IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

APPEAL CASE NO : A5052/2011

SGHC CASE NO : 2005/22436

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

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In the matter of the appeal between:

PRO-MED CONSTRUCTION CC (IN LIQUIDATION) Appellant
(Plaintiff in Court *a quo*)

and

BOTHA, WAYNE ADRIAN Respondent
(Defendant in Court *a quo*)

JUDGMENT

WILLIS J:

[1] This is an appeal against the judgment of our brother Makume, delivered on 2 December, 2010, in which he dismissed the appellant's claim in a trial action with costs. The appellant was the plaintiff in the court below. For the sake of convenience I shall refer to the appellant as 'the plaintiff' and the respondent as 'the defendant'. The plaintiff appeals with the leave of the court below.

[2] The plaintiff, which is in liquidation, was represented by its joint liquidators in the action the plaintiff claimed payment of the sum of R349 900,00 from the defendant. The plaintiff's case was that an agreement relating to Stand 245 in the development known as Pinehaven Country Estate (hereinafter referred to as 'the Pinehaven property') amounted to a disposition without value in terms of the provisions of section 26 (1) (b) the Insolvency Act, No. 24 of 1936 and, accordingly, stood to be set aside.

[3] It is common cause that on 18 June 2003 AD Master Parts (Pty) Limited (hereinafter referred to as 'AD Master Parts') sold the immovable property, a farm, described as Portion 4 of the Farm Boschfontein 445, Registration Division, KQ, Northern Province (commonly known as 'Enkeldoorn'), together with certain movable items to Superfecta Trading CC (hereinafter referred to as "superfecta Trading') for R2 950 000- and that the transfer was registered with the Registrar of Deeds in Pretoria on 26 August 2003. The immovable property was originally sold for R1 950 000 and the movables for R1 million. The defendant's father, Mr Adrian Botha ('Mr Botha senior') had been the managing director of AD Master Parts at the time.

[4] This agreement relating to the purchase and sale of the farm, Enkeldoorn was varied so that the payment of the total of R2 950 000 would be paid for by the payment of R2 374 000 and the balance of R576 000- by transfer to Botha senior or his nominee of the Pinehaven property and another immovable property, also in the Pinehaven estate, the value of these two properties being R299 900,00 and R274 900, 00 respectively. Mr Botha senior was not the author of the variation agreement but accepted it as a *bona fide* agreement that would facilitate the sale of Enkeldoorn. The Pinehaven property was, at the time of this agreement, owned by the plaintiff.

[5] Hendrik Peter Lubbe, who had been the sole member of the plaintiff in 2003, had expressed the interest in acquiring this property from AD Master Parts during 2003. The property was to have been bought by the plaintiff, which Botha senior had understood to be vehicle through which Mr Lubbe make the purchase. When the documentation came to be signed the purchaser was recorded was being Superfecta Trading 58 CC. One Ignatius Michel Robbertse Victor Victor and Mr Lubbe were the members of Superfecta Trading at the time. Superfecta Trading's name has since been changed to Enkeldoorn Lodge CC. Mr Victor is an attorney.

[6] Mr Botha senior nominated each his two sons as the persons to take transfer of the properties which were to be given in part payment of the purchase price for Enkeldoorn. The Pinehaven property in question was transferred to the defendant but transfer of the other property in the Pinehaven estate did not occur.

[7] The payment of the cash portion of the purchase price was made as follows:

(i) payment in favour of a certain Mr Spykerman in the sum of R500 000,00 by virtue of a cheque appearing on page 360 of the Record;

(ii) R490 000,00 by virtue of a cheque made out in favour of Botha senior;

(iii) payment of a cheque made out in favour of AD Master Parts in the sum of R700 000,00;

(iv) a cheque in favour of AD Master Parts in the sum of R337 000,00; and

(v) a further cheque in the sum of R337 000,00 made out in favour of AD Master Parts .

[8] All the cheques and payments made in respect of the purchase price were forthcoming from the plaintiff, which was controlled by Mr Lubbe who was also one of the members of Superfecta Trading. Mr Botha senior signed the transaction relating to the Pinehaven property being used as a part payment. The defendant had no knowledge of the machinations of the transaction at the time but was merely informed that the transfer of the Pinehaven property to him was a donation in his favour. While the challenged agreement records the purchase price of the Pinehaven property as R100,00 it does not according to the evidence of the defendant, his father (Botha senior) and Mr Victor reflect the actual intention of the parties that the Pinehaven property be given as part-payment of the purchase price in respect of the farm Enkeldoorn.

