THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 66/10

In the matter between:

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O.	**1ST APPELLANT**
PHILIP FOURIE N.O.	**2ND APPELLANT**
JACOB LUCIEN LUBISI N.O.	**3RD APPELLANT**
LILY MAMPINA MALATSI-TEFFO N.O.	**4TH APPELLANT**
ENVER MOHAMMED MOTALA N.O.	**5TH APPELLANT**
RABOJANE MOSES KGOSANA N.O.	**6TH APPELLANT**
(in their capacities as joint-liquidators of	
MP FINANCE GROUP CC [IN LIQUIDATION])	
and	
SAREL JOHANNES LODEWIKUS STEYN (18137/2005)	**RESPONDENT**

Neutral citation: *Janse van Rensburg v Steyn* (66/10) [2011] ZASCA 71 (25 May 2011)

Coram: NAVSA, HEHER, SNYDERS, SHONGWE JJA and MEER AJA

Heard: 3 May 2011

Delivered: 25 May 2011

Updated:

Summary: Practice – default judgment – validity of order appointing plaintiffs as liquidators – order preceded by published *rule nisi* – order *res judicata* between liquidators and investors of estate administered by them.
Insolvency – voidable preference – application to set aside under s 29 of Insolvency Act 24 of 1936 and to recover amount of disposition – 'debtor' – who is – consolidated estate in which liquidators unable to identify entity making the disposition – interpretation of consolidation order.

–

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Tuchten J sitting as court of first instance):

In the result the appeal succeeds. The following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:

‘1. The payments totalling R117 100.00 made by the Krion Scheme to the defendant are set aside in terms of s 29 of the Insolvency Act 24 of 1936.

2. Judgment is entered against the defendant for payment of R117 100.00 and interest thereon at the prescribed rate from date of judgment to date of payment.

3. Costs of suit.’

—

—

JUDGMENT

HEHER JA (NAVSA, SNYDERS, SHONGWE JJA AND MEER AJA concurring):

[1] This is an appeal from a judgment of Tuchten AJ sitting in the North Gauteng High Court with leave of the learned judge.

[2] The six applicants, professional liquidators, sued the respondent, a retired train driver. They relied on s 29 of the Insolvency Act 24 of 1936. They asked the court to set aside as voidable preferences payments made to the respondent by the consolidated estate of four corporate entities and a ‘partnership’ which estate they referred to in their particulars of claim as ‘the Krion scheme’, and for payment of R117 100 as contemplated in s 32(3) of the Act.

[3] The respondent (Steyn) did not oppose the action. The liquidators applied for default judgment. The trial judge expressed doubts about the validity of their cause of action and required them to file an affidavit to explain why more than one entity was

being liquidated under the same name and why that entity was claiming payment of the alleged debt. The liquidators duly provided such an explanation by means of an affidavit by their attorney, Mr Coetzee, supported by the application papers in TPD case no 21098/2002 to which reference will be made below.

[4] The learned judge was not persuaded. Although he questioned the *locus standi* of the liquidators in his judgment, he left that matter open. Instead he refused the application on the grounds that:

'Section 29 of the Insolvency Act requires a plaintiff to show that the disposition in question was made by a specific debtor. A plaintiff who relies on either s 26 or s 29 is further required to show that at a decisive moment the liabilities exceeded the assets of that specific insolvent debtor . . . This is precisely what the plaintiffs are unable to do: this is why no such allegation is made in their particulars of claim and the evidence presented through the affidavit of the plaintiff's attorney shows that this is why the court order was sought.[1]'

Tuchten AJ accordingly concluded that the liquidators' claim disclosed no valid cause of action and he dismissed the application for judgment.

The *locus standi* of the liquidators

[5] Because of the doubts expressed by the learned judge, and because Fabricius AJ in his judgment in the *Botha* case – the appeal in which was heard together with this appeal and in respect of which judgment is also delivered today – expressly approved of those reservations, it will be convenient to deal first with the question of *locus standi*.

