CASE NO.323/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

LYNDALL BEDDY NO APPELLANT

AND

JOAN VAN DER WESTHUIZEN RESPONDENT

BEFORE: VAN HEERDEN DCJ, HEFER, NIENABER, MARAIS and SCHUTZ JJA

HEARD: 7 MAY 1999

DELIVERED: 24 MAY 1999

W P SCHUTZ

Insolvency - claim by solvent spouse for return of asset deemed to fall into insolvent spouse's estate by s 21 of Insolvency Act - under common law collusive donation between spouses cannot found a "title valid as against creditors" under s 21 (2) (c) - question not whether transaction a donation but whether a collusive donation - simulation to be ignored - on facts collusion found.

J U D G M E N T

SCHUTZ JA:

Section 21 (1) of the Insolvency Act 24 of 1936 ("the Act") provides that upon the sequestration of the separate estate of a spouse ("the insolvent") all the property of the other spouse ("the solvent spouse") vests in the Master and thereafter in the trustee. The insolvent in this case is Hertzog van der Westhuizen, whose estate was finally sequestrated at Cape Town on 2 February 1995. The solvent spouse, to whom I shall refer as "the wife", is Joan van der Westhuizen, who was the successful applicant before van Deventer J, and who is the respondent on appeal, leave having been refused below and thereafter granted on petition. Her application was based on s 21 (2) of the Act, which provides that the trustee shall release any property of the solvent spouse "which is proved" by that spouse to have been acquired during the marriage "by a title valid as against the creditors of the insolvent" (to quote the only one of the five classes of property listed in the section that is relevant). The purpose of s 21 is to "prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse" (as van Heerden JA put it in *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) at 13 I); and, viewed from the other angle, "to ensure that property which properly belonged to the insolvent ends

up in the estate" (as Goldstone J put it in *Harksen v Lane NO And Others* 1998 (1) SA 300 (CC) at 318 E).

The van der Westhuizens were married out of community of property in 1957. She had been a teacher and he a farmer in the Aberdeen district. Roundabout 1982 he purchased and had transferred to himself a holiday home at Hartenbos near Mossel Bay ("the home"). In December 1989 he sold his farms and on 23 May 1990 he sold the home to his wife. Transfer was taken by her on 25 September 1991. His estate was sequestrated in 1995. It was because of the refusal of the appellant (Mrs Lyndall Beddy - the insolvent's trustee - hereinafter "the trustee") to release the home under s 21 (2) that the application by the wife was brought. The trustee's stand is that the known circumstances, plus the spouses' backwordness in revealing facts best known to themselves, throw serious doubt upon the genuineness of the sale, and give strong grounds for suspicion that there was collusion between them to rescue the house out of his estate to the prejudice of creditors.

An amendment to the insolvency legislation in 1926 is the basis of the decision in *Maudley's Trustees v Maudsley* 1940 TPD 399, to the effect that the onus had been shifted to the solvent spouse to prove one of the grounds constituting entitlement to release under s 21 (2) and its immediate 1926

predecessor. The parties are agreed that the onus rests on the wife to prove that she acquired the home "by a title valid as against the creditors of the insolvent". But there was some argument as to what the extent of this onus was, particularly whether the wife had to disprove the applicability of sections 26 (dispositions without value), 29 (voidable preferences), 30 (undue preferences) and 31 (collusive dealings before sequestration). Because of the view which I have formed on the facts it is unnecessary to decide this question.

Under the common law, if a disposition has the effect of preferring the alienee above other creditors and the disposition has been agreed upon in order to defraud creditors, the disposition may be set aside. The sense in which the expression "in order to defraud creditors" is used is explained by Solomon JA in *Trustees, Estate Chin v National Bank of South Africa ltd* 1915 AD 353 at 363. If "the object of the transaction were to give one creditor an unfair advantage over other creditors in case of insolvency, that would not necessarily be a fraud in the criminal sense of the word, but it would certainly constitute a fraud upon the creditors within the ordinary meaning of that expression." A disposition having that purpose and that effect cannot confer a title valid against creditors. A person facing insolvency and the person whom he wishes to advantage may act overtly, if bold or merely naive, but it is more usual that an attempt will be

