HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 63945/2013

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 18 MAY 2021

SIGNATURE

In the matter between:

KILOTECH INVESTMENTS (PTY) LTD Applicant

and

DE JONGH ONTWIKKELINGS (PTY) LTD First Respondent
ELIZABETH WILANDA PRINSLOO N.O. Second Respondent

J U D G M E N T (Leave to Appeal)

This matter has been heard by way of a virtual hearing in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 On 25 March 2021 this court declared that a disposition of the assets of the De Jongh Ontwikkelings (Pty) Ltd ("DJO") in the amount of R1, 9 million to Kilotech Investments (Pty) Ltd ("Kilotech") had taken place in circumstances as contemplated in either section 26 or section 31 of the Insolvency Act, 24 of 1936.

1.2 Kilotech now seeks leave to appeal the above judgment and the order whereby DJO's liquidator was empowered to recover the amount of the disposition, together with certain interest and costs.

[2] The factual matrix

The following factual matrix in respect of which the above order has been granted, has not been attacked in the application for leave to appeal and remains intact:

2.1 Mr Neil de Jongh was the controlling mind and a director of both DJO and Kilotech.

2.2 Kilotech was, prior to the disposition, a shelf company with no assets or income. Its shareholder was a trust of which Mr De Jongh was the creator and a trustee.

2.3 DJO sold a certain immovable property (the "Knysna property") to a Mr Sachs for R8,55 million. Part of the purchase price, in the agreed amount of R5,5 million, would be "paid" by Mr Sachs by way of a transfer of a property of his (the "Sedgefield property") to DJO.

2.4 Mr Sachs had discharged his obligations as purchaser to DJO but, rather than DJO becoming the transferee of the Sedgefield property, Kilotech ended up with the property. This was contrived by Mr De Jongh, on behalf of Kilotech, having ostensibly entered into a second sale agreement with Mr Sachs whereby he "sold" the Sedgefield property to Kilotech. There was no actual sale by Mr Sachs to Kilotech and he received no payment for the Sedgefield property. Even the purported sale agreement provided that the purchaser (Kilotech) would "*pay R nil as the transfer of the property is in part payment* ..." for the Knysna property sold by DJO to Mr Sachs.

2.5 The only "payment" made by Kilotech, was not to Mr Sachs, but was the passing of a bond in the amount of R3, 6 million in favour of DJO's principal creditor, ABSA. Despite the illusion being created that the full R5, 5 million purchase price had been paid, no value was given for the difference of R1,9 million, which Mr De Jongh referred to in cross-examination as "the equity".

2.6 The last important part of the factual matrix which also remained intact, was that the providing of indirect ownership of a property in which Mr De Jongh's ex-wife could share, being the Sedgefield property, was so that Mr De Jongh could discharge his divorce settlement obligations. This, combined with the reduction of DJO's exposure to Absa, was referred to by Kilotech's counsel, as proverbially killing two flies with one swat.

[3] <u>The applicant's contentions:</u>

In both oral and written argument, the primary contentions of Kilotech on which it argues it has reasonable prospects of success on appeal, are the following:

3.1 The submission that different divisions of the High Court have interpreted the Supreme Court of Appeal's judgments referred to in this court's judgment in this matter (in paragraphs 6.3.1 and 6.3.2 thereof) in different ways when considering the reciprocal value given for a disposition as contemplated in Section 26 of the Insolvency Act. Whether this court's judgment contributed to obtaining harmony between the judgments (in those instances where the facts in the different cases are indistinguishable) or not, need not be resolved as the facts in this case remain that no value was given for the R1, 9 million, but an illusion was created of a disposition for value. In view hereof, I find no reasonable prospect that a court of appeal would find that no impeachable disposition had taken place, irrespective of the differences in the other judgments referred to. The differences are, in any event, more nuanced than substantive and have been explained in the judgment in this matter.

3.2 Even if Kilotech's contentions might hold water, there was no answer to the alternative ground that, even if Section 26 may be found not applicable, a collusive disposition had taken place as contemplated in Section 31 of the Insolvency Act. This would result in the order still being unassailable. Mr Greyling valiantly sought to argue on behalf of Kilotech that the different hats Mr De Jongh wore were of little or no consequence, but one cannot ignore the existence of the different legal personalities at play: Mr De Jongh, wearing the hat of a director of DJO, abdicated its claim to receive transfer of the Sedgefield property at the same time that Mr De Jong, this time wearing the hat of director of a Kilotech, received transfer of the property in the name of the shelf company. Wearing the same hat, Mr De Jong then had Kilotech take over R3, 6 million of DJO's debt which takeover Mr De Jong, wearing both his own hat and that of a director of DJO had pre-arranged with Absa. Again, at the same time, Mr De Jong,

wearing his own hat, agreed with his ex-wife that she should accept the transfer of the property into Kilotech as a discharge by Mr De Jong of his personal obligations to her, instead of one half of the Knysna property (which had previously been tendered instead of two other townhouses as initially agreed in the divorce settlement agreement). In this fashion, the multiple hats, as it were, colluded with each other to dispose of R1,9 million of DJO's equity. Whilst these facts remain as unaltered as they are, I do not find any prospects of success on appeal in favour of Kilotech, irrespective of which section of the Insolvency Act finds application.

