REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54704/2013

12/12/2016

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

12·12·2016 .....
SIGNATURE **DATE**

In the matter between:

LOUIS MARIUS TALJAARD N.O	1st Plaintiff
CHEBO CHAZA N.O	2nd plaintiff

and

JOHANNES VAN DEN HEEVER	1st Respondent
THE REGISTRAR OF DEEDS	2nd Respondent
NEDBANK LTD	3rd Respondent

JUDGMENT

AC BASSON, J

Nature of the application

[1] This is an application by the joint liquidators of a closed corporation (Sunset Point Properties 212 CC – "Sunset") in liquidation to declare void the transfer by Sunset of its immovable property after the effective date for the winding-up and for ancillary relief to procure a retransfer of the property to Sunset from the name of the first respondent. The first respondent (Mr J van den Heever) is the purchaser of an immovable property identified in the papers as the farm Kareebosch ("the farm"). The second respondent is the Registrar of Deeds and the third respondent is Nedbank Ltd ("Nedbank") in whose favour a mortgage bond was registered over the farm that was purchased by the first respondent. Nedbank advanced no submissions and abides by this court's findings.

Relevant facts

[2] A creditor (Nicky Bosman NO in re Estate Gordon Anthony Jones) applied for the winding-up of Sunset. The application was opposed by Sunset. It is common cause that the application for the winding-up of Sunset was presented to the Magistrate's Court on 7 April 2010. The deponent to the affidavit in the liquidation application – Mr Bosman - is the appointed executor of the estate of the late Mr. Jones. Sunset was represented by Ms Bierman (Elmarie Bierman Attorneys). From the affidavit in the liquidation application it appears that the late Mr Jones had paid an amount of R 650 000.00 into the trust account of Sunset which represented 50% of the purchase price of two immovable properties. It was common cause that the two offers to purchase was never signed. A letter was written to Sunset demanding repayment of the said amount. It was common cause that the money was never repaid to the late Mr Jones.

[3] The matter came before a Magistrate in Polokwane. The application for the winding-up of Sunset was however dismissed on 13 July 2010.

[4] The creditor (the estate of the late Mr Jones) filed an appeal to the High Court against the order dismissing the winding-up. On 9 February 2012 the High Court Pretoria upheld the appeal and granted an order for the winding-up of Sunset.

[5] At the time of the application for the winding-up, Sunset was the registered owner of the farm.

[6] On 16 August 2010 (which is a date after the effective date of the winding-up of Sunset) the first respondent made an offer to Sunset to purchase the farm. The offer was accepted on 17 August 2010. It is not disputed that at the time when the first respondent made the offer, he had no knowledge of any impending liquidation proceedings against Sunset.

[7] It is also not disputed on the papers that the farm was sold to the first respondent for a price of R 3 450 000.00 which is above market value. From the report of a sworn valuator it appears that he had determined at the time the market value of the farm to be R 3 100 000.00.

[8] Although the first respondent did not have any knowledge of any pending liquidation proceedings at the time when the offer to purchase was made, he subsequently became aware of the pending liquidation application. It is not disputed that late in November 2010 the first respondent was visited by Mr Bosman ("Bosman") the attorney appointed as the executor of the estate of the late Mr Jones and a certain Adv J Nel ("Nel"). The first respondent was advised of the intended appeal. This much is also clear from a letter dated 18 January 2011, written by Bosman to the first respondent, in which the conversation with him (the first respondent) was confirmed advising him of the pending liquidation application. Bosman also subsequently spoke to the first respondent's attorney (Mr Jan Kampherbeek) advising him of the fact that there was a pending liquidation application against Sunset.

[9] The first respondent admits that he was informed by Bosman of the consequences should the appeal in the liquidation application succeed. The

first respondent states that he sought legal advice but decided to nonetheless persist with the purchase of the farm because he had a valid and binding agreement of sale.

[10] By November 2011 the first respondent therefore had knowledge of the pending winding-up application but nonetheless decided to proceed with the transaction. On this point, it was submitted on behalf of the applicants, that the first respondent could at that stage have cancelled the agreement on the basis that the management of Sunset had withheld a material fact from him namely that the farm that he had purchased was disposed of after the effective date of a winding-up.

[11] It is common cause that the transfer documents in respect of the farm was lodged with the Deeds Office somewhere in January 2011 and that the transfer of the farm in the name of the first respondent was effected on 11 February 2011. The transferring attorney was the same Ms Bierman who also acted on behalf of Sunset in the liquidation application.