made to conceal their true purpose. Once exposed such an attempt is of no avail, as the law is concerned with the actual intention of the parties to a transaction: *Erf 318/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 952 F. It is against this background that the decisions in *Snyman v Rheeder NO* 1989 (4) SA 496 (T) at 505 I - 506 B and *Jooste v de Witt NO* 1999 (2) SA 355 (T) 361 J - 362 E should be viewed. In those cases it was correctly held that, after putting any simulation aside, it is the validity of the true transaction that must be examined in order to ascertain whether a title valid against creditors has been established for the purposes of s 21 (2) (c). This conclusion is reached without any resort to s 31 of the statute (collusive dealing). Nor, since the amendment of the law in 1984, is the enquiry whether the true transaction is a donation, as even a donation can now found such title. It is a collusive donation, not any donation, just as any other collusive transaction, that will not satisfy the requirements of the section. As far as onus is concerned, s 21 (2) expressly places the onus on the solvent spouse, and I do not think that that onus is discharged simply by pointing to the ostensible transaction (in this case the sale) and saying to the trustee "It is now your turn to do your worst with it". The onus is on the solvent spouse to prove the true transaction and that it is a valid one such as may confer a valid title.

Validity is usually closely related to the parties' knowledge of the alienor's actual or imminent insolvency. In a case such as the present there are several theoretical possibilities, in the light of the queries raised by the trustees: that the entire transaction was not a sale at all but a collusive donation, that it was a sale but the price was collusively diminished or, again, that it was a sale but with the price collusively agreed not to be paid by the wife (which latter is really a donation). In my opinion the facts clearly indicate that the true intention of the parties was a collusive donation agreed upon in order to prejudice creditors and save the home for themselves, which donation they sought to disguise by a simulation - the sale. This means that the wife has not discharged the onus of proving valid title. I would add that even if the onus had rested on the trustee, I consider that she would have discharged it. My reasons for these conclusions are set out below.

The papers and much of the heads of argument were directed to the sale in May 1990 as constituting the disposition under consideration. If one were concerned with the statute then this sale would constitute a "disposition", as the wide definition of that term in s 1 of the Act includes a sale. But it also includes a transfer. However, I consider that the answer should be sought in the common law. The act with which the common law concerns itself is alienation - see eg

Voet 42.8.1 and van der Keessel *Theses Selectae* 200 (Lorenz translation 67) and the transfer in September 1991 was an alienation. Although it is necessary to analyse the sale in some detail in order to understand the entire course of dealing, in the end the emphasis will fall upon the transfer, because, although the insolvent may have been precariously solvent in May 1990, by September 1991 he was bereft of assets whilst still subject to a substantial liability, and also because it is the transfer that is ultimately relevant to the validity of the wife's title.

When the evidence is considered one is struck by the generality of much of what is presented by the wife on important matters and by the paucity and patchiness of documentary support . It was not that she was not forewarned. The trustee warned her at an early stage that her duty entailed that she had to be presented with sufficient evidence before she could release assets. In her answering affidavit the trustee raised pertinently those things that troubled her, and which in her opinion required explanation. Yet in her reply the wife went so far as to say that she had already largely dealt with the real points of dispute in her founding affidavit. Although she did attempt to deal with some of the points raised in the answer, her tendency was to be dismissive and not to face up to them squarely. Perhaps that was because it was not possible for her to do so.

A convenient starting point is the purchase price for the home fixed in the contract between the spouses on 23 May 1990. It was R 67 000, payable in cash against registration of transfer. Questions have been raised by the trustee both as to whether the price was related to market value, and, in any event, as to what, if anything, the wife paid out of her own, rather than the insolvent's estate.

