissan,(supra)* the appellant *(Nissan)* had erroneously caused its bank to transfer an amount in excess of R12 million from its account to an account held by a company, (Maple), which was not entitled to such payment, when it actually intended to make payment to TSW. Upon receipt of the funds into the wrong bank account, the amounts were immediately withdrawn and Maple was liquidated. *Nissan* claimed that of the amount paid erroneously to Maple, an amount of at least R9 750 000,00 could be traced to the amount transferred erroneously by it to Maple's account and that such amount did not form part of Maple's insolvent estate. Maple's liquidators contended that the money formed part of Maple's property. It was held that a bank that 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. The Court held that the amount of R9 750 000,00 plus the interest accrued thereon did not form part of the insolvent estate of Maple and directed that the liquidators of Maple release such amount and the interest accrued thereon to *Nissan*, as the insolvent had

not become entitled to the funds erroneously credited to its account.

[93] The approach of the Supreme Court of Appeal in the *Nissan* decision was followed by the Full Court of this Division in *Pestana v Nedbank Ltd*[54] and by the Supreme Court of Appeal in *Joint Stock Company Varvarinskoye v Absa Bank Ltd and Others*[55]. In that decision Navsa JA stated as follows :

> "*[41] In Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening) 2005 (1) SA 441 (SCA), Streicher JA in dealing with the perplexing question of the appropriate remedy available to a person laying claim to money wrongfully transferred from its own bank account to another over which it had no control, and considering an earlier decision by this Court,*[56] *said the following:*
>
> > *'This Court was aware that its decision may not be strictly according to Roman-Dutch law but stated that Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.*"
>
> *[42] In the Nissan (supra) case this court took into account that it was common cause that, if it concluded that the liquidators in that case were not entitled to the contested funds, the appellant was entitled to payment thereof and made an order accordingly. In the present case the parties were agreed that, if we find that no person other than the appellant had any interest or claim to the money appropriated by Absa, the appellant was entitled to the relief sought. I can see no reason why, in the present case, for the reasons stated in the Nissan case and considering the conclusions arrived at in the preceding paragraphs, a similar result should not follow.*"

[94] In the *Joint Stock* decision the first respondent (the Bank) had

54 2008 (3) SA 466 (W), 473,para15
55 2008 (4) SA 287 (SCA), 297-298.
56 i.e. *S v Graham* 1975 (3) SA 569 (A) where the question arose whether an accused was guilty of the theft of a cheque of R37 153,88 or of the theft of that amount and the Court was dealing with the principle of Roman-Dutch law that only corporeal things were capable of being stolen.

appropriated money standing to the credit of one of its client's (the sixth respondent's) accounts, in a set-off of the money due by the sixth respondent to the Bank. The appellant had instituted an application for an order declaring that the right to the monies appropriated vested in the appellant and ordered the Bank to pay to the appellant an amount equal to the amount appropriated. The appellant had used the account exclusively for the purpose of warehousing monies to meet the claims of sub-contractors on a certain mining project abroad for which the appellant was responsible. Subsequent to the appropriation of the monies, the appellant had, out of its own resources, paid the sub-contractors their due. The respondents resisted the application on the basis that the money deposited into a bank account of a client became the property of the Bank, so that only the sixth respondent had any right to contest the appropriation. On appeal it was held that it was not correct, as contended for by the Bank, that only an account-holder could assert a claim to money held in its account with the Bank. The funds in an account could also "belong" to someone other than the account-holder of the Bank.

[95] Furthermore Navsa JA stated that :[57]

> "*[31] It is not correct, as contended for on behalf of Absa, that it is a universal and inflexible rule that only an account holder may assert a claim to money held in its account with a bank. Nor does the proposition that money deposited in an account becomes the property of a bank, necessarily militate against a legitimate claim by another party.*
>
> *[32] In McEwen NO v Hansa 1968 (1) SA 465 (A), a mortgage bond debtor made monthly payments into a savings account with the Allied Building Society in the name and under the control of Mr*

57 At paragraphs [31], [32] and [33] at 294H-I and 295D-E

Mortimer. It was clear that, save for very limited purposes, there was never any intention that Mr Mortimer would acquire any rights whatever in relation to the moneys deposited into the account. When Mr Mortimer was sequestrated the question arose whether the amount standing to the credit of the account formed part of Mr Mortimer's insolvent estate. In that case, as in the present, it was submitted that only the account holder had the exclusive right to claim money therein. That submission was rightly rejected.

