IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
DATE	**SIGNATURE**

CASE NO: 12304/2012

DATE: 16 October 2014

IN THE MATTER BETWEEN

CORNELIA MARIA CLOETE N.O.	1ST APPLICANT
KOBUS VAN DER WESTHUIZEN N.O.	2ND APPLICANT
MOHAMED WAHEED ESSOP N.O.	3RD APPLICANT
CORPORATE MONEY MANAGERS (PTY) LTD	4TH APPLICANT
REGENT GROUP CAPITAL (PTY) LTD	5TH APPLICANT
PIETER HENDRIK STRYDOM N.O.	6TH APPLICANT
JOHN RODERICK GRAEME POLSON N.O.	7TH APPLICANT
LOUIS STRYDOM N.O.	8TH APPLICANT
REGENT BOND DISCOUNTING (PTY) LTD	9TH APPLICANT

AND

QUENTIN RUPERT SMITH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] I am writing this judgment in English, although the applicants presented their case in Afrikaans. I am doing so for the benefit of the respondent.

[2] The applicants, by way of these opposed motion proceedings, seek an order for payment against the respondent of an amount of R5 million together with interest and costs.

[3] The first three applicants are the duly appointed liquidators of Classic Crown Properties 84 Close Corporation ("Classic Crown") which was voluntarily liquidated on 9 September 2009 after its members passed a resolution to that effect.

[4] The 6th, 7th and 8th applicants are the duly appointed curators of the 4th and 5th applicants.

[5] Before me, Mr Badenhorst SC, with Mr Schoeman, appeared for the applicants and Mr Rip SC, assisted by Mr Vorster, appeared for the respondent.

INTRODUCTION AND BRIEF SYNOPSIS

[6] The respondent is an accountant, practising as such in Kempton Park under the name and style of Q R Smith & Associates. Towards the latter part of 2005 the respondent

was approached by a certain Mr Eugene Kruger ("Kruger") to discuss a business transaction. Kruger was not very well known to the respondent but the latter had at that stage known Kruger's father, Jan, for many years. Jan Kruger was a fairly prominent property developer in the Kempton Park area. It appeared that Kruger wanted to follow in his father's footsteps when he told the respondent that he had signed an offer to purchase an immovable property from a certain Mr McDonnell.

Kruger knew that the respondent had previously been involved in some property developments and had a fairly good credit rating with the commercial banks. Kruger persuaded the respondent to come on board and, in the process, they both became 50% shareholders in Classic Crown.

[7] During October 2006 Classic Crown secured transfer into its name of the relevant property ("the property") known as Erf 7 Norton Home Estate, Benoni. In order for this to happen, Classic Crown had to register a first mortgage bond in favour of Standard Bank Ltd in the amount of some R3,7 million.

[8] The plan was for Classic Crown to develop the property into a residential estate comprising 57 individual full title stands. A professional team was appointed to apply for permission to establish a township and to prepare a site development plan.

[9] In his opposing affidavit, the respondent says that he, at that stage, paid the monthly bond instalments from his personal funds as well as the municipal rates and taxes on behalf of Classic Crown. The reason for this was that Classic Crown did not earn any income. As correctly pointed out by the applicants in their papers, there is no clear

proof of the extent of these payments allegedly made by the respondent on behalf of Classic Crown, other than his allegations on oath in the opposing affidavit, neither is there evidence of a loan account having been created in Classic Crown in favour of the respondent. In my view, not much turns on this for present purposes.

[10] The property measured some 2,9 hectares and the purchase price, in 2006, came to some R3,1 million.

[11] In January 2007, the respondent and Kruger prepared a detailed income statement containing projections of income and expenses to be created by the development project, and from this it appears that a profit of some R31,4 million was anticipated.

[12] In the weeks that followed, the respondent presented the business plan to several close friends and trusted clients. He believed that the project could be very profitable. Broadly speaking, and on a general reading of the papers, it can be said that the respondent recruited fourteen of his close friends and trusted clients ("the investors") who, in terms of pre-sale agreements, acquired the rights to fourteen of the proposed stands in the intended development, against payment of a deposit of R200 000,00 each. The total amount deposited came to R2,8 million. Against proclamation of a township, and registration of transfer of the properties, the investors stood to receive a handsome return on their money.

[13] According to the opposing affidavit, the "internal services" had all been installed by the middle of 2007. By then township proclamation had not formally taken place and

no individual stands could be sold. I add that there is some dispute on the papers as to the extent to which "internal services" had been installed.

[14] The respondent also persuaded a prominent client, Mr Alf Ferreira, the owner of Alf's Tippers CC to supply funding and earth moving equipment in return for certain future profits and interests. There is also some dispute in the papers about how many contractors actually took part in the development of the project, and there are also strong suggestions that some of the alleged contractors were family members of Kruger who were less than honest when preparing certain documents and invoices.