[6] According to the liquidators' particulars of claim:

'7.1 The First to Sixth Plaintiffs act herein in their capacities as the duly appointed liquidators of the estate of MP Finance Consultants CC (in liquidation), Krion Financial Services Limited (in liquidation), Marburt Financial Services Limited (in liquidation), Madikor 20 (Pty) Ltd (in liquidation) and M&B Co-Operative Limited Partnership.

7.2 All of the estates referred to hereinabove have been consolidated into a single estate by order of the High Court of South Africa (Witwatersrand Local Division) under case number 21098/2002.

7.3 The consolidated estate is referred to as MP Finance Group CC (in liquidation) and is

1 The learned judge was referring to the rule issued in case no 21098/2002 as confirmed on 4 February 2003.

referred to herein as the 'Krion Scheme'.'

Four matters of note arise from the allegations made in para 7 of the claim:

1. The liquidators sue as the joint liquidators of a consolidated estate.

2. The consolidated estate is made up of the estates in liquidation of one close corporation, three companies, and an entity which, by description, is a partnership that is not alleged to have been sequestrated.

3. The consolidated estate is alleged to be that of a close corporation that bears a name which is not that of one of the entities whose estates have been combined.

4. The authority relied on for this, patently unusual, situation is an order of the High Court.

[7] There is, of course, a context to these allegations, disclosed to the learned judge, that should not be lost sight of in the procedural mists. The liquidators are carrying out a public duty. They applied for and received sanction for both the scope of their administration and the manner of its exercise.[2] Although I would not necessarily have sought relief in the terms of the orders in case no 21098/2002 (or granted it) that is, for reasons which will appear, water under the bridge. The liquidators have been carrying out their mandate for more than seven years. Before they applied for the authority conferred by the two orders they were aware of complexities and uncertainties in the administration of the estates of the various entities. The ramifications appear from the founding affidavit of the first appellant in case no 21098/2002. In short, the Krion scheme was a pyramid scheme operated by a Ms Marietjie Prinsloo almost entirely on a cash basis and dependent entirely upon procuring 'investments' from gullible members of the public sufficient to pay the fantastic rate of return promised to every one. The scheme was operated under various names including the four registered corporate entities referred to in the particulars of claim. Although meticulous records were kept of moneys received from and returns owing to investors, none of the entities, incorporated or otherwise, kept books of account or published financial statements and only Krion Financial Services Ltd opened a bank account (and then only for a period of about three months in 2002). The liquidators' task was especially complicated by the practice of Ms Prinsloo, as the driving

2 In case no 21098/2002 and case no 388/2003 to which reference will also be made below.

force behind the operation of the scheme, of moving from one corporate identity to another successively and as it suited her and, particularly, during a period when there were official enquiries being made into her affairs. On such occasions the assets and liabilities of the discarded entity were simply taken over holus bolus by the one that followed. As the first appellant deposed:

'Mev Prinsloo het self getuig [in a s 417 enquiry] dat dit ook vir haar onmoontlik sou wees om vas te stel welke beleggers by welke entiteit belê het en welke entiteit die maandelikse rente en of kapitaal terugbetalings aan beleggers gedoen het. Dit was egter nie vir haar belangrik nie aangesien sy al die aparte entiteite se besigheid as net een besigheid beskou het en was die verskillende entiteite aldus haar net nodig om die skema te probeer wettig . . . So byvoorbeeld blyk uit al die state dat MP Financial [a trading name utilized by Ms Prinsloo] die uitbetalings doen ten spyte van die feit dat dit gedoen is met fondse van die ander entiteite soos en wanneer hulle begin handel dryf.'

[8] The first appellant informed the court in the initial application (and likewise the learned judge a quo) that

1. a minimum of 8 748 persons invested money in the scheme;
2. each investor invested, on average, 3.1 times;
3. 26 885 separate investments were made;
4. the total of all investments was about R1.5 billion, represented by about R950 million in new investments and about R625 million in re-investments;
5. about R975 million was returned to investors;
6. there was an unexplained shortage of about R600 million.