[33] In McEwen (supra) this court accepted the basic proposition that when the money was deposited with the Building Society it passed into ownership of the latter. The issue before it was properly identified as follows: Who had the right to claim the credit balance in the savings account? In that case this Court considered the account holder to be the agent of the mortgage debtor. Of importance is the following dictum:

> *'Under circumstances such as these, this Court should not, in my opinion, allow the apparent, as distinct from legal, absolute right of control vested in the agent prior to his insolvency to withdraw monies from the account to transcend the realities of the situation so as to permit the insolvent's creditors to reap the benefit of that which was in truth never legally vested in the insolvent himself.'*

The funds in an account may also 'belong' to someone other than the account holder or, for that matter the bank or institution holding the money."

[96] The finding by the Supreme Court of Appeal in *Joint Stock* is particularly significant and applicable to the present matter. It recognises in the first instance that even the account-holder itself is not necessarily entitled to the monies standing to the credit of a bank account.

[97] That decision as too the decision of the Supreme Court of Appeal, over 4 decades ago, in *McEwen NO v Hansa*[58] makes it plain that the account-holder does not necessarily have exclusive rights to claim money in an

58 1968 (1) SA 465 (A) at 472 D-E

account.

[98] In my view what was said by Streicher JA in *Nissan* is not *obiter dictum* but *ratio.* What in effect Streicher JA was stating was that when money is paid erroneously into your bank account and you know that you have no right to it, you have no right to say to the bank "I want you to pay out the money to me, I demand that you pay the credit balance standing to the credit on that account". The *ratio* is clearly that the money was not paid into the bank account with the intention that it be for the benefit of the designated account holder. Should the amounts that have been so transferred be withdrawn knowing that it is not due to the account holder, he is guilty of theft.

[99] Navsa JA in *Joint Stock* endorsed the approach in *Nissan.* What Navsa JA was postulating in *Joint Stock* was who was intended to be beneficially entitled to the monies in the bank account. That is the enquiry. It does not matter if the account is in customer X's name. The mere fact that you are the account holder does not mean that you are entitled to assert against the bank your entitlement to the money standing to the credit of that account. That is the ratio. In simplistic terms because you are the account holder does not mean that you can claim. The monies paid into the account is not necessarily money to which the account holder is entitled to. The funds in an account may also "belong" to someone other than the account holder or, for that matter the bank or institution holding the money.[59]

[100] Even though it is well recognised that the legal relationship between a banker and customer is one of debtor and creditor in terms of which the

59 Joint Stock, para 33

banker becomes owner of money deposited in the client's account,[60] it must nonetheless be established that the company had a right of action against its banker for the payment of the money standing to its credit in its banking account. However, the Standard Bank in the case before me is not a disputant. Tuscan not only has no right of action for payment to it of any of the amounts standing to the credit of the bank account but it has also not been established that it was Tuscan's account that was opened and operated with the bank. As the learned authors of *Henochsberg on the Companies Act*[61] write:

"*Where an amount standing to the credit of a customer's account with his banker represents monies obtained by theft or fraud, the customer has no entitlement to the credit representing such monies and accordingly has no claim against the bank for payment thereof. Nor is there any such entitlement in respect of monies erroneously credited to the customer's account and the customer has no right to such monies (Nissan South Africa Case supra at 448)*."

[101] Before the insolvency act applies, Tuscan must be shown to be unable to pay its debts. If it is unable to pay its debts then the question is, were the payments made to the defendant, dispositions by Tuscan of its property?

[102] Mr Subel has argued that before section 340(1) of the Companies Act is triggered, the plaintiffs must establish that Tuscan is "*unable to pay all its debts*". The relevant time for determining whether the company which is being wound up as being unable to pay its debts is not at the time of the application for winding-up nor at the time of the grant of the winding up order. It is not necessarily the date when it was placed in liquidation.[62] The relevant

60 Joint Stock, para[37], ;Rousseau NO v Standard Bank of SA Limited 1976 (4) SA 104 (C)
61 Vol 1, 680.
62 Henochsburg Vol 1, page 670 ; Blackman, Commentary on the Companies Act, Vol 3, 14-23, See Taylor and Steyn NNO v Koekemoer 1982(1) SA 374 at 377- 379

time is at the date of the institution of the proceedings in the course of winding-up. The plaintiff's reliance on the order of court winding up Tuscan, as proof that Tuscan is unable to pay its debts, therefore, is misplaced.

