IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2012/44987

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE **SIGNATURE**

In the application of:-

BARNARD N.O., HENDRIK JAKOBUS RUST First Plaintiff

MICHAU N.O., JOHN DOUGLAS Second Plaintiff

MSHENGU N.O., THAMSANQA EUGENE Third Plaintiff
(In their capacity as the duly appointed liquidators
Of Blue Chip Snacks (Pty) Ltd (in liquidation)

And

FIRSTRAND BANK LIMITED t/a WESBANK Defendant

JUDGMENT

NICHOLLS, J

[1] This is an action by the joint liquidators of Blue Chip Snacks (Pty) Ltd ("Blue Chip") to set aside a sale by Blue Chip to the defendant, Firstrand Bank Limited t/a Wesbank ("Wesbank") on the basis that it is a disposition without value in terms of Section 26(1)(b) of the Insolvency Act No. 24 of 1936 ("the Act"), alternatively it constituted an undue preference to creditors in terms of Section 30(1) of the Act.

[2] The business of Blue Chip was the operation of a potato chip factory. Wesbank financed the acquisition of equipment and machinery utilised in the factory, including a production line known as the Kiremko line. It is the disposition of the Kiremko line that is the subject matter of this action. The liquidators claim that the disposition took place by way of a sale by Blue Chip to Wesbank in April 2010 for an amount of R661 067.079 when the true value of the Kiremko line was R4 475 000. They seek payment for the difference between the two amounts, namely the sum of R3 838 932.

[3] The facts are largely common cause:

3.1 Blue Chip, albeit then under a different name and as a close corporation, entered into a Master Instalment Sale agreement with Wesbank on 20 February 2002. In terms of the agreement Wesbank would retain ownership of the goods and had the right to repossess the goods on breach. Ownership would pass to Blue Chip on payment of the final instalment. The 'goods' were those defined in the first schedule.

3.2 On 5 December 2005 Blue Chip and Wesbank entered into a first schedule to the master instalment sale agreement in terms of which Westbank sold the Kiremko line to Blue Chip for an amount of R7 200 025.92 repayable in 48 monthly instalments of R150 000.54 each. Between December 2005 and March 2008 Blue Chip and Wesbank entered into numerous other first schedules, in respect of

other equipment in the factory. All in all Blue Chip and Wesbank concluded 23 separate first schedules.

3.3 By April 2010 48 month period in respect of the Kiremko line had expired, the agreement had lapsed and Blue Chip was in arrears in the amount of R650 376.66. Apart from another first schedule which had expired and on which there was an outstanding balance of R767.60, the other 21 first schedules still had remaining periods to run. The balance outstanding in respect of these unexpired agreements was R8 276 379.41.

3.4 Blue Chip was placed in provisional liquidation on 26 January 2011 and under final winding up on 10 March 2011.

[4] The administrator of the insolvent estate, attorney Mark Poole testified for the Plaintiff. Melda Pieters ("Pieters") (neé Walker) and David Jeffrey, ("Jeffrey") who were both employees of Wesbank at the relevant time, testified for the defendant. Agreement was reached between the two experts for the parties that the value of the Kiremko line as at the date of disposition was R4 475 000 and that it had a lifespan of 25 years at the time. This obviated the need for their testimony.

[5] Pieters testified that Blue Chip was in financial difficulty and had a weak balance sheet. This was confirmed by Jeffrey who said that in order to protect the bank and minimise Wesbank's loss, he negotiated a deal whereby the assets in respect of all 23 first schedules were moved out of Blue Chip and into a new company, Carnival Foods CC ("Carnival Foods") by way of a sale agreement to Carnival Foods of all the equipment.

[6] Pieters was instructed to draw up three settlement letters, one for R661 067.69 in respect of Kiremko line, one for R767.60 for the other lapsed sale agreement and another for R8 276 379.41 for the 21 other

assets in respect of which the instalment sale agreements had not lapsed. The sum of these settlement letters is equivalent to the purchase price of the deal negotiated by Jeffrey, namely the amount of R8 938 214.80 plus VAT.