[15] Roughly during June or July 2007 Kruger approached the respondent with the idea to change the business plan. Kruger explained that he had met a reputable and trustworthy BEE partner and that he no longer wanted to continue with the proposed residential development but wanted Classic Crown to develop an upmarket boutique hotel with a view to accommodating visitors to the upcoming 2010 soccer world cup. The respondent did not like the idea, and also approached the investors who would not support the intended change in the business plan. All this led to a parting of ways between the respondent and Kruger. On 13 August 2007, they concluded a written agreement, a lengthy and involved printed affair, ("the interest sale agreement"), in terms of which the respondent sold his 50% share in Classic Crown to Kruger. The due date of payment was 3 September 2007. The money would be deposited into the trust account of Q R Smith & Associates, account no 4[…]. The purchase price was R5 million.

[16] In the opposing affidavit, the respondent also alleges that Kruger, at the time, agreed to refund the investors the fourteen deposits coming to R2,8 million, as described, although such a provision is not to be found in the interest sale agreement. However, there is support for this evidence of the respondent in the fact that Kruger, later, furnished the respondent with a cheque for R5 million (a Classic Crown cheque, dishonored by the bank) and another cheque (also of Classic Crown) for the R2,8 million which the respondent never deposited.

The respondent alleges in his opposing affidavit that the cheque for R5 million was handed to him by Kruger on 12 December 2007 and the cheque for R2,8 million, destined for the investors, was handed to him on 31 March 2008. A copy of this cheque is attached to the opposing affidavit and dated 31 March 2008. According to the respondent Kruger asked him not to deposit the cheque because there were no funds. The respondent suspects that Kruger handed him the cheque simply to influence him or persuade him to prepare the management accounts of Classic Crown which were needed for purposes of applying for a loan.

[17] On 13 August 2007 the respondent handed over the documentation signalling his resignation from Classic Crown and the Registrar of Close Corporations removed the respondent as a member on 10 December 2007. It is, therefore, common cause that the respondent ceased to be a member of Classic Crown on 10 December 2007. Although it is undisputed that he ceased to play an active part in the affairs of Classic Crown from about August 2007, he stayed on as the accounting officer.

[18] It is not disputed that Kruger involved Mr Ratha Krishnan Nayager ("Nayager") as his BEE partner, as already mentioned, from about the time when the respondent resigned. In his opposing affidavit, the respondent states that Nayager almost immediately took over the respondent's "functions" and even co-signed payment requisitions with Kruger during September and October 2007. There is also a letter, exhibit "QS4", on Classic Crown's letterhead, reflecting Nayager and Kruger as its members. It appears from repeated allegations made by the respondent in his opposing affidavit, that he had an expectation that Nayager would probably have to make a payment for his newly acquired 50% share in Classic Crown which payment could be utilised by Kruger to settle the latter's debt to the respondent for the purchase of the respondent's share.

[19] From a general reading of the papers, it is clear that exchanges took place between the parties featuring the displeasure of the respondent at the failure of Kruger to pay for the 50% interest that had been purchased. The amount was already payable, as I have said, by 3 September 2007 in terms of the provisions of the interest sale agreement. Excuses were offered and extensions for payment requested, but the money was not forthcoming. The respondent was embarassed by the disillusionment on the part of the investors, who were trusted friends and clients of his.

At one stage, Kruger found himself in Australia on holiday. When he returned towards the end of January 2008 a meeting was arranged between Kruger, the respondent and the investors. There was general talk by Kruger that arrangements were underway to obtain additional finance so that the claim of the respondent could be paid. According to the respondent, this was the first time that he got wind of the

fact that such finance could be forthcoming from the 9th applicant and not, as the respondent had imagined, from the bond holder, Standard Bank, who may have consented to the registration of a second mortgage bond. Not much turns on this.

[20] What is, however, of crucial importance for present purposes, is the fact that, on 4 February 2008, the respondent received a payment of R5 million ("the 4 February payment"). This is the amount which the applicants are seeking to recover from the respondent in this application, mainly basing their claim on the provisions of sections 51 and 70 of the Close Corporations Act no 69 of 1984. There is an alternative claim aimed at setting aside the payment to the respondent as a disposition without value, as intended by the provisions of section 26 of the Insolvency Act no 24 of 1936. Further alternative claims were abandoned in the course of the proceedings.

[21] Sadly, the path later travelled by Classic Crown was not covered in glory: on 27 May 2009, almost two years after the respondent resigned as a member, the 9th applicant obtained judgment by default against Classic Crown as well as Kruger and Nayager, as second and third respondents, in the South Gauteng High Court, in an amount of some R21 million. As I understand it, this is the escalated claim flowing from financing to the tune of some R12,2 million obtained by Kruger from the 9th applicant early in 2008. Although the details are not altogether clear, it seems that the debt to the 9th applicant was already repayable by 23 April 2008. When the judgment aforesaid was granted in favour of the 9th applicant against Classic Crown, Kruger and Nayager, the court also declared the property on which the development of either the housing project or the boutique hotel was to take place, executable.

