

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no. 8855/2017P

In the matter between:

STEWART N.O., MICHAEL LAWRENCE

FIRST PLAINTIFF

BODIBE N.O., PULENG FELICITY

SECOND PLAINTIFF

MASHAMBA N.O., JERIFANOS

THIRD PLAINTIFF

(IN THEIR CAPACITY AS THE JOINT LIQUIDATORS
OF CARMOL DISTRIBUTORS (PTY) LTD
(in liquidation)

and

PILLAY N.O., SUMENTHREN POOBALAN

FIRST DEFENDANT

PILLAY N.O., ROMILADEVI MOGHAMBRY

SECOND DEFENDANT

(IN THEIR CAPACITY AS THE DULY APPOINTED
TRUSTEES OF THE SUMEN PILLAY
PROPERTY TRUST)

JUDGMENT

KHALLIL AJ

Introduction

[1] The Plaintiffs are the duly appointed joint liquidators of Carmol Distributors (Pty) Ltd (Carmol) which was placed under provisional liquidation on 1 October 2015 and which order was made final on 30 November 2015 in the Gauteng Local Division of the High Court, Johannesburg.

[2] The First and Second Defendants are the Trustees of the Sumen Pillay Property Trust (the Trust), a Trust duly registered in the Pietermaritzburg Deeds Office with Trust Number IT1129/2011.

[3] It is common cause that a Ms Carawan was the sole director of Carmol and her husband, Mr Moola, held himself out as the managing director, and was responsible for the day-to-day operations of Carmol¹.

[4] The Plaintiffs, as joint liquidators, seek to recover excess payments, consisting of 101 transactions, made by Carmol to the Trust in terms of Section 26 (1) (b) of the Insolvency Act 24 of 1936 (Insolvency Act), as voidable dispositions, made to the Defendant within two (2) years of Carmol's winding-up. The Trust "invested" R3.3 million in a Scheme operated by Carmol and in return received R66 087 300-00.

¹ Exhibit "A", paragraph 1, page 388, wherein Moola formally admitted in the resultant criminal proceedings under section 220 of the Criminal Procedure Act 51 of 1977 under case 41/154/2016, the following: "I admit that Fathima Carawan (accused two) is my customary wife, and I only used her name to register Carmol Distributors (Pty) Ltd (accused three). She was in no way involved in the operations of the business. I fully represented accused three at all times."

[5] By virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008, Chapter 14 of the repealed Companies Act 61 of 1973 continues to apply to insolvent companies, until a date to be determined. Sections 339 and 340 form part of Chapter 14. Section 339 makes the provisions of the law relating to insolvency *mutatis mutandis* applicable to the winding up of a company unable to pay its debts. Section 340(1) provides:

‘(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.’

[6] In accordance with Section 340 (2) (a) of Act 61 of 1973 read with section 348 of Act 71 of 2008, the effective date of Carmol’s winding-up is the date when the application for its winding-up was presented to the Johannesburg High Court², namely, 18 August 2015, and the two (2) year period is to be calculated with reference to such date.

[7] The Defendants whilst admitting that the various payments were made by Carmol to the Trust, deny that the payments were made without value. In amplification of its denial, the Defendants have pleaded that the said payments received, were repayments of monies it advanced to Carmol³. This defence pleaded was however not pursued at trial.

[8] At trial, only the evidence of the lead liquidator, Mr M L Stewart (First Plaintiff) was led on behalf of the Plaintiffs’ and the Defendants elected to close its case without leading any evidence. The Defendants’ contend that as the Schedule relied upon by the Plaintiffs to prove the payments (in excess of the deposit) made by Carmol to the Defendants (in relation to the scheme), was authored by another person (Spies) and not by Mr Stewart, his evidence relating thereto constituted hearsay evidence and ought to

² Paragraph 1.7 of the Particulars of Claim read with paragraph 1 of Defendants’ Plea, page 174 of Exhibit “A”. See also Notice of Motion in Liquidation Application.

³ Paragraph 4 of Defendants Plea, pages 36 – 37.

be disregarded. The Defendants also take issue that all the relevant bank statements running into hundreds of pages were not produced in court.

The Scheme

[9] The background to the claims against the Defendants as sketched in the Particulars of Claim, is the following⁴:

9.1 Carmol conducted an illegal Scheme of a company ostensibly trading in petroleum products. Funds were solicited from members of the public under the pretext that such funds would be used to fund diesel trading and the profits generated were used to pay returns to “investors” (participants).

9.2 Participants were offered and paid a monthly return of 6 to 8 per cent amounting to between 72 to 96 per cent per annum.