[12] On 26 January 2011 the attorney acting on behalf of the first respondent (Kampherbeek) addressed a letter to the attorney acting on behalf of Nedbank (Ms Bierman) in which he sought clarity in respect of the allegations made by Mr Bosman in his letter dated 18 January 2011 regarding the pending liquidation application against Sunset. In this letter Kampherbeek pertinently pointed out to Ms Bierman that he needed the information and that it was also the duty of Ms Bierman (as the attorney attending to the transfer of the property) to also look after the interest of the purchaser of the farm (the first respondent).

[13] On 28 January 2011, Ms Bierman replied to this letter and stated that there were no "pending liquidation" proceedings against Sunset. She, however, confirmed that an appeal had been lodged against the decision of the Magistrates Court's refusal of the application but that no date had been set for the hearing of the appeal. However, despite having first-hand knowledge of

the pending appeal, Ms Bierman nonetheless proceeded to the transfer of the property in the name of the first respondent.

[14] As already pointed out, transfer of the farm was effected on 11 February 2011. A mortgage bond was registered over the property in favour of Nedbank. Shortly after the transfer of the farm Ms Bierman paid out the proceeds to Sunset.

[15] Immediately prior to the transfer of the farm, another creditor of Sunset (Mr Musolwa – "Musolwa") launched an urgent application to interdict the transfer of the farm to the first respondent. (I will refer to this urgent application as the "Musolwa urgent application".) Shortly after the Musolwa application a second urgent application was launched. I will first deal with the Musolwa application as it has a direct bearing on this matter.

The Musolwa urgent application

[16] Musolwa launched an urgent application on 10 February 2011 (a day before the farm was transferred to the first respondent) to interdict the transfer of the farm by Sunset to the first respondent, alternatively for an order to interdict the transferring attorney (Ms Bierman) to pay out the proceeds of the sale pending the finalisation of the appeal against the order in the Magistrates Court dismissing the application for winding-up. In the Musolwa application Sunset was the first respondent, Van Heerden the fourth respondent and Elmarie Bierman Attorneys was the fifth respondent.

[17] Although the first respondent in this application is cited as a respondent in the Musolwa application, he alleges that the urgent application never came to his attention. Bosman signed a confirmatory affidavit in support of the order sought in the Musolwa appliaction. I will refer to his reasons for signing that affidavit herein below.

[18] It appears from the papers that the urgent application was then settled at court between Musolwa and Sunset. The salient terms of the settlement are embodied in a court order dated 10 February 2011, that reads as follows:

"Having read the papers and having heard Counsel on behalf of the Applicant and by agreement between the parties, it is hereby ordered:

1. THAT the seventh Respondent [the Registrar of Deeds, Pretoria) be allowed to proceed and register the immovable property of the First Respondent namely potion 43 of the Farm Kareebosch no 618, Registration division LS, Limpopo Province in the name of the fourth Respondent [Van den Heever]."
2. THAT pending the finalisation of the action referred to in paragraph 3 infra. The fifth Respondent within twenty four (24) hours after registration of the immovable property referred to in paragraph 1 *supra*, pay the amount of R340 000,00 to the Applicant's Attorneys, Messers De Bruin Oberholzer, which amount shall be invested by the said Attorneys in an interest bearing account in terms of Section 78(2A) of the Attorneys Act pending the finalization of the action to be instituted by the Applicant against the first and second Respondents.
3. THAT the Applicant institute action against first and second Respondents within thirty (30) days from date of this order.
4. THAT the amount of R340 000.00 will only be paid out in terms of an order of this court alternatively in terms of a written agreement signed by the Applicant and first and second Respondents."

[19] I have already pointed out that it is common cause that the farm was transferred to the first respondent on 11 February 2011 which is the very next day after the order referred to herein above was granted by agreement between the parties.

[20] On the face of this order Musolwa entered into an agreement in terms whereof the Registrar of Deeds is "allowed" to proceed and register the farm in the name of the first respondent. It is further appears from this order that the fifth

respondent (Elmarie Bierman Attorneys will pay an amount of R340 000.00 to Musolwa' attorneys which amount shall be invested in an interest bearing account in terms of section 78 (2A) of the Attorneys Act "pending the finalization of the action to be instituted by [Musolwa] against the 1st and 2nd respondents".