3.3 The second contention was that, in the event that the finding of a disposition remains intact, the amount thereof should be R266 295,40. and not R1, 9 million. This figure was not testified about by Mr De Jongh, nor contemplated by him when he effected the hat-transferring manoeuvres referred to above, but by an ex-post facto calculation exercise undertaken regarding the values, purchase prices and VAT implications of the two property transactions. Not only are these calculations incomplete regarding input VAT and VAT obligations, but it is not supported by evidence. Hand-in-hand with this argument is the one that, once the time for the proving of their claims in the insolvent estate came to pass, the secured creditors chose to limit their claims to the value of the realisation of their securities and therefore, so the argument goes, the insolvent estate is not in need of the restoration of the disposition. In my view, Kilotech cannot rely on post-liquidation choices by DJO's creditors, based on what was left in the estate after the disposition to justify the disposition or rather, the non-reversibility thereof. I do not find a reasonable prospect that another court would come to a different conclusion on either of these aspects.

3.4 The next reason why Kilotech argued that it was entitled to leave to appeal, is the issue of the timing of the commencement of interest. This court ordered interest to run from the date that the Sedgefield property had been transferred to Kilotech. Adv. Greyling conceded that this issue was not debated at the trial, but argued that certain Supreme Court of Appeal judgments have "finally" determined that the correct date for the commencement of the running of interest to be the date of a court's declaration of the disposition being void. For purposes of this argument, reliance was placed on Duet and Magnum Financial Services CC (in liquidation) v Koster 2010 (4) SA 499 (A) and Griffiths v Janse van Rensburg 2016 (3) SA 389 (SCA).

3.5 The submission that the above cases have "finally" determined the position, is not that simple. The conclusion by the majority judgment in Griffiths (above) states at para [40] the position to be the following:

> "*It is clear that the object of section 32(3) [of the Insolvency Act] is to ensure that the property brought back into the estate for the benefit of creditors has not diminished in value. It may be that a case could be made out for an increased award in certain circumstances where money forms the disposition. Judgment could then be granted for payment of a higher amount. Interest would run on that higher amount from date of judgment according to the principle in Janse van Rensburg [with reference to Janse van Rensburg and Others NNO v Steyn 2012 (3) SA 72 (SCA)] ... whether such a case can be made out, and the correctness of the reasoning of the trustees referred to in [32] hereof, must therefore be left for decision at the time when these issues arise squarely*".

3.6 The reasoning of the trustees in Griffiths, referred to by the learned (then acting) judge of appeal, contained in paragraph [32] of that judgment was "*to allow for the payment of mora interest on the judgment debt ... from date of the disposition*" in order to fulfil the objects of section 32(3) of the Insolvency Act so as to not leave the insolvent estate out of pocket. It is trite that the award of pre-judgment interest serves to counter the loss of the value of money over time. This was what was granted in this case and, save for reliance on the two cases referred to in paragraph 3.3 above (which reliance was only raised when leave to appeal was sought and not at the conclusion of the trial) no other evidence, contentions or considerations were raised or referred to on behalf of Kilotech. The considerations referred to in Griffiths therefore "arose squarely" and the trustee's contentions were not refuted. Having regard to the "equity" disposed of (in the words of Mr De Jongh) at the time of transfer of the Sedgefield property as described above, I find no reasonable prospects that another court would find on appeal that the insolvent estate should be deprived of the interest on the R1,9 million for the years since the disposition to the conclusion of the trial and that, consequently, Kilotech as the others collusive party, should have the benefit thereof. Such a finding would be contrary to the object of section 32(3) of the Insolvency Act and I see no reasonable prospect of success of Kilotech obtaining such a finding.

3.7 In the written heads of argument submitted on behalf of Kilotech, it was also submitted that reliance could not be placed on the Liquidation and Distribution account of DJO for inferring its insolvency at the time of the disposition, but this is not so and it was only one of the issues on which the court relied. It was in any event permissible to do so. See Nicholls and Whitelaw, NO v Akoo 1948 (4) SA 197 (N). It must also be remembered that Kilotech had the onus to satisfy this issue, in respect of which it only

sought to rely on Mr De Jongh's subjective and vague "guestimate", which does not suffice.

[4] Conclusion

Reflecting dispassionately on this court's decision, I find that the requirements set out in sections 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 have not been met.

[5] Order

The application for leave to appeal is refused with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 11 May 2021

Judgment delivered: 18 May 2021

APPEARANCES:

For the Applicant:	Adv PJ Greyling
Attorney for Applicant:	Schabort Inc, Pretoria
For the Respondents:	Adv GW Amm
Attorney for Respondents:	Lowndes Dlamini Attorneys, Pretoria