On 9 September 2009 Classic Crown was placed in voluntary liquidation on the strength of a resolution to that effect passed by its members, presumably Kruger and Nayager. This is when the first three applicants, who are really driving this litigation, were appointed as liquidators of Classic Crown. I add that, on a general reading of the papers, the remaining applicants, no 4 to no 9, do not feature prominently in the papers, neither did their participation receive any particular attention during the proceedings before me. One of the alternative claims was apparently based on the finance obtained from the 9th applicant, but this claim was abandoned.

[22] So much for the introduction and synopsis.

THE RELEVANT STATUTORY PROVISIONS

[23] The main claim is contained in prayer 2 of the notice of motion. Freely translated, an order is sought directing the respondent to repay the amount of R5 million paid to him by Classic Crown on the strength of the provisions of section 70(2) read with section 51(1) of the Close Corporations Act 69 of 1984.

[24] Prayer 4 of the notice of motion is aimed at setting aside the payment of R5 million as a disposition without value in terms of section 26 of the Insolvency Act 24 of 1936.

[25] Prayer 7 contains a further alternative claim at the instance of the 6th, 7th and 8th applicants, as curators of the 4th and 5th applicants, based on an alleged cession agreement. This claim was abandoned, and received no attention before me.

[26] Prayer 8 of the notice of motion contains the claim, to which I have referred, crafted in the name of the 9th applicant on the strength of an alleged loan. This was also abandoned.

[27] There are also prayers for *mora* interest and costs. The costs order is sought on a punitive scale.

[28] The relevant provisions of section 70 of Act 69 of 1984 read as follows:

> "70. **Repayments by members. –**
>
> (1) Subject to the provisions of this section, no member of a corporation shall in the winding-up of the corporation be liable for the repayment of any payment made by the corporation to him or her by reason only of his or her membership, if such payment complies with the requirements of section 51(1).
>
> (2) In the winding-up of a corporation unable to pay its debts, any such payment made to a member by reason only of his or her membership within a period of two years before the commencement of the winding-up of the corporation, shall be repaid to the corporation by the member, unless such member can prove that-
>
> (a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and
>
> (b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and

(c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business.

(3) A person who has ceased to be a member of the corporation concerned within the said period of two years, should also be liable for any repayment provided for in subsection (2) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation."

[29] Section 51 of Act 69 of 1984 reads:

"**Payments by corporation to members. –**

(1) Any payment by a corporation to any member by reason only of his or her membership, may be made only –

(a) if, after such payment is made, the corporation's assets, fairly valued, exceed all its liabilities;

(b) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and

(c) if such payment will in the particular circumstances not in fact render the corporation unable to pay its debts as they become due in the ordinary course of its business.

(2) A member shall be liable to a corporation for any payment received contrary to any provision of subsection (1).

(3) For the purposes of this section –

(a) without prejudice to the generality of the expression 'payment by a corporation to any member by reason only of his or her membership', that expression –

(i) shall include a distribution, or a repayment of any contribution, or part thereof, to a member;

(ii) shall exclude any payment to a member in his or her capacity as a creditor of the relevant corporation and, in particular, a payment as remuneration for services rendered as an employee or officer of the corporation, a repayment of a loan or of interest thereon or a payment of rental; and

(b) 'payment' shall include the delivery or transfer of any property."

[30] Section 26(1) of the Insolvency Act, no 24 of 1936, reads 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) more than two years before the sequestration of his estate, and if it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(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."

THE 4 FEBRUARY PAYMENT: WAS IT MADE UNDER CIRCUMSTANCES WHICH WOULD RENDER THE RESPONDENT LIABLE IN TERMS OF SECTION 70 AND SECTION 51?

[31] On a general reading of these provisions, it appears that the applicants have to establish that:

(i) the payment was made by Classic Crown to the respondent; and

(ii) the payment was made to the respondent by reason only of his membership; and

(iii) where the respondent ceased to be a member even before the payment was made, but did so within the two year period before the winding-up, that the respondent is liable for a repayment to the extent that repayments by present members (presumably those who were members at the time of the winding-up) together with other available assets are insufficient for paying all the debts of Classic Crown – section 70(3).

[32] If all this has been established, it would appear that the respondent will then have to show:

(i) after the payment was made (in other words on 4 February 2008) Classic Crown's assets, fairly valued exceeded all its liabilities; and

(ii) the payment was made while Classic Crown was able to pay its debts as they became due in the ordinary course of business; and

(iii) the payment, in the particular circumstances, did not in fact render Classic Crown unable to pay its debts as they became due in the ordinary course of its business.

[33] As is generally the case, discharging the *onus* of proof is of crucial importance.

[34] The applicants seek final relief on motion. Although I mooted the subject during the proceedings, there was no application to refer any issue to evidence in terms of the provisions of section 6(5)(g) of the Uniform Rules of Court.

[35] In *Plascon-Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (AD) at 634H-I the following is stated:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[36] The following is also stated at 635B-C:

> "Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ..."

In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 3 SA 371 (SCA) the following is stated at 375D-F:

> "Recognising that the truth almost always lies behind mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers ..."