[9] In his plea the defendant averred, before the trial commenced, as follows:

5.2.15 In these circumstances the disposition did not take place without value

> and in the overall scheme of the transactions between the parties, the plaintiff transferred the property to the defendant for R350 000-00 in part payment of the obligations of Superfecta to AD Master, in terms of the agreement between the parties.
>
> 5.2.16 In these circumstances the plaintiff's claim lies against Superfecta for repayment of the R350 000-00 which it loaned to Superfecta to enable Superfecta to comply with its obligations to AD Master.

[10] About a year later, the Pinehaven property was on-sold to one James Bertram Gibson for R350 000,00. At the time the defendant was unaware on this 'on-selling' transaction of the Pinehaven property. The defendant did not receive any proceeds of the sale. Mr Gibson was a *bona fide* purchaser.

[11] Mr Botha senior made it clear in his evidence that, in his assessment of the situation, the controlling mind behind the agreements to purchase Enkeldoorn was Mr Lubbe and that Mr Lubbe and the plaintiff were the *alter egos* of each other.

[12] Mr Victor testified that the other member of Superfecta Trading at the relevant time was Mr Lubbe, who was also the sole member of the plaintiff. Mr Victor he was aware of the fact that an agreement had been entered into in terms whereof AD Master Parts would sell to Superfecta Trading the farm Enkeldoorn together with the movable assets thereon for a purchase price of R2.95 million which was to be paid as R1.95 million in respect of the immovable property and R1 million in respect of the

movables. He was also aware of the following:

(i) payment for the purchase of the farm Enkeldoorn was to be made by way of certain payments which Mr Lubbe was to make and which Mr Lubbe made out of the plaintiff;

(ii) part-payment for the farm Enkeldoorn was to be effected by way of transfer of two properties from the plaintiff to AD Master Parts or Botha senior's nominee;

(iii) Mr Botha senior had nominated his two sons to take transfer of the properties which was the purchase consideration for the farm Enkeldoorn;

(iv) the original agreement between Superfecta Trading and AD Master Parts had been incorrectly drafted as reflecting the aggregate purchase price as R1.95 million, when this had been the sum agreed to in respect of the immovable property;

(v) after the valuation of the farm Enkeldoorn, Mr Lubbe approached Botha Senior and requested that the agreements be amended so as to reflect the purchase price in respect of the immovable property of R950 000,00 whilst the overall purchase price remained the same and to give effect thereto only page 2 of the first agreement was amended;

(vi) Superfecta Trading did not have a loan account in favour of the plaintiff but did have a loan account in favour of Mr Lubbe;

(vii) the loan account in favour of Mr Lubbe amounted to R3 329 033,00 as at 2005 as can be seen from the balance sheet of Enkeldoorn Lodge CC (previously Superfecta Trading CC);

(viii) whilst there was no agreement by Superfecta Trading to repay the plaintiff, there was an agreement by Superfecta Trading to repay Mr Lubbe the amounts in respect of the sale, most of which were amounts as reflected in his loan account;

(ix) Mr Lubbe had used the plaintiff as the vehicle through which to make payment and to make transfer of the properties, which formed part of the purchase price in respect of the farm Enkeldoorn, and Mr Lubbe believed that he could do so as the plaintiff owed him a substantial amount of money, which would be reduced by these payments, i.e. his loan account in the plaintiff would be reduced thereby;

(x) the members' interest in Superfecta Trading had subsequently been sold by him (Mr Victor) and Mr Lubbe to a certain Mr Van Staden in terms of an agreement of sale of members' interest;

(xi) the sale of members' interest agreement reflects that the sale

included both the members' interest and claims in Superfecta Trading;

(xii) when Mr Lubbe lent the money in question to Superfecta Trading, Mr Lubbe was in fact making use of the plaintiff's money.

[13] During the evidence-in-chief of Mr Victor the following appears:

Q: So what benefit would Pro-Med have received in relation to this?

A: M'Lord, Mr Lubbe and we had a discussion on various occasions about his membership with Pro-Med, and his opinion and attitude was that Pro-Med owes him a lot of money so he can use the money as he likes.

Q: So there would have been a reduction of the loan account of Mr Lubbe is that correct?

A: Yes.

Under cross-examination, Mr Victor conceded that there appeared not to have been a loan account in Superfecta Trading (now Enkeldoorn Lodge) in favour of the plaintiff.

Counsel for the plaintiff pressed the point and questioned Mr Victor as follows:

Q: Enkeldoring Lodge was not indebted to Pro-Med in any way?

A: Enkeldoring Lodge was not indebted to Pro-Med. Mr Lubbe took the money M'Lord, from Pro-Med account and paid.

Q: And what money are we talking about?

