B:b 18/92

CASE NO. 267/91
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LLOYD EDWARD SPENDIFF N.O. APPELLANT

and

KOLEKTOR (PROPRIETARY) LIMITED RESPONDENT

CORAM: HOEXTER, NESTADT, VIVIER, MILNE et GOLDSTONE JJA

DATE HEARD: 20 FEBRUARY 1992

DATE DELIVERED: 12 MARCH 1992

J U D G M E N T

NESTADT, JA

The appellant, in his capacity as liquidator of a company, sued the respondent in the Durban and Coast Local Division. In addition to pleading over on the merits of

the claim, the respondent, by way of a special plea, objected to the court's jurisdiction. The appellant excepted to the special plea as disclosing no defence. McCALL J dismissed the exception. This appeal is against such dismissal. It is brought with the leave of the court a quo.

The appellant's claim is for an order setting aside the payment of an amount of R325 523.00 allegedly made by the company to the respondent and for the recovery thereof. The cause of action is based on sec 340(1) of the Companies Act, 61 of 1973, read with sec 26(1)(b) of the Insolvency Act, 24 of 1936. In terms of sec 340(1) of Act 61 of 1973, 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 the law relating to insolvency shall mutatis mutandis be applied to any such disposition". Sec 26(1) of Act 24 of 1936 is the well-known provision dealing with dispositions without value. It reads:

> "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 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."

There follows a proviso which is not material to the present dispute. The appellant's summons alleged that the company had been wound up by reason of an inability to pay its debts; that on a date about twelve months prior to its winding up, the company paid the amount in question to the respondent; and that such payment constituted a

disposition of the company's property not made for value.

The facts relevant to the jurisdictional issue may be briefly stated. The respondent is a domestic corporation. However, its registered office is not situate within the area of jurisdiction of the Durban and Coast Local Division. The respondent's registered office (and, so it would seem, its main place of business) are in Johannesburg. Furthermore, according to the special plea, the appellant's cause of action did not arise within the jurisdiction of the trial court. These allegations would normally constitute a sound basis for objecting to the court's jurisdiction. This was not in dispute. What the appellant relies on in these circumstances to establish jurisdiction, is the fact (alleged in the summons) that it was the Durban and Coast Local Division which granted the order winding up the company.

The main argument presented on behalf of the appellant was founded on two broad propositions, namely: (i) on a proper interpretation of the Insolvency Act, the

word "court" in sec 26(1) means the court which sequestrated the debtor; it is this court which therefore has jurisdiction to set aside a disposition without value made by the insolvent; and this is so whether the defendant is otherwise subject to such court's jurisdiction; (ii) the effect of sec 340 is to render applicable, in relation to impeachable dispositions by a company, not only the relevant substantive provisions of the Insolvency Act, but also its procedural provisions; these included the jurisdictional rule referred to; accordingly, and making the necessary adaptations to it, the forum competent to set aside a disposition by a company prior to its liquidation is the one which grants the winding up order. In the result, so it was said, it mattered not that the respondent was a peregrinus of the Durban and Coast Local Division and that the appellant's cause of action did not arise there; that court had jurisdiction simply on the basis that it had granted the order winding up the company.

I turn to a consideration of whether, in terms

of sec 26(1), it is the court which sequestrated the insolvent that has jurisdiction to set aside a disposition made without value ((i) above). "Court" is defined (in sec 2 of the Act) as follows:

> "In this Act unless inconsistent with the context -
> 'Court' or 'the Court', in relation to any matter means the provincial or local division of the Supreme Court which has jurisdiction in that matter in terms of section one hundred and forty-nine or one hundred and fifty-one, or any judge of that division; and in relation to any offence under this Act or in section eight, twenty-six, twenty-nine, thirty, thirty-one, thirty-two, paragraph (a) of sub-section (3) of section thirty-four, seventy-two, seventy-three, seventy-five, seventy-six, seventy-eight or one hundred and forty-seven the expression 'Court' or 'the Court' includes a magistrate's court which has jurisdiction in regard to the offence or matter in question." (My emphasis.)

Sec 151 deals with the review of decisions, rulings and orders of the Master or the officer presiding at a meeting of creditors. It is unnecessary to quote it. Of crucial importance, however, is sec 149. It reads:

"(1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who -

(a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or

(b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.

(2) The court may rescind or vary any order made by it under the provisions of this Act". (Again, my emphasis.)

In summary, the submission of Mr Meskin on behalf of the appellant was that the "court" in sec 26(1) meant the "Court" as defined in sec 2; this in turn led one to sec 149(1); the court there referred to is the one which on

the basis inter alia of the debtor's domicile or ordinary residence has jurisdiction to sequestrate his estate or accept its surrender; hence (to complete the reasoning) "the court" in sec 26(1) means the court which sequestrated the debtor's estate.