In *National Scrap Metal (Cape Town) (Pty) Ltd and another v Murray & Roberts Ltd and others* 2012 5 SA 300 (SCA) the following is stated at 307 paragraphs [21] and [22]:

> "[21] These factors – particularly collectively – do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the High Court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below), unless they were 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the

appellants is so far-fetched and improbable that it can be rejected without evidence.

[22] As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence is being led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known *dictum* in *John v Rees and others* ...:

'As everybody that has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.'"

[37] The learned authors Zeffertt and Paizes, *The South African Law of Evidence* 2nd ed at p180 also deals with the subject under the heading "affidavits and motion proceedings".

Here are some of their observations:

"A person who produces on paper the evidence of a witness is, as a rule, remarked Wessels J in *Robinson v Randfontein Estates Gold Mining Ltd* 1918 TPD 420 at 422, at a disadvantage, because the court will pay more attention to the evidence of witnesses who appear before it."

The learned authors also refer to *National Director of Public Prosecutions v Zuma* (still unreported when the textbook was published but later reported at 2009 2 SA 277 (SCA)) where the learned Deputy President says the following at 290D-G:

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such an order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[38] Against this background, I must attempt to determine the circumstances under which the 4 February payment was made.

[39] Significantly, there is no evidence before me from two of the main players, Kruger and Nayager, who may have been able to make a vital contribution towards clearing up any uncertainties.

[40] The applicants were not in a position to offer any evidence from anyone directly involved with the making of the 4 February payment.

(i) The applicants' version in the founding affidavit with regard to the 4 February payment

[41] The applicants deal with the two cheques handed to the respondent late in 2007, already referred to in the introduction to this judgment. They put it as follows:

> "Gedurende November 2007 oorhandig Kruger 'n tjek van R2.2 miljoen aan die respondent, vooruit gedateer vir 12 Desember 2007, asook 'n tjek vir R2.8 miljoen, na bewering om betaling te maak aan beleggers wat die respondent gewerf het, vir die koop van erwe van Classic Crown. Laasgenoemde tjek is gedateer vir 31 Maart 2008."

The reference to the cheque of R2,2 million appears to be a mistake. As is stated in the introduction, it was a cheque for R5 million dated 12 December 2007. This is exhibit "QS9", attached to the opposing affidavit. The cheque for R2,8 million is correctly stated by the applicants to have been post-dated for 31 March 2008 (as appears from the introduction) and it is common cause that it was intended to compensate the 14 investors who each deposited R200 000,00 as already stated. The last-mentioned cheque is exhibit "QS14". The respondent's evidence that he never banked the cheque is not disputed. This also appears from the face of the cheque which is attached to the opposing affidavit.

[42] The applicants also referred to Kruger's visit to Australia and the meeting he had with the respondent and the investors upon his return and the fact that he then disclosed that he would be making use of a new financier, the 9th applicant. They refer to the fact that the respondent, at that time, also contacted one Ms Gill Harding at the 9th applicant to establish what progress was being made to obtain finance.

The applicants alleged that Kruger submitted a schedule of invoices representing expenses incurred by Classic Crown during the development process and on the strength of that information, Kruger managed to secure financing to the tune of some R12,2 million. It is alleged that the financing was for Classic Crown. It is suggested by the applicants that this amount obtained from the 9th applicant would be utilised towards settling the first bond in favour of Standard Bank (some R3,8 million) and paying the contractors who allegedly did the work as appears from the invoices (some R6,9 million).

[43] The applicants then go on to make the following submission which is perhaps the high-water mark of their case against the respondent with regard to the 4 February payment:

> "Op 4 Februarie 2008 slegs enkele dae na ontvangs van die leningsbedrae van Regent Bond in die bankrekening van Classic Crown, is die respondent die bedrag van R5 miljoen betaal uit die rekening van Classic Crown, by wyse van 'n elektroniese oorplasing, soos bevestig word in aanhangsel 'CM12'. Die respondent het tydens die insolvensie ondervraging erken dat hy die bedrag persoonlik ontvang het en dat hy dit ontvang het van Classic Crown."

"CM12" (which the respondent also attached to the opposing affidavit as "QS11") is a "statement enquiry" dated 16 October 2009 (some eighteen months after the 4 February payment was made) reflecting the account number of Classic Crown (1948074923) and containing the following entry next to the date 4 February 2008: "EFT TR Smith & Associates R5 000 000.00".

The respondent denies these allegations in paragraph 20 of the opposing affidavit in the following terms:

> "20.1 As explained earlier in this affidavit, my accounting practice's trust account received payment in a total amount of R5 000 000,00 (five million rand) on 4 February 2008. The payments were not received from the close corporation, but were received from Eugene personally.
>
> 20.2 I have also explained that the payment was received in four deposits (two payments of R1 000 000.00 and two payments of R1 500 000.00)."