[21] From the papers it appears that Musolwa never pursued the action and that the amount that was intended to have been kept in trust by his attorneys was in fact paid out to him. This payment to Musolwa was made in circumstances where he had not proved a claim against Sunset and in circumstances where there existed other creditors that had not recovered any payment towards their claims. Payment to Musolwa was also ostensibly effected contrary to the express terms of the court order. It should also be noted that Ms Bierman paid out the proceeds of the sale with full knowledge that there was a pending appeal and with full knowledge that there were other creditors (most notable the estate of the late Mr Jones) who did share in the proceeds of the sale.

[22] The creditor who launched the application for the winding-up in the first place (the estate of the late Mr Jones) therefore did not recover any monies from the proceeds of the sale. Another creditor, Mr Van den Berg who had in fact instituted a claim against Sunset and had obtained judgment against Sunset, also did not receive any monies. In the case of Van den Berg, Sunset did not pay the amount upon demand. Van den Berg then issued a warrant of execution in an endeavour to procure payment. The Sheriff could not attach sufficient assets to pay the amount of the warrant. As already pointed out, only one creditor, Musolwa, received payment from the proceeds of the sale. It is apparent from the papers that the Musolwa's urgent application was settled on a basis that only one particular creditor (Musolwa) received payment from the proceeds of the sale whilst the rest of the creditors were left in the cold.

The second urgent application

[23] On 14 February 2011, shortly after the Musolwa order was granted, Bosman (in his capacity as the executor of the estate of the late Mr Jones) launched

a second urgent application (herein referred to as "the second urgent application") for an order that, pending the determination of the appeal against the order of the Magistrate dismissing the application for the winding-up of Sunset, the third respondent (Elmarie Bierman Attorneys), the fourth respondent (H Swart Konsultante) and the fifth respondent (the Registrar of Deeds) be interdicted from proceeding with the registration and transfer of the farm. Sunset was again cited as the first respondent.

[24] In the founding affidavit in this urgent application Bosman explains that he had received instructions from the late Mr. Jones to handle a claim against Sunset. At that stage charges of theft were laid against Sunset and its members. Bosman explains that he was aware of the fact that Musolwa's attorneys were in the process of drafting papers to launch an urgent application on 10 February 2011. He also states that he was aware of the fact that the purpose of that application was to interdict the transfer of the farm to the first respondent. He further states that when he signed the confirmatory affidavit in the Musolwa urgent application he was confident that the relief that was sought (namely to interdict the transfer) would be granted and that the position of the creditors would be protected pending the liquidation application and the action to be instituted by Musolwa. He only learned of the court order at approximately 12H00 on 10 February 2011. According to Bosman, he then only realised that the other creditors would not be protected by the terms of the court order and that this order would have the effect that one of the creditors (Musolwa) would be preferred above the others.

[25] On 14 February 2011 the High Court granted an interim order that pending the determination of the appeal and the finalisation of the application for the liquidation of Sunset, the relevant respondents were interdicted from proceeding with the registration and transfer of the farm. As of 14 February 2011 two conflicting court orders existed: The one interdicted the transfer whereas another court order seemingly allowed the Registrar of Deeds to finalise the transfer.

[26] By the time the urgent application was launched by Bosman (on 14 February 2011), the farm had however already been transferred to the first respondent and the proceeds paid by Bierman to Sunset and the attorneys of Musolwa.

The appeal

[27] The appeal served before the High Court in Pretoria on 9 February 2012. The court upheld the appeal and ordered that Sunset be liquidated. In the judgment penned by Prinsloo, J it was concluded that Sunset was in fact unable to pay its debts. It is noteworthy that Prinsloo, J also remarked that he was "of the view that given the circumstances of this case, which strongly indicate foul play and probably theft of the monies of the creditors" it was in the interest of justice to proceed with the application and deliver judgment on the merits.

Proceedings in this court

[28] The joint liquidators were appointed on 27 February 2013. On 3 September 2013 the present application for an order declaring that the disposition of Sunset of the farm is void and for ancillary relief, was launched. More in particular, an order is sought to authorise the second respondent (the Registrar of Deeds) to rectify the title deed of the farm so as to reflect that Sunset (in liquidation) is the registered owner of the farm.

[29] The first respondent filed a notice of intention to defend as well as a notice of a counter-application. In the counter-application the first respondent seeks an order that the agreement entered into between him and Sunset whereby the farm was purchased be validated. In his answering affidavit the first respondent also raised a point *in limine* regarding the failure of the applicants to join Nedbank as a respondent. It is common cause that Nebank was later joined as the third respondent.