As to the true value of the home, the trustee points to the fact that when the insolvent bought it in 1981 or 1982 (transfer was registered on 21 May 1982) the price was already R 62 500. No mention of this price was made in the founding papers. An appreciation of a mere R 4500 over eight years of the inflationery 80s is most unlikely, the trustee contends. In her reply the wife brushes aside the price that the insolvent paid as irrelevant. The striking fact is that nowhere does she attempt to make out a positive case as to what the market value was in 1990 or in 1991. Indeed she goes so far as to say in her reply that in the context of the transaction with the insolvent the actual market value in 1990 is an irrelevance. This attitude is confirmed by another passage in her reply, in which she says that she and the insolvent had regard to all the facts and circumstances at the time when they determined the price. For her part she was satisfied that she had been compensated for all that she had paid out on the

insolvent's behalf in the past (what she meant by this will become apparent later). However, in the founding affidavit the emphasis had been somewhat different - not on what the spouses had determined - but rather: "Hierdie koopprys [R 67 000] is destyds deur prokureur Bouwer van Graaff-Reinet *bepaal* . . .". For whatever reason, in her reply she asserted "Nêrens het ek beweer dat . . . Bouwer die eiendom *waardeer* het nie" (both emphases my own). What the point of the reference to Bouwer was, other than to lend an air of respectability to the transaction, is unclear. The passage quoted from the founding affidavit involving Bouwer is followed by another invocation of authoritative confirmation in these terms: ". . . Hereregte is ook op slegs hierdie bedrag betaal, wat deur die Ontvanger van Inkomste as die billike markwaarde aanvaar is." What the Receiver was told, other than that the cash price was R 67 000, we are not informed. Had he had sight of the wife's papers in this case, never mind those of the trustee, his assessment of transfer duty might have been different.

A further important fact put forward by the trustee is to be found in the affidavit of the insolvent which he filed in an application in mid 1989 by Boland Bank to sequestrate his estate. The insolvent succeeded in his opposition, but what is now of importance is that in his list of assets he reflected the home as

being worth R 120 000. In her reply the wife brushes this aside with the remark: "Ek kan nie verantwoordelikheid aanvaar vir die insolvent se opinie van wat die eiendom in 1989 werd sou wees nie." Elsewhere in her reply she describes this value as irrelevant. The matter cannot be so simple. The two spouses are still married and live together. She is accused of having colluded with him. He made an affidavit in support of the founding affidavit, even if it was in simple confirmatory form. But no explanation of this value of R 120 000 is given by him in the reply. Accordingly, looking only at the facts mentioned so far, before one even looks at the valuations put in by the trustee, there must be a strong suspicion that the home was worth much more than R 67 000 in 1990 and in 1991.

The trustee has produced two valuations of the home made by an appraiser, one Levitt, in November 1996. His valuation at that date is R 250 000, and at May 1990, approximately R 180 000. In making these valuations he took into account that the property was not in a good state of repair. The wife has raised a series of objections to the these valuations, questioning both their admissibility (because Levitt did not make an affidavit) and their worth. For instance, she contends that the appraiser is not acquainted with the area and has not viewed the interior. However, I do not consider that these valuations can be

brushed aside as incapable of giving even an approximate value much in excess of the 1990 purchase price. Particularly is this so when the wife has made no attempt to put forward a lower valuation in reply. Indeed, as I have indicated already, in her reply she treats market value as an irrelevance. The result is that the strong suspicion mentioned in the previous paragraph is strengthened.

Nor does the wife make a persuasive case that she paid R 67 000 out of her own separate estate and not out of her husband's. Her case is that she had a substantial estate of her own, partly built up out of her independent farming activities, carried out on the insolvent's farms. I shall return to this subject. Her version of the payment of the price is that she paid a total of R 56 511,79 direct to the bondholder, Allied Building Society, by means of two payments out of her bank account, of R 12 000,00 on 28 February 1990 (before the sale) and R 44 511,79 on 8 June 1990. The balance of the price of R 10 488,21 was paid by way of further set-off of amounts owed to her by the insolvent. The "further" set-off is a reference to her earlier statement that in arriving at the price of R 67 000 the spouses had already given her credit for the fact that since 1986 she had paid a total of R 35 000 as instalments on the Allied bond over the home. A difficulty with both the R 10 488,21 and the R 35 000 is that in the insolvent's affidavit in mid 1989, already referred to, when he lists his liabilities, he makes