The insolvency interrogation referred to in the passage quoted from the founding affidavit, is a lengthy document, running into some 177 pages, attached to the replying affidavit so that the respondent did not have the opportunity to comment thereon, unless it can be argued that he should have later filed a duplicating affidavit. The document purports to be a record of an insolvency interrogation in terms of section 152 of the Insolvency Act, which is normally convened by the Master. It is dated 24 May 2010, more than two years after the 4 February payment was made. The enquiry was evidently convened by the liquidators (the first three applicants) and they were represented by the first applicant and two attorneys. The document reflects

evidence given by the respondent, represented by counsel, who did not appear to take a very active part in the proceedings. The presiding officer was magistrate Ms Horn. At the commencement of the enquiry Mr Smith was informed that it amounted to no more than an information session and that no findings of any description would be made. This appears to have been the case. In answer to a question, the respondent said that his occupation was that of a chartered accountant and auditor in private practice ("geoktrooieerde rekenmeester en ouditeur in privaat praktyk"). During the course of the proceedings it was also, at times, suggested that Kruger also testified, but his testimony was not placed before me. There was initially an objection against the admissibility of the transcript of this evidence, but the objection was not proceeded with. The parties were permitted to refer to passages from the evidence led during the interrogation. I will return to a brief reference to the transcript of this evidence.

(ii) The respondent's version, contained in his opposing affidavit with annexures, of the 4 February payment

[44] In the introduction, I already made brief reference to some aspects of the respondent's evidence.

[45] When it was learnt that Kruger had departed for Australia, the respondent was hounded for information and payment by his trusted friends and clients, ie the investors. When they heard that the December 2007 cheque had been dishonoured, the investors thought that Kruger had left the country with their money. The respondent was embarassed by the whole situation given his personal relationship with the investors.

[46] It is convenient to quote the respondent's version about the 4 February payment as set out in his opposing affidavit:

"3.29 On 4 February 2008 I eventually received payment from Eugene. I wish to stress the fact that I did not receive payment from the close corporation, as alleged by the applicants, but directly from Eugene. I annex hereto as annexure 'QS10' the trust bank statements of my accounting firm, QR Smith & Associates, for the relevant period. On the second page of the statements it can be seen that on 4 February 2008 I received four deposits from Mr Kruger. The four deposits (totalling R5 000 000,00) were all received through electronic fund transfers from four different account numbers. None of these account numbers are the close corporation's account number held at Nedbank Ltd. The close corporation operated account no 1948074923. In this regard I humbly draw the attention of the honourable court to a copy of the close corporation's account statement for February 2008 which is annexed hereto as annexure 'QS11'. (My note: as I have already indicated, this is the same as 'CM12' to the founding affidavit. I have referred to the 4 February 2008 entry 'EFT TR Smith & Associates R5 000 000,00'.)

3.30 In the light of the above I deny that I have received any payments from the close corporation *in lieu* of the sale of my members interest. I reiterate the fact that the four payments were received directly from Mr Kruger. To the extent that the close corporation's bank statement refers to an electronic fund transfer to TR Smith & Associates I humbly point out that my firm's name is QR Smith & Associates. Also, from

practical and personal experience, I know that the description on a bank statement is left to the discretion of a client. Clients can literally include any description on their own bank statements. No value can be attributed to the description on the statement. (The emphasis is by the respondent.)

3.31 After receipt of the 4 (four) deposits I made arrangements with the investors in the fourteen stands to pay their investments in the agreed amount of R200 000,00 each. I have kept to this undertaking and made almost immediate payment to all investors. I will later in this affidavit annex confirmatory affidavits from some of the investors confirming that they have received payment from my accounting firm's trust account. (My note: a number of such confirmatory affidavits by a number of investors are indeed attached to the answering affidavit. These affidavits generally end with the sentence 'I confirm that I was one of the persons who invested in the 14 stands in the intended development and further confirm that I received payment as described in the opposing affidavit during February 2008 from QR Smith & Associates accountants'. The applicants, in the lengthy replying affidavit, running into some 327 pages with the annexures, made an issue of the fact that these repayments to the investors were evidently structured in such a way that the monies were paid to a company in which the respondent had an interest, Mavava Trading 168 (Pty) Ltd which company then paid the investors. In my view, nothing turns on this, given the crisp issue under consideration and it is, in any event, undisputed that the respondent parted with R2,8 million which went

back to the investors and respondent only retained R2,2 million which is all he ever received for his 50% interest in Classic Crown despite having contracted to sell it for R5 million.)

3.32 As far as the balance of the money, being an amount of R2 200 000,00, is concerned I declared the receipt of this amount as an income of a capital nature and paid capital gains tax on this income to the Receiver of Revenue."