[103] In addition, the confirmation of the Liquidation and Distribution account does not relieve the plaintiffs of having to establish that Tuscan is unable to pay its debts. The liquidators reliance on the claim forms by alleged creditors does not establish that such "creditors" are indeed the creditors for the purposes of these proceedings.[63] These alleged creditors cannot constitute creditors of Tuscan, as it has not been proven that Tuscan was party to any misappropriation of shares nor liable for any misconduct. Their claims lie against the wrongdoers / perpetrators of the thefts, and not against Tuscan.

[104] At all material times Tuscan was a non-trading entity, and, at most, was a property owning company in whose name the Inanda residence of Kebble was registered. The only creditor of Tuscan was the Standard Bank of South Africa in whose favour a mortgage bond was registered over such property. The value of the property exceeded the balance owing on the mortgage bond and the liquidation and distribution account reflects that the proceeds from the realisation of the property exceed the indebtedness to Standard Bank.

[105] Tuscan, therefore, had no liabilities and, accordingly, has not been shown to be a company unable to pay its debts within the meaning of section 340 of the Companies Act. It must be shown by the liquidators that Tuscan had debts when the action was instituted and this they failed to do,

63 Exhibit B, p124-125; Rulten v Herald Industries (Pty) Ltd 1982(3) SA 600(D)

notwithstanding the proof of claim forms. Having regard to the evidence (including that of Gainsford), it has not been established that Tuscan has debts.

[106] Section 33(1) of the Insolvency Act provides:

> "*(1) A person who, in return for any disposition which is liable to be set aside under section twenty six, twenty nine, thirty or thirty one, has parted with any property or security which he held or who has lost any right against another person, shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such property or security or for losing such right.*"

[107] Accordingly, three requirements must be met:

107.1 the defendant must have parted with property or security or lost a right;

107.2 such parting must be "*in return for*" the disposition liable to be set aside; and

107.3 the defendant must have acted in good faith (*bona fide*).

[108] "*Good faith*" is defined in section 2 of the Insolvency Act as "*… in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above another*".

[109] In *Ruskin NO v Barclays Bank DCO*[64] the Court (adopting the approach of the Appellate Division in *National Bank of South Africa Ltd v Hoffman's Trustee* 1923. AD 247) said:[65]

> "*I do not think that the phrase 'in good faith' is confined to the action merely of parting with property or security or losing a right. In my view 'good faith' is required in the whole operation giving rise to the parting of property, or security or losing right.*"

[110] Fernandes' evidence clearly demonstrates that the defendant parted with money in making payment of disbursements and expenses "in return for" the payments that are sought to be set aside (other than the sum of R650,000 for the loan) and that the defendant acted "in good faith". There was clearly an absence of any intention to prejudice creditors of Tuscan or to prefer any creditor of that entity. It is inconceivable that the defendant would have proceeded to incur large disbursements if it had any reason to doubt that the monies had been safely and lawfully transferred to it by or at the instance of Kebble into its bank account.[66] There is no reason to reject Fernandes' testimony that she had trusted Kebble implicitly.

[111] Even had the plaintiffs succeeded in establishing that the dispositions to the defendant were liable to be set aside, (which they did not do), this court would have made an order that the defendant was not obliged to restore any of the amounts unless the plaintiffs have indemnified the defendant for parting

64 1959 (1) SA 577 (W)
65 At 584H-585A ;See also Gore NO and Others V Shell South Africa (Pty) Limited [2003] 4 ALL SA 370 (C), 376 – summarising the position as set out by the Supreme Court of Appeal in Cooper & Another NNO v Merchant Trade Finance Ltd 2000(3) SA 1009(SCA).
66 Fourie NO and Others v Edeling NO and Others [2005] 4 ALL SA 393 (SCA); Geyser NO and Another v Telkom SA Ltd 2004 (3) SA 535 (T)

with such monies as the defendant disbursed and paid in respect of the services for which the defendant was engaged.