no mention of any debts owed to his wife. Again no explanation is given. Nor is there any objective evidence that an indebtedness existed. It must be borne in mind that on the wife's own showing the insolvent was hard pressed for money continuously after 1986, so that any payments she may have made for his benefit may well have been paid as part of her duty of support or even as a means of keeping a roof over her own head. These problems are simply not addressed. It is all too easy for spouses staring insolvency in the face to fashion out of the past liabilities that were not there before. No attempt is made by the wife to establish in detail how the
R 10 488,21 was made up. Even in her reply she is content to say "Deurdat die insolvent veel meer as R 10 488,21 op die betrokke datum [23 May 1990] aan my verskuldig was uit hoofde daarvan dat ek finansiële bystand aan hom verleen het, het skuldvergelyking plaasgevind." As far as the two payments to Allied are concerned there is, as will be explained later, the additional question as to whether the funds in the wife's bank account in May 1990 were all her own.

In order to examine the wife's claim that she was using her own money and also to test her claim that the spouses believed that the insolvent had weathered his troubles and was not faced by probable insolvency, it is necessary

to look at their financial histories more closely. The wife says that she had an estate of her own acquired from non-farming sources between 1956 and 1982. It was derived from pension moneys paid out to her when she gave up teaching, and sundry gifts and inheritances, none of which was large. From the time of her marriage in 1957 she earned an income from the sale of cream, milk, butter, eggs and vegetables. She acquired some stud Jerseys which she marked with her own brand. She had to sell them in the 1967 drought. When it was over she used the proceeds to buy some angora goats, as also some milk goats. These also bore her brand. Later she acquired some sheep, which were branded as hers. By means of careful husbanding of her income she acquired livestock, implements and other farming necessaries. Because of the insolvent's sale of his farms towards the end of 1989, she was obliged to sell these things in late February 1990. Up to this point she has given no figures of her farming income or the proceeds of the disposal of her farming assets. She then claims that she received R 110 625, 45 for this disposal, relying upon a credit transfer in that amount to her Nedbank account at George on 9 November 1990. The subject of the transaction is described as a transfer by First National Bank at Graaff-Reinet of an investment comprising capital and interest. Other than a general statement that these moneys were derived from the sale of her farming assets, we are given

no details of the sale of the assets, or of the creation of the investment. Because there are no details of the sale there is no evidence, other than the wife's say so and the insolvent's laconic confirmation, that these moneys were hers and not derived from the sale of some of his assets.

On her version the insolvent's farming, to avail oneself of the Afrikaans expression, went backwards. After the collapse of the goat and ostrich markets, in 1986 the Boland Bank, which had a bond over his farms, terminated his credit facilities. As a result he suffered an acute shortage of working capital and had to devote all his income to paying creditors. She had to use some of her own funds to ease his cash flow problems. She claims to have paid R 35 000 to the Allied Building society in instalments on the bond over the home, at least R 38 658,25 to the Land Bank, which also had a bond over the farms, and sundry current farming expenses. In fact in the last few years preceding 1990 she claimed to have maintained him. Late in 1987 she became a member of the co-operative (Boeremakelaars (Koöp) Beperk - "BKB"). She states this fact in order to bolster her claim that she was farming on her own account on a substantial scale, but does not explain why it was only in 1987 that she became a member. Nor are any BKB accounts annexed, either for herself or the insolvent (assuming that he was a member - we are not told). Such accounts

would probably have been revealing. In September and October 1987 the insolvent was obliged to sell five bakkies in order to provide working capital. In addition he sold a 1984 Audi motorcar to the wife.

In the meantime the insolvent, perennially short of funds, was still farming on Vredelus, Voorspoed, Skoongezicht, Spioenkop and Eiland, principally with 2500 angora goats. On 12 July 1989 Boland Bank obtained a provisional order of sequestration against him. The affidavit filed by him in those proceedings is the one already referred to, in which he lists his assets and liabilities. Livestock was reflected as being worth R 608 850 (after shearing) and implements R 250 000. A surplus of assets over liabilities of R 1 273 458,60 was reflected. Not surprisingly, on this version the provisional order was discharged on 17 August 1989. But the insolvent's farming days were ending. In December 1989 he sold his farms. We are not told what the price was. It is common cause that the proceeds were sufficient to settle the claims of the bondholders Boland Bank and the Land Bank, and that they were paid. We are also not told what was received for livestock and implements (not long before valued at R 608 850 and R 250 000 respectively). However that may be, it appears to be common cause that on 18 June 1990 creditors (save one to be mentioned below) were paid, whoever they were and in whatever amounts.