[47] "QS10" is the trust account (a cheque account) of QR Smith & Associates held in Absa Central Avenue, Kempton Park. It was issued on 8 February 2008, four days after the payment and covers the period 9 January 2008 to 6 February 2008. The account number 4056813704 is the number reflected in the interest sale agreement as the nominated account into which the purchase price of R5 million would be deposited by Kruger. The four credit transfers of R1 million, R1,5 million, R1,5 million and R1 million are all dated 4 February 2008 and originate from four different accounts in the name of E Kruger. Apart from the four credits, it also reflects six other small credits ranging from R1,55 to R1 283,40. There is no sign of the alleged credit transfer from Classic Crown to the respondent on 4 February 2008 as purportedly reflected in "QS11", the "statement enquiry" dated 16 October 2009. This is perhaps not surprising, because if there had been such a credit entry on the respondent's account, it would mean that he received R10 million on that day and not only R5 million. If the R5 million purported electronic transfer to "TR Smith & Associates" on 4 February 2008 was indeed made in that form and received by the respondent, as was put to him at the insolvency enquiry to which I will revert, then what happened to that credit transfer? Must one then, in attempting to decide these

disputes on affidavit, embark upon speculation? Perhaps Classic Crown, after all, did not electronically transfer the R5 million to the respondent (as was put to him at the enquiry) but to Kruger? Would Kruger then, somehow, split the money into four portions, deposit those amounts into four of his accounts and, on the same day, credit the four amounts to the respondent? Why would he do it? Would he already at that stage, in February 2008, anticipate a possible claim against the respondent based on sections 70 and 51? Or did Kruger, perhaps, obtain the R5 million from Classic Crown after negotiating some counter-performance or undertake to refund the money to Classic Crown? Or did Nayager, for example, make some payments to Kruger because, after all, Nayager had to pay for the 50% interest in Classic Crown? And if the respondent received the R5 million from Classic Crown on 4 February, as was put to him at the enquiry and as he admitted, why would Kruger, who, as a member, would on the probabilities have known about the transfer, still see fit to pay another R5 million in four different proportional amounts?

[48] Against this background, the question to be considered is whether I can, and ought to, decide that the applicants, on affidavit, discharged the *onus* of establishing that the 4 February payment was made to the respondent by Classic Crown and not, for example, by Kruger under circumstances which fall outside the ambit of sections 51 and 70. As I pointed out, Kruger and Nayager did not offer any evidence. There is no evidence by any banking official. Mr Rip also submitted, and there is something to be said for this submission, that the first three applicants, as liquidators of Classic Crown, would have had access to all Classic Crown's documents, including bank statements and the like but they did not offer anything by way of annexures to their papers to establish a clear answer to the question.

In this regard it is convenient to revisit some of the remarks made by the learned Judge of Appeal in *National Scrap Metal, supra*:

> "An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.
>
> As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush ..."

[49] As to the version of the respondent, I am not persuaded that his allegations or denials "are so far-fetched or clearly untenable" that I would be justified in rejecting them merely on the papers, in the spirit of the Plascon-Evans principle. In my view, the allegations of the respondent find compelling support in his bank statement, "QS10", reflecting the four payments made by Kruger on 4 February 2008 from four accounts, not one of which belongs to Classic Crown. "QS10" covers the period 9 January to 6 February, and there is no sign of the alleged R5 million electronic transfer from Classic Crown to the respondent. The four payments were made by Kruger into the account number which was specified in the interest sale agreement. Shortly before 4 February, there was an urgent meeting between Kruger, the respondent and the investors. Kruger must have been alive to the embarrassment experienced by the

respondent because his trusted clients and friends, the investors, were being let down. The payment was not made without value or just cause: the respondent was entitled thereto in terms of the interest sale agreement. He parted with the 50% interest in favour of Kruger at a time when they both projected a R31,4 million return on that particular project. The debtor who owed the respondent the money, was Kruger, who, ostensibly, made the payment *ex facie* "QS10". At one point in his opposing affidavit, the respondent states that when he received the payment, he treated it as part payment for his members interest and part payment for the investors. Indeed, this approach is supported by the uncontested evidence that the respondent then parted with R2,8 million in favour of the investors and only retained R2,2 million which he declared for tax purposes. This is all he ever received.

[50] On this basis, and in terms of the Plascon-Evans principle, I must decide the dispute on the version of the respondent.

(iii) Brief remarks about what was said at the insolvency enquiry

[51] As pointed out, the enquiry was held on 24 May 2010, more than two years after the 4 February payment was made and almost two years before the application was launched against the respondent on 29 February 2012. As mentioned, the transcript of the evidence was not attached to the founding affidavit, although there was reference to the enquiry made in that document, but it was only attached to the replying affidavit. It was not, and could not, be commented upon in the opposing affidavit, unless the defendant were to file a duplication. It is obvious that the transcript must have been available to the applicants by the time the application was launched almost two years after the enquiry took place. I am not entirely in sympathy with the

procedure adopted, but did not interfere when the initial objection against the admissibility of the transcript was not proceeded with.

[52] I also mentioned that, at the commencement of the enquiry, the respondent was informed that it would only be an information session ("inligtingsessie") and that no findings would be made. This is what happened. At the end of the enquiry, it was simply postponed by the learned magistrate who informed the respondent that if further information were to be required he would be contacted.