[112] The plaintiffs have argued that there was an important difference between Bawden's evidence and that of Poole. Poole's version was that they had approached Bawden and got his consent to use him as a shadow director for Tuscan. Bawden's evidence was to the contrary. According to Mr Pretorious, Poole was not cross-examined on this issue because they had not consulted on it at that stage with Bawden. In my view this made little difference. Even though Bawden's evidence of his state of knowledge about Tuscan is approached with caution, nevertheless, both from his evidence and that of Poole, Bawden at no stage authorised any transactions on behalf of Tuscan nor was he aware of any business conducted by or on Tuscan's behalf. Nor was he aware that his signature was forged on the company documents and the account opening forms.

[113] According to Mr Pretorious, the forgery had no 'effect' as Bawden was the director of Tuscan on the company's documents. In my view the plaintiff's reliance on this forgery, is destructive of its case. In such circumstances, there could never have been a genuine intention for the monies paid into the bank account to belong to Tuscan, nor was there any intention for Tuscan to acquire title to the monies deposited into the bank account.

[114] Gainsford's testimony and the views expressed by him with regard to the affairs of Tuscan has been less than satisfactory. In the course of his

investigation as a joint liquidator he did not interview Bawden, the person reflected as the sole member of the company of which he was a liquidator. Fernandes' evidence was satisfactory in all material respects and was consistent. Furthermore, the only witness upon whom this court can rely for a factual version as to what was intended by Kebble, was Poole.

[115] That Kebble and Poole used Tuscan's name, does not make Tuscan liable unless Tuscan itself was a party to the wrongful conduct. It has not been alleged or proved that Tuscan itself was knowingly a party to the unlawful misappropriation of the shares. Even had Tuscan received the proceeds from misappropriated shares into its banking account, this would not in itself render Tuscan liable. There was no evidence from any alleged creditors or from the liquidators that there are "earmarked" or "traceable" funds in that bank account to which they would have a claim.[67] The mere fact that the money was paid into the bank account does not make Tuscan liable to any person or entity. It would only be liable if it knowingly participated in the receipt of monies knowing it to be stolen or in regard to monies that have been 'earmarked' from an identifiable theft. In these circumstances, no weight can be attached to Poole's conclusions that Tuscan was a joint wrongdoer and that both he and Kebble were the controlling minds of Tuscan. There are no facts to justify such conclusions.

F. CONCLUSIONS:

67 Joint Stock para 35 ;First National Bank of Southern Africa Ltd v Perry No and Others 2001 (3) SA 960 (SCA) para 18

[116] In view of all the aforegoing, I find that what both Kebble and Poole in fact intended and did was use the name Tuscan and give the appearance that it was in fact the bank account of Tuscan (when in fact it was not), so that they could open, as Mr Subel argued, a 'phantom' bank account to launder money. They simply misused its name. But, even if the bank account was established to have been the bank account of Tuscan, the evidence establishes that Tuscan was never entitled to any money paid into that account. It was not seriously in dispute that the account was used as a conduit for the purpose of the receipt and payment/transfer of monies derived from the misappropriation of shares.

[117] A litany of falsehoods was created by Kebble and Poole by the misuse of the Tuscan name. The registration documents to set up Tuscan to reflect Bawden as a director was false. Poole misrepresented that Tuscan had in fact opened an account when in fact it did not. Bawden's signature on the account opening forms was forged. The bank account was never intended to be the account of Tuscan. It was intended by Poole and Kebble to be their bank account, a shelter for their nefarious activities. The property in Inanda, (which Kebble also did not want to be connected to him), was the only asset owned by Tuscan and registered in the name of Tuscan, was another "cover up" to give their money laundering operations a semblance of legitimacy. In truth Tuscan was not a customer of the bank and it could therefore not assert a right to the monies in the bank account.

[118] I am therefore in agreement with Mr Subel's argument that the plaintiffs'

reliance on legal authority to the effect that the underlying cause for the transfer (i.e. into the bank account) is irrelevant, is misplaced. The real question is whether there had been any intention on the part of Tuscan to acquire title or right to the funds standing to the credit of the bank account or to make any payment therefrom.

[119] The bank account and the credits to that account were clearly apart from and independent of Tuscan which had neither knowledge of the account nor any participation in the operation of the account. This is apparent from the evidence of the sole registered member Bawden who testified that he was never aware of nor authorised the opening and operation of the bank account on behalf of Tuscan.

[120] There was no intention on the part of either Kebble or Poole that Tuscan have an entitlement to the funds. Nor could there conceivably have been any intention on their part that Tuscan make payment from any monies belonging to it.