[30] If regard is had to the papers at the time when the replying affidavit was filed on behalf of the applicants, the following was common cause: (i) The offer to purchase was made *after* the effective date of the winding-up of Sunset; (ii) The first respondent was informed by Bosman and Nel in November 2010 of

the pending liquidation of Sunset and that he nonetheless decided to proceed with the sale; (iii) The first respondent was aware of the second urgent application but did not oppose it because no relief was sought against him; (iv) The farm was transferred in the name of the first respondent on 11 February 2011; (v) More importantly, in his answering affidavit the first respondent conceded that the sale of the farm constituted a "disposition" in terms of section 341 of the Companies Act[1](herein after also referred to as "the Act") and (vi) The first respondent instituted a counter-application in terms of section 341(2) of the Companies Act for an order that the court exercise its discretion to validate the sale of the farm. In the counter-application the first respondent set out various facts in support of the validation of the agreement of sale.

[31] Because of the fact that it was common cause at that stage that the sale of the farm constituted a disposition in terms of section 341 of the Companies Act, the only question then before the court was whether this court should exercise its discretion in terms of section 341(2) of the Companies Act and "decide otherwise" and validate the sale and transfer of the farm.

[32] In December 2014 the two liquidators (applicants) filed an application in terms of Rule 28(1) for the amendment of the Notion of Motion to include a prayer that the registration of the bond over the farm be declared void. I should mention in passing that it is in any event a legal consequence of a disposition in terms of section 341(1) of the Act that the mortgage bond will likewise be void. See in this regard *Gainsford and others NNO v Tiffski Property Investments (Pty) Ltd and others*[2] where the court held that a mortgage bond which was registered simultaneously with the registration of transfer of an immovable property (where the transaction is void) will likewise be void:

> "[11] The registration of the disputed mortgage bonds was assailed on the grounds that: (a) Tiffski did not acquire valid title to the immovable property on the purported transfer to it; and (b) thus could

[1] Act 61 of 1973.
[2] 2012 (3) SA 35 (SCA).

not validly grant the bank a real right thereon by hypothecating or encumbering the immovable property. Thus the mortgage bonds registered simultaneously with registration of transfer of the immovable property to Tiffski were void."

Application to withdraw an admission

[33] On 15 June 2016 the application was set down for hearing. However, on the day of the hearing the first respondent sought a postponement of the application. The first respondent thereafter brought an application in terms of which he gave notice that he would apply to this court on 28 November 2016 for an order that he be granted leave to formally withdraw the admission contained in paragraph 12 of his answering affidavit of the main application where it is admitted that the agreement of sale (the disposition) is void subject to the validation by this court as set out in his notice of the counter-application.

[34] In brief it is the submission on behalf of the first respondent that the Musolwa order specifically provided that the Registrar of Deeds be allowed to proceed and register the farm. The "disposition" of the farm to the first respondent was therefore in compliance of a court order and therefore the transfer of the farm cannot be regarded as "a disposition" for purposes of Section 341 of the Companies Act. In this regard the first respondent referred to the definition of a "disposition" in terms of Section 2 of the Insolvency Act[3] which expressly excludes "a disposition" in compliance with a court order.[4] The first respondent accordingly prayed for an order dismissing the main application.

[35] The applicants opposed this application and in their affidavit, proceeded to set out in fair detail the circumstances under which the court order was obtained by Musolwa. I will return to some of these facts herein below where I specifically deal with the issue as to whether the disposition of the farm can

[3] Act 24 0f 1936.

[4] The definition in section reads as follows: "'**disposition**' means 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 the court; and '**dispose**' has a corresponding meaning;"

be regarded as a "disposition" in terms on the provisions of Section 341(1) of the Companies Act. The pertinent point made by the applicants in their answering affidavit (in the application to amend) is the fact that the court order in the Musolwa urgent application were made in circumstances where one creditor was clearly preferred above others and in circumstances where the transferring attorney (Bierman) knew that there was a pending appeal. In this regard it was submitted that the settlement agreement (in terms of which one creditor (Musolwa) was preferred to the exclusion of other creditors) was clearly aimed at serving the selfish interest of one creditor only and that of the management of Sunset. The applicants further submitted that when the settlement agreement was made an order of court, there was no *bona fida* intention to ventilate and engage in a court on the merits of Musolwa's claim. This is evident from the fact that Musolwa never instituted a claim and from the fact that Ms Bierman paid Musolwa's attorneys shortly after the court order was obtained. Furthermore, at the time of the court order, Sunset was well aware of the fact that there were other unpaid creditors who did not receive any payments from the proceeds of the sale.