[53] Although not much debate took place before me with regard to the contents of the transcript, it appears that the high-water mark of the applicants' case (also referred to in the founding affidavit, paragraph 17.4, and in the opposing affidavit. I quoted both those passages from which it appears that the respondent denied the allegations and insisted that Kruger made the payments) is the following exchange which took place between the applicants' attorney and the respondent:

> "MNR CROUSE: ... en so in die middel van die bladsy sal u sien daarso is 'n elektroniese oordrag EFT TR Smith & Associates vir R5 miljoen. Dis maar QR Smith & Associates.
>
> MNR SMITH: QR Smith & Associates.
>
> MNR CROUSE: En dit is die R5 miljoen wat u ontvang het?
>
> MNR SMITH: Korrek agbare.
>
> MNR CROUSE: Goed, en die feit dat u daardie bedrag ontvang het is nie in dispuut nie?
>
> MNR SMITH: Nie in dispuut nie, glad nie.

> MNR CROUSE: Agbare ek het geen verdere vrae vir mnr Smith op hierdie stadium nie ..."

The electronic transfer referred to is the one on "QS11", also "CM12", the "statement enquiry dated 16 October 2009".

I have already referred to all the imponderables emerging from "QS11" and the fact that the electronic transfer does not appear on "QS10", the account of the respondent. As I read the exchange, the respondent also did not admit that he received the payment personally as alleged in the founding affidavit. Obviously, the respondent was not confronted with "QS10", his bank statement dated 8 February 2008 showing the four payments made by Kruger on 4 February 2008. Where the respondent testified more than two years after the 4 February payment was made, and where his memory was not refreshed as to the contents of "QS10", his concession of having received R5 million, which is indeed what happened, is perhaps not surprising. The respondent was not cross-examined in the context of a claim based on sections 51 and 70. Such a claim was clearly not in his contemplation, and perhaps not in the contemplation of the applicants either at the time and only saw the light almost two years later. The respondent was only told that it would be an information session and that no findings would be made. Where I did not have the benefit of hearing *viva voce* evidence or cross-examination on the contents of the transcript or the benefit of the respondent's reaction thereto, I am not persuaded that this passage relied upon by the applicants, such as it is, ought to influence my decision, already recorded, to deal with the matter in terms of the Plascon-Evans principle.

[54] I add that, by and large, from a cursory reading of the transcript, the evidence of the respondent appears to correspond with what he states in his opposing affidavit.

Significantly, one gets the impression that the respondent thought that Kruger himself would be getting the finance in order to meet his obligations to respondent in terms of the interest sale agreement. When discussing the January 2008 meeting after Kruger returned from Australia, the respondent says the following:

> "In Januarie op daai stadium toe het ons weer 'n vergadering gehad met my beleggers saam met mnr Kruger waarin mnr Kruger gesê het hy het nou van finansierder verander, hy gaan nou na Regent Bank toe en Regent Bank gaan hom slegs R5 miljoen gee vir my transaksie en dat al die beleggers sal moet wag tot en met registrasie." (p447)

He also says -

> "Hy (Kruger) deel ons mee, die hele vergadering, dat hy 'n R5 miljoen transaksie by Regent versekureer het vir die uitkoop van my belang. Die transaksie sloer nog steeds, sloer nog steeds. Op die 30ste Januarie skakel ek self vir Regent praat met 'n dame Gill Harding ... Me Harding deel my mee dat mnr Kruger se fasiliteite in plek is en dat daar nie verdere probleme sal wees met enige uitbetalings nie ..." (Emphasis added.)

[55] I do not consider it necessary to analyse the transcript any further for present purposes. For the reasons mentioned, I am not persuaded that the transcript, offered as it is in this matter without evidence or cross-examination thereon, serves to advance the case

of the applicants to the extent that it ought to be found that the applicants managed to discharge the *onus* resting upon them.

WAS THERE A PAYMENT MADE TO THE RESPONDENT "BY REASON ONLY OF HIS MEMBERSHIP"?

[56] Given the wording of sections 51 and 70, the applicants have to establish that the payment of R5 million was made by Classic Crown to the respondent and that it was made "by reason only of his or her membership".

[57] By deciding the dispute on the version of the respondent, in terms of *Plascon-Evans*, I have already found that the payment was not made by Classic Crown but by Kruger. This should signal the end of the enquiry, because it is required that the payment sought to be recovered must be made by the corporation to a member (or someone who ceased to be a member within the two year period prior to the winding-up, which applies to the respondent).

[58] Nevertheless, it may be convenient to take the enquiry further. The phrase "by reason only of his or her membership" is not defined in Act 69 of 1984, but, in terms of section 51(3), it does include "a distribution, or a repayment of any contribution, or part thereof, to a member". This inclusion is introduced "without prejudice to the generality of the expression" but, in any event does not apply to the respondent.

The exclusions, introduced by section 51(3)(a)(ii), are also recorded "without prejudice to the generality of the expression" and also do not apply to the respondent.

[59] I could find no authorities where the meaning of this phrase was judicially considered and pronounced upon, neither was I referred to any.