9.3. The main business of the Scheme was the acceptance of deposits from participants (members of the public) in the Scheme, which deposits were repayable to participants upon the expiry of 12 months following the deposits being made.

9.4 The alleged diesel business was no more than a front in order to create an illusion that real business was being conducted.

9.5 There were approximately 3 800 participants in the scheme and an amount of R925 million had been “invested” in Carmol pursuant to the conducting of the Scheme.

9.6 Carmol operated what is often referred to as Pyramid or Ponzi Scheme, and as all these schemes do, it collapsed when the inflow of the deposits (funds) could no longer sustain the outflow of exorbitant returns to participants.

⁴ Paragraph 4 of Particulars of Claim, Exhibit “A”, pages 8 – 10.

[10] Carmol in conducting the Scheme contravened section 11(1) of the Banks Act 94 of 1990 in that it conducted the business of a bank by soliciting and accepting deposits from the general public as a consistent feature of the scheme, in circumstances where Carmol was not registered as a bank.

[11] The Scheme operated by Carmol also constituted a harmful business practice and was declared unlawful⁵. It constituted a multiplication scheme under section 43 of the Consumer Protection Act 68 of 2008 in that participants were offered an effective annual return which was at least 20 percent above the Repo rate determined by the South African Reserve Bank as at the date of the various “investments”⁶.

[12] It is common cause that Mr Moola has been convicted of a litany of charges (over 3 700) relating to the operation of the Scheme and is awaiting sentencing⁷.

[13] The particulars of the various dispositions by Carmol to the Defendant Trust are set out in paragraph 5 of the Particulars of Claim. The dispositions constitute 101 payments, totalling R66 087 300.00 commencing on 19 August 2013 to 22 November 2014⁸. It is common cause that these dispositions were all made within two (2) years of the winding-up of Carmol (18 August 2015).

[14] The Plaintiffs’ accordingly contend that any payments made by Carmol in relation to the Scheme in excess of the deposits received, were made unlawfully and constitute dispositions without value.

Relevant Legal Principles

[15] Section 26 (1) (b) of the Insolvency Act reads;

⁵ Notice 1135 of 1999 (Government Gazette number 20169 dated 9 June 1999), promulgated in terms of Section 12 (6) of the Consumers Affairs (Unfair Business Practices) Act 71 of 1988.

⁶ Consumer Protection Act 68 of 2008 (section 43 in particular – Pyramid and Related Schemes).

⁷ Exhibit “A”, pages 373 – 394

⁸ Exhibit “A”, paragraph 5 of Particulars of Claim, pages 10 – 16.

‘(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

(b) within two years of the sequestration of his estate, and the person claiming under or benefitted by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liability:

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.’

[16] The only disputes on the pleadings relate to whether the dispositions were not made for value and whether the dispositions constituted repayments of monies advanced by the Defendant to Carmol⁹.

[17] In order to succeed with their claims, the Plaintiffs need to establish the following:

17.1 The various dispositions by Carmol¹⁰.

17.2 Of Carmol’s property¹¹.

17.3 The dispositions were made within two (2) years of Carmol’s winding-up; and

17.4 The dispositions were not made for value¹².

⁹ Exhibit “A”, pages 36 – 37, First and Second Defendants’ plea, paragraph 4.

¹⁰ Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd 1965 (2) SA 597 (A) at 602

¹¹ Ibid

¹² Commissioner of Inland Revenue v Bowman NO 1990 (3) SA 311 (AD) at 314. As to the meaning of “not made for value”, cf, Strydom NO and another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022) at paragraph 25. (There must be no value, i.e., there must have been no *quid pro quo*).

The above factors (save for paragraph 17.4) are common cause. In respect of the dispositions made not for value, there has been no evidence led by the Defendants' to rebut the Plaintiffs' version that no benefit or value was received.

Facts

[18] In regard to the Scheme operated by Carmol, the Defendants have pleaded no knowledge of such facts and nor have they denied that the 101 payments constitute dispositions of Carmol's property. Such allegations are accordingly deemed to be admitted. Uniform Rule 22 (3) of the Uniform Rules of Court provides:

'(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.'

[19] Mr Stewart who is the lead liquidator and of considerable relevant experience testified that Carmol conducted a typical pyramid scheme which used diesel return sheets as a way of giving credence to the fraud perpetrated by it. Carmol conducted no business whatsoever apart from taking deposits from members of the public and making exorbitant return payments. It had no ability to generate profits with which to repay its obligations to the participants other than by obtaining new "investments". From the time Carmol received the first "investment", it was accordingly unable to pay its debts and was insolvent.