[36] The applicants however persisted with their claim that the winding-up is void by virtue of the provisions of section 342(1) of the Companies Act and persisted in seeking an order to this effect together with other ancillary relief.

Legal framework

[37] It is not in dispute that the effective date of the winding-up of Sunset was 7 April 2010 which is the date when the application for winding-up was presented to the Magistrates Court (section 348[5] of the Companies Act). See also the decision in *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* where this principle was confirmed.[6]

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[5] Section 348 reads as follows: "Commencement of winding-up by Court: "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

[6] 1980 (4) SA 669 (SWA) at 673H.

[38] It is also not in dispute that Sunset had disposed of the farm *after* the commencement of the winding-up of the close corporation. The parties are in agreement that dispositions in these circumstances (and the registration of the mortgage bond) are void. In this regard section 341 of the Act provides as follows:

> **"341 Dispositions and share transfers after winding-up void**
> (1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.
> (2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders."

[39] A disposition after the commencement of a winding-up is void and not merely voidable. Although this section does not make provision for the "setting aside of" or for the declaring void "of the disposition", it would follow as a necessary corollary that, in the absence of an order of an order validating the disposition, the disposition would be void.

[40] I have already pointed out that it is now submitted on behalf of the first respondent that, because the disposition (the transfer) took place in the context and "in compliance" of a court order allowing for such a transfer, it is not open to the applicants to attack the disposition under section 341(1) of the Act and it is submitted that the application should be dismissed. In the alternative, it was submitted on behalf of the first respondent that the court should exercise its discretion in terms of section 341(2) of the Companies Act in favour of the first respondent and validate the disposition. (I will return to the issue of the validation of the disposition herein below.)

<u>"Disposition" in terms of the Companies Act</u>

[41] On behalf of the applicants it was initially argued that the definition of the word "disposition" contained in the Insolvency Act does not necessarily bear the

same meaning in context of the Companies Act simply because the structure of the two sets of legislation cater for completely different circumstances: In the Insolvency Act the impeachable dispositions are voidable and not void (as they are in terms of the Companies Act) and refers to dispositions prior to sequestration and not to dispositions after sequestration.[7] In argument it was, however, conceded on behalf of the applicants that there is authority for this proposition. In this regard the Court was referred to the decision in *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another*[8] where the court held as follows:

> "The handing over of the assets would have amounted to a disposition of the company's property; it would have been made after the commencement of the winding-up; the company is unable to pay its debts, and, therefore, upon the company being wound-up, the handing over would have been rendered void. For complete protection the applicant then needed a Court order. Such an order might have been an order in terms of s 341 (2) specifically validating the disposition, but any order directing the respondent to effect the disposition would have sufficed. *Where s 341 (2) speaks of a "disposition" being avoided, it refers to a "disposition" as defined in s 2 of the Insolvency Act 24 of 1936 (see s 339 of the Companies Act which renders the provisions of the law relating to insolvency applicable in respect of any matter not specially provided for in the Companies Act). And "disposition" in the Insolvency Act excludes "a disposition in compliance with an order of the Court".*[9]

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[7] In this regard the Court in *Sackstein en Venter NNO v Greyling* 1990 (2) SA 323 (O) at 327A-C held as follows in respect of the purpose of the provisions of section 2 of the Insolvency Act that contains the definition of a "disposition": "Dit kom my voor dat die Wetgewer met die uitsluitende bepalings in art 2 beskerming wou bied aan die persoon aan wie die regte oorgedra is. 'n Skuldeiser wat sy vordering in 'n hof afgedwing het, en lewering van 'n bate ontvang het ter voldoening aan die bevel wat in sy guns gegee is, behoort die sekerheid te hê dat die toedrag van sake nie versteur sal word deur die latere insolvensie van sy skuldenaar nie. Indien dit anders sou wees sou dit aanleiding kan gee tot regsonsekerheid. Die bewoording wat gebruik is dui ook nie daarop dat die beskerming nie van toepassing is waar die hofbevel verkry is nadat 'n *bona fide* skikkingsooreenkoms aangegaan is nie. Dit kan egter nie die bedoeling van die Wetgewer gewees het om die beskerming ook te bied aan die skuldeiser wat op bedrieglike wyse saamwerk met die skuldenaar om 'n hofbevel te verkry ten einde ander skuldeisers te benadeel nie."

[8] 1983 (1) SA 79 (C) at 85B – E.

[9] My emphasis.