[7] Pieters confirmed that no valuation was done of the individual assets and the settlement figure was calculated on the basis of the outstanding arrear amounts on all 23 assets. This is why in her email of 4 May 2010 it is recorded on the top "Email waiving special condition for pricing in line". This was a reference to the normal procedure whereby a new purchase would go through the credit vetting department of Wesbank to determine that the finance required was in line with the value of the asset. In this instance the requirement was waived. A valuation was not done because the price was fixed at the settlement value.

[8] In accordance with procedure, Wesbank procured an invoice from Blue Chip in an amount equivalent to the settlement values, namely R8 938 214.80 plus VAT, a total amount of R10 189 564.84. All the assets were listed and a value placed on each, being the amount outstanding on the instalment sale agreement in respect of each one. The Kiremko line was invoiced in the amount of the arrears, that is R661 067.79.

[9] According to Pieters Blue Chip would act as supplier and would sell the items to Wesbank. On receipt of an invoice from Blue Chip, Wesbank was in a position to deal with its new customer/buyer, Carnival Foods. Once confirmation of delivery was received from Carnival Foods, Wesbank would make payment of the invoice price to Blue Chip. The price on the invoice from Blue Chip and the amount charged to Carnival Foods was identical. It is common cause that delivery of the Kiremko line took place by way of *constitutum possessorium* and it remained in situ.

[10] Another master sale agreement was then concluded between Wesbank and Carnival Foods on 30 April 2010. The signatory on behalf of Carnival Foods was Manuel De Agrela, ("De Agrela") its sole member. The first schedule was concluded on 3 May 2010 for all the equipment as per Blue Chip's invoice, including the Kiremko line. The purchase price reconciled with the settlement amount of R10 189 564.85 (R8 938 214.80 plus VAT) to which a further R5 914 774.21 in respect of finance charges was added, a total of R16 104 339.06.

[11] It is clear that what occurred was that when Blue Chip experienced financial difficulties, De Agrela created another entity, Carnival Foods, to run the business. The Kiremko line was moved from Blue Chip to Carnival Foods without being disassembled and the entire factory, including the Kiremko line, remained in situ. It cannot be ignored that Manuel De Agrela, as the managing director of Blue Chip, concluded the sale agreement with Wesbank in terms of which all the equipment was sold at its settlement value, and also concluded the instalment sale agreement on behalf of Carnival in terms of which the equipment was sold to carnival at exactly the same price. The goods did not move nor did the factory. It appears that when Blue Chip was in financial difficulty, de Agrela merely continued to operate in the same premises, with same production line but under a different name.

[12] The liquidators allege that the transfer of the Kiremko line was a disposition without value to the prejudice of other creditors in that Wesbank had effectively transferred the Kiremko line and the debt from Blue Chip to Carnival Foods. This had the effect of depriving its other creditors of recovering any portion of their claims from the equity of R3 838 932.31 that should have been paid to Blue Chip in respect of the Kiremko line, once the arrears in the amount of R661 067.079 had been settled.

[13] The defendant submits that the sale of all 23 assets was an indivisible package and it is impermissible to assail individual components of an indivisible transaction as being without value. This type of sale was normal procedure which is accepted industry wide whereby suppliers sell assets to finance houses for the purpose of delivering the asset to the customer, in this instance Carnival Foods.

[14] Further it is contended that the transaction was clearly for value in that a purchase price of R8 938 214.80 was paid and that the alleged loss of R3 838 932 is offset by the gain. Wesbank accuses the liquidators of calculating the loss without considering the gain. This, it is submitted, is impermissible as it calculates the loss without reference to the package as a whole.