A: M'Lord, I am talking about the money that Peter-Lubbe paid from Pro-Med for the purchasing of the farm.

Q: Which will include the value of the stands no doubt?

A: That is correct, M'Lord.

Later, as the cross-examination progresses, the questioning reveals the following:

Q: So you are saying that Superfecta has no loan account for Pro-Med?

A: Yes, but for Peter Lubbe.

And later:

Q: So let us just get this straight Sir, In June 2003 Superfecta is a shelf company, you agree?

A: Yes

Q: It was bought solely for the purpose of acquiring this farm (Enkeldoorn) from AD Master Parts?

A; That is correct, M'Lord

Q: It had no assets?

A: At that stage it did not have any assets, M'Lord.

Q: Yet it requires for all its funding, some third party assistance. Do you agree with that?

A: M'Lord, Mr Lubbe paid the money.

> Q: In paying money Sir, he did not use Superfecta's money? No, M'Lord, he used Pro-Med'ss money.

And later:

Q: Is there any benefit that Pro-Med would have derived by paying Superfecta's debt, that you can think of?

> A: M'Lord, from Mr Lubbe's opinion, and he said it to me on several occasions that he had got a big loan against Pro-Med and that is why he can use the money of Pro-Med as he likes.

The audited financial statements of Superfecta Trading (later Enkeldoorn Lodge) show that as at 28 February 2004 and 2005, it did indeed owe Mr Lubbe in excess of R3,3 million on loan account.

[14] During the hearing of this appeal, counsel for the plaintiff protested that these answers by Mr Victor regarding the Plaintiff's indebtedness to Mr Lubbe and the loan accounts in favour of Mr Lubbe in the books of Superfecta Trading were 'hearsay'. Apart from the fact that the plaintiff, as a juristic person, would have spoken through Mr Lubbe as its sole member and director and that Superfecta Trading would have spoken through both Mr Lubbe and Mr Victor as its members and directors, there was no objection to this evidence when it was led in chief. Besides, since the case of *R v Perkins*[1] it has been trite that, in civil proceedings, a party cannot object to answers which it has elicited under-cross-examination.[2] The now contested evidence is admissible against the plaintiff.

[1] 1920 AD 307
[2] At 210

[15] The learned trial judge records in his judgment that he allowed the defendant, after the close of his case, to amend the value of the Pinehaven property from R350 000,00 to R299,900,00 and that he allowed the defendant to amend his plea to read as follows:

> In these circumstances, the plaintiff's claim lies against Superfecta alternatively Lubbe for payment of the R350 000,00 which it loaned to Superfecta to enable Superfecta to comply with its obligations towards AD Master Parts.

The plaintiff has protested that the amendment was not properly sought by the defendant and was wrongly granted, because it was not properly sought, and even if it was properly sought, should not have been allowed. Even if these points, relating to the amendment were to be good, they would have no bearing on the outcome of the case. The case turns on whether there was 'value' for the disposition in question.

[16] The plaintiff presented no evidence. It put up no version which contradicted the evidence presented by the defendant and the defendant's witnesses. The defendant and his witnesses were subjected to rigorous cross-examination and stood up well.

[17] The parties agreed, before the trial, that the plaintiff bore the overall onus to establish that the disposition was a disposition not made for value; that the defendant had a burden of rebuttal; and that the defendant had the duty to begin. Against this background of events, Makume J cannot be

faulted for accepting the defendant's version of events.

[18] The evidence is that the Pinehaven property was used, together with other assets of the plaintiff, to discharge a debt of Superfecta Trading to AD Master Parts that arose from Superfecta Trading's purchase of the farm, Enkeldoorn from AD Master Parts. *Ex lege*, that would have given rise to a corresponding claim by the plaintiff against Superfecta Trading (now Enkeldoorn Lodge). That disposition would have been matched by a corresponding legal obligation arising *ex lege*: the indebtedness of Superfecta Trading to the plaintiff.[3]

[19] Counsel for the plaintiff submitted that, because the evidence was that no loan appeared in the books of Superfecta Trading in terms of which it owed a debt to the plaintiff that corresponded with the purchase of the farm Enkeldoorn, this meant that there was no value for the disposition. As appears from the evidence referred to in paragraph [13] above, the fact that there was no such debt appearing in the books of Superfecta Trading was explained by Mr Victor in the following manner:

(i) Mr Lubbe was owed money by the plaintiff;

(ii) Mr Lubbe used assets of the plaintiff, including the Pinehaven property, to discharge the debt of Superfecta Trading to AD Master Parts for the purchase of the farm Enkeldoorn;

[3] See in this regard, *Froman v Robertson* 1971 (1) SA 115 (A) at 125A-B where Corbett AJA (as he then was) refers to Voet XII.6.9.