[60] However, judging by what the legislature considered to be included in the phrase, namely "a distribution, or a repayment of any contribution, or part thereof", I am unable to conclude that the 4 February payment, made as it was under the circumstances described, can be held to have been "a payment by reason only of his membership". The interest sale agreement in terms of which respondent sold his share in the corporation to Kruger, is already dated August 2007, some five months before the 4 February payment. The weight of the evidence unquestionably suggests, as I also found when deciding the case on the version of the respondent, that the payment was made in settlement of Kruger's obligation towards the respondent flowing from the interest sale agreement. It was made months after the respondent had ceased to be a member. Nayager had taken over from the respondent. The payment represented the settlement of an overdue debt. The debt was not that of the corporation but of Kruger. The four entries on "QS10" also suggest that Kruger made the payment. The payment was also made after pressure was applied towards Kruger by the respondent and the frustrated investors. Indeed, part of the payment may even have been intended for the settlement of the claims of the investors – see paragraph 6.3 of the opposing affidavit.

[61] Under these circumstances, I am not persuaded that the payment, even if it was made by the corporation, which I have found not to have been the case, was made "by reason only of the respondent's membership".

[62] For this reason, also, it seems that one of the jurisdictional requirements which has to be met by a corporation in order to successfully claim a refund in terms of sections 51 and 70, has not been established and the application, for that reason too, ought to fail.

DID THE CORPORATION'S ASSETS, FAIRLY VALUED, STILL EXCEED ITS LIABILITIES AFTER THE 4 FEBRUARY PAYMENT WAS MADE, AND DID THE 4 FEBRUARY PAYMENT RENDER THE CORPORATION UNABLE TO PAY ITS DEBTS AS THEY BECAME DUE IN THE ORDINARY COURSE OF BUSINESS? (SECTION 70(2))

[63] This enquiry has also become academical in view of my conclusion that the dispute had to be determined on the version of the respondent.

[64] I add, however, that detailed submissions were made to me on this question from both sides. I am also alive to the fact that the *onus*, on this particular question, appears to be on the respondent.

I find myself quite unable, on these affidavits, to determine the answer to the questions posed in section 70(2)(a), (b) and (c).

The only remark I wish to make is that the financial position of the corporation must clearly be decided immediately after the 4 February payment was made. At that stage, it seems that things had not yet deteriorated to the level where the substantial judgment was granted more than two years later in May 2009 and the winding-up took place even later, in September 2009.

[65] In support of his own case, the respondent obtained a signed valuation from Attie Ebersöhn Waardasies which was attached to the opposing affidavit. I was not called upon to analyse the document but, on a general reading thereof, it appears to be a detailed affair with appropriate annexures. What the valuator was instructed by the respondent to determine was the following:

> "Vir doeleindes van hierdie waardasie word die totale ontwikkelings projek op datum van waardasie beskou as die eiendom, met geïnstalleerde dienste en byna voltooide muur en waghuis, maar sonder die verwagte inkomste uit die verkoop van bou pakette. Vir doeleindes van die waardasie word dit beskou as aparte onderneming van Classic Crown Properties 84 BK wat net sowel deur 'n ander persoon of instansie as projek met winsoogmerk hanteer sou kon word."

The valuator was instructed to determine the value as at 4 February 2008. He came up with the figure of R19 million.

The applicants attached no valuation to their founding papers but to their replying affidavit they attached a valuation, dated 13 October 2009, in terms of which the valuators came up with the figure of R3,2 million or R2,2 million on a forced sale basis. There is no indication that the valuation was made as at February 2008. The document is also unsigned.

[66] As already indicated, I am not able, on the available documents, to determine an answer to the statutorily posed questions referred to. Some of the submissions made by counsel appear to be based, at least to an extent, on speculation and some do not

appear to take into account the position as at 4 February 2008, when matters were still relatively more favourable from the point of view of the corporation.

SECTION 70(3)

[67] As far as I can make out, the applicants failed to address the question as to whether or not their claim ought to be limited "to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation". This apparent *lacuna* in their case, cannot redound to the benefit of the applicants.

WAS THERE A DISPOSITION WITHOUT VALUE TO THE RESPONDENT AS INTENDED BY THE PROVISIONS OF SECTION 26 OF THE INSOLVENCY ACT 24 OF 1936?

[68] I have found that the corporation made no disposition to the respondent.

[69] Consequently, this question must be answered in the negative.

CONCLUSION

[70] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that the application must fail.

COSTS

[71] The costs ought to follow the result. I find no basis for ordering costs to be paid on a punitive scale.

ORDER

[72] I make the following order:

1. The application is dismissed.

2. The applicants, jointly and severally, are ordered to pay the costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

12304-2012

HEARD ON: 31 JULY 2014
FOR THE APPLICANTS: M A BADENHORST SC ASSISTED BY Z SCHOEMAN
INSTRUCTED BY: CROUSE INC
FOR THE RESPONDENT: M M RIP SC ASSISTED BY J VORSTER
INSTRUCTED BY: JOHANN DE WET ATTORNEYS