It is a matter of some difficulty to determine the true meaning of the word "Court" as defined in sec 2. It is an important definition. The word occurs not only in sec 26(1) but in various other sections of the Insolvency Act. In Dyter and Tiran vs Vorster NO 1922 OPD 218, DE VILLIERS JP described the broadly similar definition of court as contained in sec 2 of the previous Insolvency Act (32 of 1916) as "an instance of rather inartistic draughtsmanship". This criticism applies equally to the present definition. I confine my attention to the first part, ie up to "judge of that division". In doing so, I leave aside the effect of the qualification "unless inconsistent with the context". The definition tells

one that "in relation to any matter", "Court" means a provincial or local division of the Supreme Court. So much is clear. But in what matters? And which provincial or local division has jurisdiction? The reference to sec 151 is uninformative. The section is silent on what court has review jurisdiction. That leaves the reference to sec 149. Here there is an unfortunate lack of clarity. Had it stated that "Court" means the provincial or local division "which has jurisdiction in terms of sec 149", then the grounds of jurisdiction might simply have been those mentioned, namely, the debtor's domicile etc. But the definition does not say this. There is the reference to "in that matter". This expression must obviously be taken account of. It can only relate to the first-mentioned matter, ie "any matter". If regard is had to the Afrikaans equivalent, viz, "met betrekking tot een of ander aangeleentheid" in the signed Afrikaans version of the Act, this phrase must be taken to

denote "any particular matter". Sec 150 is of significance. Sub-sec (5) confines appeals "against any order made by the court in terms of this Act" to final orders of sequestration and orders setting aside provisional sequestrations (see sub-sec (1)). The legislature could not have intended to deprive a defendant, against whom an order in terms of sec 26(1) is granted, of the right to appeal. So "Court" in sec 2 must be given a restrictive interpretation. It would seem therefore that the effect of the definition is the following. In matters falling under sec 149 (ie where the proceedings relate to a debtor or his estate), the jurisdictional criteria therein referred to determine which is the competent provincial or local division. In matters not governed by sec 149 the definition does not operate; the ordinary grounds of jurisdiction apply. This, in essence, is what McCALL J, after a close analysis of the relevant sections, concluded.

Approaching the problem on this basis, the

question that arises is whether a claim under sec 26(1) is justiciable under sec 149. Plainly, the recipient of a disposition without value is not a "debtor" (which is defined in sec 2). Mr Meskin, however, submitted that a claim of the kind under consideration is one "in regard to the estate of every debtor"; and that on this basis the court which sequestrated a debtor's estate has jurisdiction over a person who is sued in terms of sec 26(1). I am unable to agree. It is true that what is recovered by a trustee as a result of setting aside an insolvent's impeachable transaction (such as a disposition without value) falls into and thus benefits the insolvent estate. In a sense therefore a claim under sec 26(1) may be said to concern or relate to (which according to Black's Law Dictionary, 5th ed, 713, is what "in regard to" means) the estate of the insolvent debtor. I am satisfied, however, that on a proper construction of sec 149 this is not what the legislature intended. The argument involves the

proposition that the section confers jurisdiction not only over the debtor but over third parties as well. In Dyter's case, supra, DE VILLIERS JP, dealing with the similarly worded predecessor to sec 149, viz sec 150 (contained in chapter 9) of the old Act, expressed a contrary opinion. The learned judge said (at 220):

> "Chapter 9 lays down, broadly speaking, that the court shall have jurisdiction over the persons and estates of insolvents owning property or residing or carrying on business within the territorial limits of the court's jurisdiction, but it does not purport to deal with the question of jurisdiction in the case of actions or proceedings brought by the trustee against third parties, ie., against parties other than the insolvent; for instance, actions for voidable preference. In the case of such actions, the ordinary rule of jurisdiction applies, eg., that the forum of the defendant is to be followed, etc."

These dicta are in point and I respectfully adopt them. There are sound reasons for doing so. They are:

(a) Any interpretation of sec 149 must take account of the basic common law principle of our law

that actor sequitur forum rei, ie you sue a defendant in his forum (Sciacero and Co vs Central South African Railways 1910 TS 119 at 121). Clear wording would be required to deny a defendant (who could be a peregrinus of the country as a whole) this procedural advantage. Sec 149(1) does not achieve this.

(b) No special significance attaches to the phrase "in regard to the estate of every debtor". In terms of sec 9, it is the estate of the debtor that is sequestrated. In any event, Parliament obviously felt it necessary to spell out that a court sequestrating a debtor is to have jurisdiction even though his assets may be situate in another division. This it did by referring in sec 149(1) not only to the debtor but to his estate.

(c) Confirmation of a restrictive interpretation to

sec 149 and the old sec 150 is to be found in a line of cases which decide that the jurisdiction conferred by these sections relates only to sequestration proceedings (Ex parte Bobert 1926 WLD 104 at 105; Ex parte Human 1927 WLD 286; Ex parte Merchants' Trust Ltd 1929 WLD 196 at 198 and Ex parte Coetzee 1940 TPD 35 at 37; but compare Ex parte Katzen 1937 NPD 61). The rule that only the division of the Supreme Court which made the order for sequestration has (subject to certain exceptions) jurisdiction to grant the insolvent's rehabilitation, is a special one which is not based on these sections (see Pollak: The South African Law of Jurisdiction, 143). Nor do I think that LUDORF J's statement in Goode, Durrant and Murray (SA) Ltd and Another vs Lawrence 1961(4) SA 329 (W) at 331 A, that the moment an order for sequestration is granted, the court granting the order is vested with

jurisdiction in regard to everything that follows upon the order, supports the appellant's argument. The learned judge's somewhat widely worded observation must be read in context. At 330 in fin, Bobert's case is referred to and relied on. So he could not have intended to disagree with it. The question whether sec 149 confers jurisdiction over a third party was not in issue. Insofar as Consolidated Caterers Ltd vs Patterson NO 1960(4) SA 194(E) at 197 H - 198 A decides that the section does confer such jurisdiction, it should not be followed.