[42] I am in light of this concession prepared to accept that the word "disposition" in the Companies Act should be read in light of the definition contained in Section 2 of the Insolvency Act. It is also on the basis of this acceptance that I am of the view that the application to formally withdraw the admission contained in paragraph 12 of the second respondent's answering affidavit in the main application is not without merit and that it should be granted.

[43] On behalf of the first respondent it was submitted that, because such a court order exists, this court must necessarily find that the disposition took place "in compliance with a court order" and consequently that the discretion provided for in terms of section 341(2) of the Companies Act, does not arise. On behalf of the applicants it was submitted that it can by no stretch of the imagination be concluded that the transfer took place "in compliance with a court order".

[44] The issue in dispute, as I see it, is therefore whether the settlement agreement which was made an order of court in the Musolwa matter, protects the first respondent against an application for an order that the disposition which took place after the effective date of the winding-up of Sunset is void as contemplated by section 341(1) of the Companies Act.

[45] In my view, this enquiry necessarily invites this court to consider the circumstances under which the Musolwa court order which purportedly insolates the first respondent from the effects of section 341(1) of the Companies Act.

[46] Justification for this approach can be found in a plethora of decisions where the courts have set aside dispositions in terms of the Insolvency Act despite the fact that such disposition had been made in compliance with a court order. For example, in *Dabelstein and Others v Lane and Fey NNO*[10] the court set aside two court orders which by agreement was made an order of court because the court found that the parties to the settlement agreements were not *bona fide*:

[10] 2001 (1) SA 1222 (SCA).

"[5] Relying on *Sackstein and Venter NNO v Greyling* 1990 (2) SA 323 (O) the applicants' counsel submits that it is indeed justified. In that case the plaintiffs sought to have a disposition set aside under s 29 or 30 despite the fact that it had been made in compliance with an order of court. The order had been granted in terms of a settlement agreement. At 327B - D Van Coller J reasoned that the exclusion in s 2 could not have been intended to afford protection to the receiver of property who fraudulently colluded to procure an order of court with a view to prejudicing other creditors; and that there may be other forms of improper conduct that may justify the refusal of protection. Although the plaintiffs had not alleged collusion or fraud or any other form of improper conduct in the conclusion of the settlement agreement an exception to the particulars of claim was dismissed on the ground that it might emerge at the trial that the parties had acted fraudulently.

In the present case both orders were granted in terms of settlement agreements between Harksen and the Dabelsteins and the submission is that the latter are not protected by the orders because the parties to the agreements were not *bona fide.* (Precisely what the so-called lack of *bona fides* connotes will be discussed later.)"

[47] Further at paragraph [7] the court explained under which circumstances such dispositions will be set aside:

"I accept for purposes of the argument that there are cases where dispositions in compliance with orders of court may be set aside. On the view that I take of the matter it is not necessary to decide on precisely what grounds this may be done. I will assume that fraud or collusion or perhaps other kinds of reprehensible conduct on the creditor's part in procuring an order will suffice."[11]

[48] I am of the view that in the present circumstances at least "other kinds of reprehensible conduct" existed which warrants this court to find that the

[11] *Ibid* at 1228B of the judgment.

receiver of the property (the first respondent) is not entitled to the protection granted to dispositions "in compliance with a court order". My reasons for this conclusion are briefly the following: (i) Firstly, the Musolwa urgent application was for an order interdicting the transfer of the farm. The application was not for an order allowing the transfer of the farm. The transfer cannot therefore be said to have taken place "in contemplation of a court order"; (ii) Secondly, I am in agreement with the submission that by no stretch of the imagination can it be concluded that the transfer took place "in contemplation of a court order". Put differently, it cannot be said that "but for" the court order, the transfer would not have taken place. At the time of the Musolwa application the transfer of the farm was imminent. In fact the farm was transferred the very next day. The transfer documents have been lodge at the Deeds Office long before the Musolwa application was launched and was thus not dependent upon a court ordering the transfer. Moreover, the fact that the transfer took place a day after the court order supports the conclusion that the transfer was not "in contemplation of a court order" but that it was plainly as a result of the execution of the purchase agreement; (iii) Thirdly, it cannot be ignored that Musolwa and Sunset reached a settlement in the absence of the other creditors. Musolwa had a substantial claim against Sunset and launched the urgent application in an attempt to prevent the transfer from going through in an attempt to protect his claim against Sunset. Musolwa settled the matter with Sunset on the basis that whatever is owed to him will be paid from the proceeds of the sale into his attorney's trust account pending him instituting an action for the amount of R340 000.00 allegedly owed to him by Sunset. Bosman, who acted on behalf of another creditor did not attend the court proceedings but he explains in an affidavit that he did not do so in light of the fact that the relief sought by Musolwa was to interdict the transfer of the farm and that he was satisfied at that stage that the interests of all creditors would be protected. He only realised after the fact that a settlement was reached at court and that one of the terms was the transfer of the property – something which was not contemplated in the Musolwa urgent application. Clearly therefore Musolwa had an interest in the court order and clearly consented to prayer 1 of the order well knowing that the effect thereof would be that whatever was owed to him would be paid to the trust account of his attorneys;

(iv) Fourthly, Musolwa clearly concluded this settlement agreement which resulted in a court order with the intention to obtain an advantage above the other creditors.