[20] At the time when the Second Meeting of Creditors and Contributors Report was drawn in August 2016, Carmol had assets of R187 506 137-00 and liabilities of R576 000 000.00¹³. Its insolvency increased when the South African Revenue Services lodged a claim for proof in excess of R276 000 000-00 which was later settled at R70 million.

¹³ Report submitted by Liquidators at the Second Meeting of Creditors, Exhibit "A", pages 257 - 263

[21] Mr Stewart in his evidence referred to a Schedule¹⁴ where each payment by and to the Defendant Trust is reflected. Although this Schedule was prepared by one Jaco Spies, a chartered accountant (who was not called to testify), he examined in detail the bankstatements of Carmol consisting of some 4000 pages and confirmed the correctness of the Schedule insofar as it relates to the R3.3 million “investment” by the Trust in the Scheme and all payments not made for value by Carmol to the Trust. The Defendants take issue in their Heads of Argument that this constitutes hearsay evidence. I disagree. Mr Stewart clearly examined the bank statements and Schedule as lead liquidator and satisfied himself regarding the correctness of amounts stipulated in the Schedule. It was not suggested otherwise to him during cross-examination. The information in the Schedule, even if it did constitute hearsay evidence, the Defendants’ clearly did not object to the admission of such evidence when Mr Stewart testified on this aspect. Moreover, no contrary version was put to Mr Stewart in relation to the R3.3 million “investment” by the Defendant Trust in Carmol or the subsequent payments by Carmol to the Trust.

[22] In ascertaining the amounts paid by Carmol to the Trust, the fact that all the bank statements of Carmol were not produced to court, it of no consequence. These payments were admitted in the pleadings and confirmed by Mr Stewart when he testified. His explanation that he only attached the statements relevant to this case is understandable, particularly in view of the fact that the payments by Carmol to the Trust were admitted.

[23] The evidence obtained at the section 418 (read with section 417) Enquiry¹⁵, together with the bank statements obtained and examined, I am satisfied, bolsters the evidence of dispositions not for value by Carmol to the Trust. The evidence of Mr Stewart was clear and uncontroverted that the claims herein are amounts paid to the Trust by Carmol in excess of the payments (R3.3 million) made by the Defendant to Carmol. Given his considerable practical experience as liquidator, the fact that he has

¹⁴ Exhibit “A”, pages 369 – 372

¹⁵ Exhibit “A”, pages 294 – 368

limited qualifications does not, to my mind, derogate from his competence or the reliability of his evidence. Mr Stewart was an impressive witness.

Conclusion

[24] The Defendant elected not present any evidence in rebuttal of the Plaintiffs' case¹⁶. That elevates the prima facie case to a conclusive one¹⁷. The Defendants were well placed to have come forward to deny the prima facie evidence. The rebuttal of the Plaintiffs' claim lay within the power of the Defendants. At the least, I am satisfied that a prima facie case has been made out for the relief claimed in terms of section 26 (1)(b) of the Insolvency Act.

[25] In Ex Parte Minister of Justice: In Re Rex v Jacobson and Levy it was stated:¹⁸

'Prima facie evidence in its usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.'

[26] The Plaintiffs being successful, there is no reason why costs should not follow the result.

Order

In the result, the following order is made:

1. The dispositions (totalling 101 in number) made by Carmol Distributors (Pty) Ltd to the Defendant Trust (Sumen Pillay Property Trust) are set aside.

¹⁶ Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587 (W) confirmed on appeal in Senekal v Trust Bank of Africa Ltd 1978 (3) SA 373 (A).

¹⁷ Ex Parte Minister of Justice: in Re Rex v Jacobson and Levy 1931 AD 466 at 478. Followed in Marine and Trade Insurance Co. Ltd v Van der Schyff 1972 (1) SA 26 A at 37; S v Boesak 2003 (3) SA 381 SCA, paragraph 46 -47 and Moscon hyme CC v JP Krugerrand Dears CC (Case No: 16451/2010) [2014] ZAGPJHC 24 (25 February 2014).

¹⁸ Ibid

2. Payment in the sum of R62 778 947-00 by the Defendants to the Plaintiffs.
3. Interest on the aforesaid amount calculated at 7.75 per cent per annum from the date of judgment to date of payment.
4. The Defendants shall bear the costs.

KHALLIL AJ

Appearances

Counsel for Plaintiffs	: J W Steyn
Instructed by	: Brand Potgieter Incorporated, Johannesburg
Counsel for Defendants	: N G Winfred
Instructed by	: S P Attorneys, Sandton
Date of Reservation	: 23 August 2022
Date of Judgment	: 16 September 2022