(d) In the light of the concluding part of the definition of "Court" in sec 2, a claim to recover an improper disposition brought in a magistrates court attracts the ordinary rules of jurisdiction. The effect of the appellant's argument is that where action is brought in the

Supreme Court, the position is different. This would be anomalous. Moreover, I cannot conceive of any particular considerations of convenience to the trustee which in a case of this kind (a claim sounding in money) ought to be taken into account in interpreting sec 149(1) in the way contended for. The present claim is, in this regard, no different from any ordinary debt due to the estate and which the trustee might (in terms of sec 77 of the Act) have to sue for. This would, of course, be in the defendant's forum.

The court a quo also found that property improperly disposed of by a debtor prior to his sequestration only becomes part of his insolvent estate after the disposition has been set aside by the court. This was held to be a further reason why sec 149 could not

be relied on by the appellant; the action would not be in regard to the insolvent's estate. I would prefer to leave this point open. But on the basis of what has been stated, I am of the opinion that McCALL J correctly held that the jurisdictional criteria referred to in sec 149(1) do not determine what court has jurisdiction in terms of sec 26(1) to set aside a disposition not made for value; jurisdiction in such a case is governed by ordinary principles. This disposes of the argument under consideration. In the result it is unnecessary to decide whether McCALL J was correct in holding that the jurisdictional provisions of these sections do not in any event apply to the case of a company.

The appellant advanced a second argument in support of the exception. It was based on sec 12(1) of the Companies Act. It provides:

> "The Court which has jurisdiction under this Act in respect of any company or other body

> corporate, shall be any provincial or local division of the Supreme Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate."

The contention was that the appellant's claim was one under the Companies Act; it was in respect of the company which he represented; such company was one within the meaning of "any company" as used in sec 12(1); seeing that it had been wound up by the Durban and Coast Local Division, it was to be inferred that its registered office or main place of business was within that court's area of jurisdiction; accordingly such court had jurisdiction under the section. The argument is misconceived and must be rejected. Jurisdiction means the power or competence of a court to hear and determine an issue between parties (Graaff-Reinet Municipality vs Van Ryneveld's Pass Irrigation Board 1950(2) SA 420(A) at 424). Or, according to old authority quoted by VAN DER RIET AJP in Wright vs Stuttaford and Co

1929 EDL 10 at 42, jurisdiction is "a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction". This is the sense in which the word is used in sec 12(1). It relates to the territorial competence of the various provincial and local divisions of the Supreme Court to entertain legal proceedings under the Act "in respect of any company". In accordance with principle such company is the one against which relief is claimed and whose registered office or main place of business is being referred to. It is not, as the appellant would have, the insolvent company on whose behalf relief is sought.

The substance of the appellant's third and final argument (advanced in the alternative) was that the court a quo had jurisdiction at common law. It was founded on sec 19(1)(a) of the Supreme Court Act, 59 of 1959. This

section confers jurisdiction on a provincial or local division inter alia "in relation to all causes arising...within its area of jurisdiction..." A cause is said to have arisen in the area of a court's jurisdiction if at common law that court is regarded as the proper forum (Bisonboard Ltd vs K Braun Woodworking Machinery (Pty) Ltd 1991(1) SA 482(A) at 486 C-J). The common law ratio jurisdictionis relied on was that the appellant's cause of action arose within the area of jurisdiction of the Durban and Coast Local Division. I understood the contention to be that such cause of action consisted of the fact of the company having been wound up; and that seeing the winding up order was granted by the Durban and Coast Local Division, it had jurisdiction (at common law). This argument, too, must fail. Cause of action includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim (Evins vs Shield Insurance Co Ltd 1980(2) SA 814(A) at 838 G). I do not propose to analyse what exactly constitutes a cause of action in terms of sec

26(1). Clearly it would include the sequestration order. But it is not confined to this. The fact of a disposition having been made (and that it was not for value) is also part of the cause of action. In casu, the appellant alleges such a disposition in his summons, namely the payment of R325,523.00 to the respondent. But there is no indication of where such payment occurred. As I have said, the special plea alleges that the appellant's cause of action did not arise within the jurisdiction of the Durban and Coast Local Division. For the purposes of the exception, the correctness of this allegation must be accepted. The appellant has therefore not established that his cause of action arose within that court's jurisdiction.

The result is that the appeal is dismissed with costs.

NESTADT, JA

HOEXTER, JA)
VIVIER, JA) CONCUR
MILNE, JA)
GOLDSTONE, JA)