[121] Furthermore, at no time was Tuscan the customer of Standard Bank either at the opening or operating of the bank account. Therefore whatever monies were deposited into that account could not become monies to which Tuscan could assert a title. As in *McEwen, (supra)*, the funds in the bank account quite clearly did not belong to the ostensible account holder. Similarly the monies were never the property of Tuscan.

[122] Even if Kebble and Poole had been the so called “controlling minds” these “controlling minds” did not intend that Tuscan have any title or right to such funds. Poole’s evidence that the “root intention” of the bank account was intended to permit of anonymity and prevent the world at large knowing that the funds emanated from Kebble and the JCI Group of Companies, cannot be rejected.

[123] Apart from the fact that Tuscan was not entitled on any showing to the funds deposited or transferred to the bank account, I find that it was never the intention on the part of Tuscan to receive the funds as its property. The funds had to belong to either Kebble, JCI Gold, CMMS and/or persons/entities from whom it was stolen. The one entity it did not belong to was Tuscan. Even if it was the account holder, it does not mean that only it was entitled to assert a claim to those funds.[68] It was never the intention of Tuscan or a “meeting of minds” between Tuscan and anyone else to receive the funds as its property. On the uncontroverted evidence, it was never the intention of Kebble and Poole that the monies become the property of Tuscan.

[124] Furthermore, although one cannot say whether these payments came from the lawful or unlawful proceeds in the bank account, in my view it does not matter, as it was never intended by Kebble or Poole that the large sums of monies (be it lawful or unlawful), deposited into the bank account be Tuscan’s monies. Thus, Tuscan, a dormant entity, enjoyed no title or claim against the bank to the funds standing to the credit of the bank account at any time and any transfer or payment out of the account cannot be regarded as a

68 Joint Stock, para[31]; McEwen v Hansa, page12

disposition by Tuscan of its property.

[125] All the evidence points to the intention of Kebble and Poole being that the bank account was independent of Tuscan. It was simply the name that was used to designate the account. Clearly there was never any transaction or *causa* which would have justified Tuscan having any claim to monies deposited into the account as being its "property".

[126] The bank account from which monies were paid was not the account of the company in liquidation and at no time nor on any basis did Tuscan have any claim to any of the monies in that account. On no basis can the transfer from that account to the defendant be regarded as a disposition by the company nor by Tuscan of its property. It has further not been established that Tuscan is unable to pay its debts.

[127] In my view, the following excerpt from Poole's testimony encapsulates the "fate of the money in the bank account": *"What was the fate of the money that was in the account, where was it then paid out, to whom?-- It was paid to whoever Brett told me to pay it out to. Whether it be political parties or to people who he was seeking favour with or people he wanted to buy gifts for, or investments in other businesses. Or basically just to keep JCI cash flow going".*[69]

[128] In *McEwen*, the Supreme Court of Appeal stressed the importance of giving effect to "*the realities of the situation*" so as not to "*permit the*

69 Record 1/80, lines 17-21

insolvent's creditors to reap the benefit of that which was in truth never legally vested in the insolvent himself" .[70]

[129] What the liquidators are doing in the case before me is "trying to reap the benefits" of which Tuscan was never itself legally entitled to assert. In order for Tuscan to assert title to the monies standing to the credit of the account there must have been some intention on someone's part that it be its account and that it be entitled to payment. Clearly from all of the aforegoing Tuscan had no legal entitlement to the funds standing to the credit of the bank account. For two reasons it cannot be entitled. Firstly, it was a misrepresentation, its name was simply used and secondly, the bank account was opened by Kebble and Poole to channel funds to launder money. In these circumstances it was not for the benefit of Tuscan which clearly had no reason to have it. It had no business, it did not trade.

[130] In my view the decisions in *McEwen*, *Nissan* and *Joint Stock* are wholly destructive of the plaintiffs' cause of action. This case is an *a fortiori* case of the principles referred to in these cases.

[131] In view of all the aforegoing, the plaintiffs have failed to establish the elements of their cause of action. In the result, I find that Tuscan is not entitled to assert a claim to the funds standing to the credit of the bank account. The plaintiffs' action must therefore fail.

G. ORDER

70 McEwen v Hansa p 12; Joint Stock para 33

[132] The plaintiffs' action is dismissed with costs, costs to include the costs of senior counsel.

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H SALDULKER
JUDGE OF THE HIGH COURT

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