(The affidavit of mid 1989 had shown only one creditor other than Boland Bank and the Land Bank, and that was Allied, which was owed R 53 000 on the bond over the home).

In her founding affidavit the wife says that upon the sale of the farms the spouses expected there to be a surplus and that is how it turned out when the proceeds were received. In her reply she claims that the surplus amounted to R 75 418,89. This she seeks to establish by reference to a letter from attorney Bouwer in April 1992, setting out total proceeds (from the sale of what exactly?) as R 1 682 601,68, the payments to the two farm bondholders and the expenses incurred in respect of commission and advertising, leaving the balance mentioned available for the insolvent. The trustee has had no opportunity to deal with this letter and it may be ignored as possible support for the wife's case. But it should not be ignored for the admissions it contains, concerning what the wife says happened to the surplus. It was used to buy annuities (unspecified), to compensate two sons for the inadequate renumeration they had received from the insolvent when farming with him, and to provide for a recently divorced daughter, who was unable to maintain herself. No dates or further details are given. It is most improbable that she did not know of the insolvent's intentions with regard to the few worldly goods that would be left to

him. In any event she does not claim such ignorance. Her reply proceeds:

> "Die insolvent was omdat hy sy plase verkoop het en dus sy boerdery gelikwideer het en die opbrengs daarvan aangewend het nie in staat om die verbandpaaiemente ten opsigte van die onroerende eiendom [the home] verder te betaal nie en hy moes daarvan ontslae raak" [thus leading on to the sale to her].

Apart from contradicting her statement in the founding affidavit that she had been paying the instalments on the home since 1986, the clear implication is that already by May 1990 the spouses contemplated that the insolvent would be left with practically nothing. If there was a creditor who had not been paid, and provision had not been made for him, then it seems clear that allowing the wife to set off her claims of R 35 000,00 and R 10 488,21 (assuming that she had such claims) constituted an undue preference and, in addition, that the payments to the children are suspect as dispositions without value, to the detriment of that creditor. Nor is there any attempt to explain why part of the surplus of R 75 418,89 was not used to pay off the bond over the home, seemingly the obvious destination of these funds .

There was such a creditor, the Davis Myles Trust ("the Trust"). The payment of its claim, which existed well before 1989, was delayed by litigation for years, but it was the claim upon which the insolvent's estate was ultimately sequestrated on 2 March 1995. The explanation offered in the founding

affidavit for the non-payment of the Trust was the following:

> "Op hierdie stadium [late 1989 early 1990] was die insolvent ook in besit van voldoende sybokke om aan die Davis Myles Trust te lewer. Lewering kon toe nie geskied nie *omdat die insolvent nie geweet het op watter plek die sybokke gelewer moes word nie*. Uiteindelik kon die insolvent nie die sybokke lewer nie omdat die sybokke wat vir daardie doel op Voorspoed by die nuwe eienaar van die plaas gelaat is, *nie meer daar was nie*. . . ." (Own emphasis).

We are not told what the goats were worth or what, if anything, was done to recover from the new owner of Voorspoed. The Trust had sued the insolvent for the purchase price of R 79 000, and, according to the reply, the action had been set down for hearing on 14 May 1990 (that is just nine days before the sale of the home to the wife). The matter was postponed because it might be settled by an agreement that the insolvent deliver goats rather than pay money. At the time, so the reply tells us, the insolvent had the goats needed, but by the time the anticipated settlement was concluded in 1992 they were "egter nie meer beskikbaar nie". Nor had the insolvent the money to buy them in. In argument an attempt was made to wish away the Trust's claim by suggesting that because of its failure to take back goats when tendered by the insolvent it placed itself *in mora creditoris,* so that when the goats somehow disappeared, the risk of loss, so it was suggested, fell upon the Trust. Apart from other possible difficulties with this contention, its fatal defect is that it was not raised in the founding

affidavit. What was said in the founding affidavit I have already quoted.