[49] In light of the aforegoing it is therefore concluded that the first respondent is not entitled to rely on the court order dated of 10 February 2010 for protection against the operation of section 341(1) of the Companies Act. Consequently it is held that the disposition of the farm after the effective date of the winding-up of Sunset is void as contemplated by the provisions of section 341(1) of the Companies Act.

[50] I will now briefly turn to the counter-application and consider whether the court should exercise its discretion in favour of the first respondent and validate the agreement of sale.

Discretion of the court

[51] The court has a discretion in terms of section 341(2) of the Act to validate a disposition that is otherwise void. In this regard the court in *Lane NO v Olivier Transport*[12] set out the factors – which is now regarded as trite law - that a court must consider in exercising a discretion provided for in section 341(2) of the Act:

> "It appears to me that Lichtenberg J did not intend to find that the discretion vested in him was one not to declare the disposition void. If he did so intend, I respectfully choose not to follow him in that regard, and I find that the discretion is one which entitles a Court to validate what is already a void disposition.
>
> The question which arose for decision in the *Herrigel* case and which arises in this case is the circumstances under which the discretion is to be exercised, if the discretion is to be exercised at all.
>
> I set out hereunder a summary of the guidelines for the exercise of the discretion, namely:

[12] 1997 (1) SA 383 (C).

(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. (See *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 (Ch) at 25.)

(b) Each case must be dealt with on its own facts and particular circumstances.

(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.

(d) The Court must be free to act according to what it considers would be just and fair in each case. See *Herrigel's* case *supra* at 678 and see *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA) at 490 and 492 ([1970] 1 All ER 353 at 356 and 357-8).

(e) The Court, in assessing the matter, must attempt to strike some balance between what is fair *vis-à-vis* the applicant as well as what is fair *vis-à-vis* the creditors of the company in liquidation.

(f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation. See *Re Wiltshire Iron Co; Ex parte Pearson* (1868) LR 3 Ch App 443 at 447.

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets. See *Herrigel's* case *supra* at 679-80.

(h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive. See *Wiltshire's* case *supra* at 447.

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties. See *Re Tellsa Furniture (Pty) Ltd* (1984-85) 9 ACLR 869 (NSW).

(j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. See *Herrigel's* case *supra* at 680.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. See *Herrigel's* case *supra* at 680.

(l) Generally a Court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors."

[52] Prinsloo, J in *Brent Oil*[13] considered the factors as set out by the Court in *Lane* and remarked that the following is of particular importance in exercising a discretion: (i) A court must exercise its discretion taking into consideration the relevant facts and circumstances pertaining to the matter before it; (ii) A court must consider the question of good faith and the intentions of the persons involved in the matter: (iii) The learned judge further emphasised that a court must be free to act according to what it considers to be just and fair, and (iv) that a court must strike some balance between what is fair to an applicant (in a validation application) and what is far to the creditors of a company in liquidation.

[53] The first respondent urged this court to exercise a discretion in his favour with reference to the following factors: (i) The farm was purchased at a higher price than the market value at the time. I have already pointed out that this fact does not seem to be in dispute on the papers and that it is accepted that the farm was not sold below its market value; (ii) The first respondent was *bona fide* in respect of the transaction: According to him he had no personal relationship with the seller and had acted *bona fide* at all material times. He, however, deny that he knew of the application before he received transfer of the property and allege that he had a valid contract and that he could not cancel the contract. I have already dealt with this aspect herein above. By November 2010 the first respondent knew about the pending liquidation application and was in fact fully appraised of the consequences should the liquidation application be successful. I am further in agreement with the

[13] At paragraph [59] of the judgment.