[15] What this argument fails to take into account is that if Wesbank wanted to raise this defence that value was given for the disposition, it should have pleaded this and provided sufficient detail of the alleged value[1]. This was not done and nor was it put to Poole that that Blue Chip received value from the transaction. The only defence raised in the plea is that the delivery of the Kiremko line formed "*part of an indivisible package".* It pleads no factual or legal conclusion flowing from this allegation

[16] Section 26 (1) (b) provides for the setting aside of "*dispositions without value"*:

> "*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 benefitted by the disposition is unable to prove that, immediately after the disposition is made, the assets of the*

[1] *Estate Wicks v Wicks* 1929 CPD 491; *Paruk and Others v Cousins NO*1948 (2) 830 (N)

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."

[17] Section 30 (1) provides for the setting aside of "*undue preferences to creditors"*:

"(1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.'

[18] Wesbank has conceded that the nature of the agreement between Blue Chip and Wesbank was a disposition; that it was a disposition made at a time when Blue Chip's liabilities exceeded its assets and that it was made within 2 years of the liquidation. It is also conceded that if it is found that the Krimeko line was sold to Wesbank for the sum of R661 067.079 as contended for by the liquidators, then this amounts to a disposition without value. However, it is argued that if regard is had to all the circumstances under which the transaction was made, it was an indivisible transaction made in the normal course of business, following a procedure that is widely accepted in the industry and cannot be viewed in isolation.

[19] It is argued by the liquidators that Jeffrey's testimony that his job was to ensure that Wesbank was not prejudiced and did not suffer a loss, is confirmation of an intention to prefer Wesbank. Whilst that may have been the self-proclaimed intention of Wesbank, when considering whether there was the intention to prefer, the intention to be considered is not that of the recipient but that of the insolvent.[2] There is no evidence that it was the intention of Blue Chip to prefer Wesbank over other creditors. It has been

[2] *Brands Trustees v Osman* 1926 NLR 253; *Du Plooy NO v National Industrial Credit Corporation Ltd* 1961 (3) SA 741 (W)

held that if an innocent motive can be inferred, it is the innocent conduct which must be attributed to the insolvent.[3] The claim to set aside the disposition in terms of section 30 of the Act cannot succeed.

[20] However, in my view the liquidators have made out a case for the disposition to be set aside in terms of section 26. The evidence establishes that whatever the parties may have labelled it, the delivery of the Kiremko line did not take place in terms of a sale in the true sense of the word. On Wesbank's version the agreement relating to the Kiremko line had lapsed. The amount still owing by Blue Chip was R661 067.079. On payment thereof ownership of the asset which was worth several million rand would pass to Blue Chip. This meant that Blue Chip was entitled to be paid the agreed market value of R4 475 000 less the arrears of R661 067.079, a sum of R3 813 932.31.

[21] Instead, without procuring any valuation therefor, the Kiremko line was simply delivered to Wesbank in settlement of the arrear amount of R661 067.079 as per the settlement letter. By this transaction the company in liquidation was deprived of the true value of the Kiremko line to the detriment of the other creditors. To argue that this was a component of an indivisible package does not assist Wesbank.

[22] In these circumstances the disposition of the Kiremko line amounted to a disposition without value that preferred Wesbank over Blue Chip's other creditors. It accordingly falls to be set aside. The parties have agreed that should this court set aside the disposition the judgment should sound in money rather than for the return of the Kiremko line. Further, it is agreed that the qualifying fees of experts be included in any costs order that may be made.

[3] Pretorius NO v Stock Owners Co_operative Co Ltd 1959 (4) SA 462 (A); cooper NO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)

In the result the defendant is ordered to pay to the plaintiffs:

[1] An amount of R3 813 932.21;

[2] Interest on the said amount at 15.5% per annum from the date of judgment until the date of payment;

[3] Costs of suit including the qualifying fees of the expert witnesses.

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C. E. NICHOLLS
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

Counsel of the applicant : Adv. G. Wickins

Attorneys for the Applicant: Brooks and Brand Inc.

Counsel for the respondent: Adv. C. Van Der Spuy

Attorneys for the respondent: Lanham-Love Attorneys

Date of hearing : 3 March 2014

Date of judgement : 11 March 2014