(iii) By so doing, Mr Lubbe reduced the indebtedness of the plaintiff to himself (Mr Lubbe);

(iv) The corresponding book entry (according to sound principles of double entry accounting) was that Superfecta Trading owed Mr Lubbe for the amount by which the indebtedness of the plaintiff to him was reduced in paying the debt of Superfecta Trading for the purchase of the farm Enkeldoorn.

[20] Section 26 of the Insolvency Act provides that 'every disposition of property not made for value may be set aside by the court', provided certain other provisions of the section are also met. In *Estate Jager v Whittaker*[4] the highest court in the land made it clear that one of the critical tests to determine whether a disposition was made for value or not was whether there was a *quid pro quo*. In *Goode v Durrant and Murray Limited v Hewitt and Cornell NNO*[5] Fannin J held that value need not be monetary or even tangible. As Selikowitz J observed in *Terblanche Nov Baxtrans CC and Another*,[6] after referring to the *Goode v Durrant* case 'some ascertainable commercial advantage will suffice'. In *Hurley v Seymour NO v WH Muller & Company*[7] the court held that the provision enabling the setting aside of dispositions without value was 'intended to strike at dispositions of property made by a bankrupt to the prejudice of his creditors without any value in exchange for it'.[8]

[4] 1944 AD 246 at 250
[5] 1961 (4) SA 286 (N) at 291F-G
[6] 1998 (3) SA 912 (C) at 915G
[7] 1924 NPD 121
[8] At p133

[21] This statement by Tatham J in the *Hurley v Seymour* case was approved by the court not only in the *Goode v Durrant* case but also in the case of *United Building Society Limited and Another NNO v Du Plessis.*[9] In *United Building Society v Du Plessis* the learned judge referred with approval to Mars' *The Law of Insolvency in South Africa*[10] where the learned author said; 'A disposition may be for value even though the recipient thereof has not himself given such value'.[11]

[22] In the particular matter before us on appeal, the agreement giving rise to the disposition was one between Mr Botha senior, acting for AD Master Parts and Mr Lubbe, acting for both Superfecta Trading and the plaintiff. That agreement was certainly not one without commercial advantage or without any *quid pro quo* to AD Master Parts, Mr Botha senior or Superfecta Trading (now Enkeldoorn Lodge).

[23] Both the defendant and the new owner of the Pinehaven property, Mr Gibson were entirely innocent. Besides, the defendant is now legally incapable of transferring the property back to the plaintiff. Mr Gibson has not been a party to the action. If anyone acted to the prejudice of the creditors of the plaintiff, it was Mr Lubbe who was also not cited as a party to the action. Although Mr Lubbe did not give evidence in the trial action, it is clear from the insolvency enquiry of the plaintiff, at which Mr Lubbe testified, that he had not known the defendant at the relevant times.

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[9] 1990 (3) SA 75 (W) at 91B

[10] 1998, Eighth Edition by E. De la Rey, Juta's: Cape Town

[11] At p211 in Mars' book. In *United Building Society Limited and Another NNO v Du Plessis* (*supra*) at 91B..

[24] In any event, it is clear from the evidence that the 'value' for the plaintiff in transferring the Pinehaven property was the reduction of its indebtedness to Mr Lubbe which was matched, in effect, by Superfecta Trading owing Mr Lubbe the money instead. Counsel for the plaintiff has contended that there was no evidence put before the court as to the amount of the plaintiff's indebtedness to Mr Lubbe at the time of the disposition. That evidence would have been peculiarly within the knowledge of the plaintiff. There is no requirement in law that the value must be 'fair'. The agreement by the defendant as to his evidentiary burdens did not go so far as to require such evidence by the defendant as to the plaintiff's indebtedness to Mr Lubbe. Besides, the plaintiff elicited evidence from Mr Victor under cross-examination that the plaintiff owed Mr Lubbe a substantial amount of money. It cannot be said that the disposition of the Pinehaven property was not for value.

[25] Accordingly, the learned trial correctly dismissed the plaintiff's claim with costs. The order of this court is as follows:

The appeal is dismissed with costs.

DATED AT JOHANNESBURG THIS 24TH DAY OF AUGUST, 2012

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N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

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J.P. HORN

JUDGE OF THE HIGH COURT

I agree.

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A. BAVA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. *G.D Wickins*

Counsel for the Defendant: Adv. *J.G Dobie*

Attorney for the Plaintiff: Brooks and Brand Incorporated

Attorney for the Defendant: Lloyd Kieser & Associates

Dates of hearing: 16th August, 2012

Date of judgment: 24th August, 2012