submission that the first respondent could have cancelled the contract on the basis that the seller did not disclose to him the fact that there was a pending liquidation application. The fact of the matter is that the first respondent proceeded with the transaction with full knowledge of the risks inherent in a liquidation. Furthermore, Ms Bierman, with full knowledge of the pending liquidation application nonetheless proceeded with the transfer; (iii) The first respondent submitted that the sale of the farm was to the benefit of the general body of unsecured creditors as a forced sale would in all probability not have raised a purchase price in excess of the market value. According to him Sunset benefitted as a result of the sale and that the coffers of Sunset in fact benefited in an amount of approximately 1.1 million. There is in my view no merit in this submission simply because the general body of creditors did not in fact benefit at all. The only person who benefitted from the sale was Musolwa, who obtained an unfair advantage over other creditors when he obtained a court order in apparent collusion with Sunset sanctioning the transfer of the property. I have already pointed out that this court order was obtained in circumstances where only one creditor to the exclusion of others obtained an advantage. Moreover, the amount that had to be held in trust pending the outcome of the action that Musolwa had to institute was ostensibly paid out to him in circumstances that can only be described as suspicious in light of the fact that no action had been instituted by Musolwa. Despite the clear terms of the court order I am again reminded of what Prinsloo, J found in the liquidation application namely that the fact "strongly indicate foul play and probably theft of the monies of the creditors". In this regard the applicants point out that the members of Sunset were in fact later arrested for fraud and were to appear in the Regional Court in Mokopane. Furthermore, the first respondent was represented by attorneys at the time who were aware of the pending liquidation application. These attorneys ought to have appreciated the inherent risks should the first respondent continue with the transaction; (iv) Although the first respondent will undoubtedly be affected by an order refusing to validate the transaction. I am nonetheless exercising my discretion against validating the transaction. The entire disposition of this farm smacks of foul play. Moreover, if the transaction is not validated the property will be returned to Sunset and the first respondent will have a concurrent claim.

[54] I am therefore not persuaded that there are facts present to compel me to exercise my discretion in favour of the first respondent. On the contrary, I am of the view that there are sufficient and persuasive facts before me not to do so.

Costs

[55] Costs should follow the result. In respect of Nedbank, it was submitted that costs should also be ordered against Nedbank, in light of its opposition. I can see no reason why costs should not also be granted against Nedbank.

Ms Bierman of Elmarie Bierman Attorneys

[56] Serious allegations have been levelled in the papers against Ms Bierman of Elmarie Bierman Attorneys. I am of the view that these allegations warrant an investigation by the Law Society of the Northern Provinces. I have therefore made it part of my order that this judgment and all the court documents pertaining to this application be provided to the Law Society of the Northern Provinces for further investigation.

[57] In the event the following order is made:

1. The application to formally withdraw the admission contained in paragraph 12 of the second respondent's answering affidavit in the main application is granted with costs.

2. It is declared that the disposition by Sunset Point Properties 212 CC, registration number 2005/064500/23 of its immovable property, better known as Farm Kareebos 618, Portion 43, Molemole Local Municipality, Registration Division LS, Limpopo, is void.

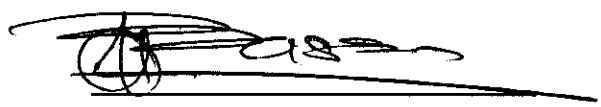
3. The registration of the mortage bond B5767/2011 over the immovable property Kareebos 618, Portion 43, Molemole Local Municipality, Registration Division L, Limpopo, is declared void.

4. It is declared that the applicants on behalf of Sunset Point Properties 212 CC are authorised to take all steps necessary to procure a retransfer of the immovable property, better known as Farm Kareebos 618, Portion 43, Molemole Local Municipality, Registration Division LS from the first respondent's name to that of Sunset Point Properties 212 CC (In Liquidation).

5. The second respondent is authorised to rectify the title deed of the immovable property better known as Farm Kareebos 618, Portion 43, Molemole Local Municipality, Registration Division, so as to reflect Sunset Point Properties 212 CC (In Liquidation) as the registered owner of the immovable property.

6. The first and third respondents, jointly and severally, are ordered to pay the applicant's costs, including the costs consequent upon the employment of senior counsel.

7. The Registrar is directed to furnish a copy of this judgment and the contents of the file to the Law Society of the Northern Provinces in order to conduct an investigation in the conduct of Ms Bierman of Elmarie Bierman Attorneys in this matter.



AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicants	:	MP Van der Merwe (SC)
Instructed by	:	Bosman Attorneys
For the first respondent	:	BC Stoop
Instructed by	:	Kampherbreek Twine & Pogrund
For the third respondent	:	R Ellis
Instructed by	:	Adams & Adams