Summons based on the settlement was issued by the Trust in January 1993. The claim was for 260 ewes with lambs, alternatively their value, being R 45 500. Judgment was later taken for R 53 000 and it was on this debt that the insolvent's estate was eventually sequestrated in 1995. The insolvent's subsequent statement of affairs reflected the R 53 000 as his only debt, apart from an unexplained claim of R 50 000 by the wife. Leaving aside the complexities which might seem to exist in the present litigation, the essential dispute is whether the Trust is entitled to have its claim paid out of the proceeds of the home preferently to, or conceivably, concurrently with, the wife. In her reply the wife says that in May 1990 (when the home was sold to her) the goats (then still in existence) were worth considerably more than R 45 000. The "considerably more" is presumably a reference to the difference between the R 75 418,89 mentioned before and

R 45 500. This explanation or justification overlooks two things. The first is that at the time the Trust's claim was not for R 45 500 but for R 79 000 plus costs plus interest. The second is that in the interim, in terms of the wife's own affidavit, the surplus had simply been handed out to the children or used in the purchase of

annuities, so that when the time came to purchase goats the cupboard was bare.

The dissipation of the R 75 418,89 affords a simple basis for allowing the appeal, because the inevitable conclusion on the papers is that after it had taken place and before the transfer of the home, the insolvent's assets were all gone, (this could not be contested by *Mr van der Walt*, for the wife), whereas he still faced the claim of the Trust. In addition, as I have pointed out already, the strong probability is that the wife knew all of these things. When taken together with the unsatisfactory features surrounding the sale which I have mentioned, and the insufficiencies of the evidence produced by the wife, both already mentioned and to be mentioned in the next paragraph, I think that the conclusion is inevitable that the spouses colluded to defraud the Trust.

Not surprisingly, there is not much evidence that the trustee has produced to contradict positively the history put forward by the wife. But the trustee has raised serious suspicions, largely based on the wife's version and lack of version. On the other hand, I find the combined effect of the affidavits of the two spouses to be selective, evasive, unpersuasive and at times contradictory. Thus the wife annexes tax assessments in her own name for the years 1993 to 1995, informing us that before that it was not the practice for wives to render separate returns. But no mention is made of the husband's

returns in the preceding years. They may have told us much about his income, her income, and their respective assets and liabilities. Then she tells us that throughout she had her own cheque account, first at Volkskas, Aberdeen, and after May 1990 at Nedbank, George. She produces the Volkskas Bank statements ranging from April 1988 to 23 May 1990 (which happens to be the date of sale of the home, and which seems to be the date on which the Volkskas account was closed). She also annexes some of the cheques drawn on this account. The difficulty is that the great bulk of them, although drawn on an account in her name, are signed by the insolvent, not herself. She also annexes numerous post May 1990 cheques drawn on Nedbank, George. All of them are signed by the insolvent, not herself. So whose bank accounts were these really? Nor are we told who was responsible for the credits or what they were. Hardly any deposit slips have been produced. We are not told if the insolvent had his own cheque account. Nor are we told whether either spouse had other accounts, such as savings accounts. What, for instance, was the nature of the "investment" transferred from Graaff-Reinet in November 1990? The wife may well be correct in saying that many past records have been destroyed, but it does not seem to me that, despite many warnings by the trustee to do so, she has made a genuine attempt to reconstruct a true picture.

In the court below van Deventer J inclined to the view that the onus did not rest on the wife (for reasons that are not clear), but concluded, in any event, that "there is no evidence here to justify an inference, on a balance of probabilities, that the sale of the house was a simulated transaction or that the applicant acted as a nominee or dummy for her husband or that the sale amounted to a collusive dealing." For the reasons given I cannot agree with this conclusion.

The appeal is upheld with costs. The order of the court *a quo* is replaced with the following:

"The application is dismissed with costs."

W P SCHUTZ
JUDGE OF APPEAL

CONCUR:
VAN HEERDEN DCJ
HEFER JA
NIENABER JA
MARAIS JA