[9] In the circumstances that gave rise to the original application a pragmatic, overall view was required, rather than one that attempted to tie loose ends. Since 2003 the liquidators have been before this Court on three occasions in the bona fide administration of the consolidated estate.[3] During those appeals no challenge was raised to their *locus standi*. They have caused thousands of summonses to be issued in order to recover assets of the consolidated estate for the equitable benefit of creditors. All these considerations were known to the court a quo. In such

3 See *Fourie NO v Edeling NO* [2005] 4 All SA 393 (SCA); *MP Finance Group CC (in liquidation) v Commissioner, South African Revenue Service* 2007 (5) SA 521 (SCA); *Janse van Rensburg & Others NNO v Steenkamp*; *Janse van Rensburg & Others NNO v Myburgh* 2010 (1) SA 649 (SCA).

circumstances a court should be slow to undermine the process of liquidation unless that consequence is unavoidable.

[10] A brief reference to the entity, called M & B Co-Operative Limited Partnership in para 7.1 of the liquidators' particulars of claim, is necessary. This entity was, according to the founding affidavit in case no 21098/2002, a vehicle used by Ms Prinsloo to further the scheme, her intention being to incorporate it as a co-operative society; that did not happen and in consequence it never matured beyond one of the trading names of the Krion Scheme. Although the deponent describes it as 'regtens soos 'n vennootskap' and purports to identify the partners, it is clear that he does not speak from personal knowledge and he does not provide any factual basis for his legal conclusion. It may therefore be accepted simply as one of the names used by the corporate entities engaged in the scheme whose recognition in the order of Hartzenberg J was probably superfluous.

[11] I think that the answer to the perceived dilemma about the *locus standi* of the liquidators lies in the orders made by Hartzenberg J in case no 20198/2002 and the reasons for those orders, as well as the order that the same learned judge made in case no 1288/2003.

[12] The order in case no 20198/2002 was in so far as relevant to the present appeal, as follows:

'2. Dat dit verklaar word dat die boedels van MP Finance Consultants BK (in likwidasie), Krion Financial Services Bpk (in likwidasie), Martburt Finansiële Dienste (in voorlopige likwidasie), Madikor Twintig (Edms) Bpk (in likwidasie) en M & B Koöperasie Bpk Vennootskap een entiteit is bekend as

die MP Finance Group BK, welke saamgevoegde boedel vir alle doeleindes as 'n gelikwideerde beslote korporasie beskou sal word en dat verklaar word dat die besigheid van die verskillende entiteite, die besigheid van die saamgevoegde beslote korporasie was.

3. Dat die voormelde gesamentlike boedel van die verskillende entiteite as een beslote korporasie beredder en beskou sal word vir doeleindes van die voorafgaande en sal die feit dat daar aparte entiteite opgerig is, verontagsaam word.

4. Dat die voorafgaande nie afbreuk sal doen aan die regte van enige skuldeiser wat 'n eis

bewys teen enige van die afsonderlike entiteite hierbo na verwys nie, met dien verstande dat sodanige skuldeiser se eis slegs ontmoet word uit ‘n bate wat bewys word die bate van sodanige afsonderlike entiteit is.

5. Dat in die geval van Krion Financial Services Bpk (in likwidasie) word verklaar dat die bepalings van Artikels 311, 312, 417, 418 en 424 van die Maatskappywet (Wet 61 van 1973) van krag bly, asof hierdie bevel glad nie gemaak is nie, behalwe dat alle koste hieraan verbonde uit die saamgevoegde boedel betaal mag word en dat die likwidateurs te enige tyd in die toekoms om gegronde redes mag aansoek doen aan hierdie hof dat enige ander bepalings van die Maatskappyewet ook van krag sal wees, of dat hierdie bevel op enige gepaste wyse gewysig word om voorsiening te maak vir die meer effektiewe administrasie van die boedel.

6. Dat die likwidasie van die saamgevoegde boedel geag word ‘n aanvang geneem het op 4 Junie 2002.

7. Dat behalwe vir die voorafgaande uitsonderings word die Applikante gelas om enige eise wat bewys word teen enige van die gemelde entiteite te beskou as ‘n eis teen die saamgevoegde boedel.’

[13] The order in case no 1288/2003 was, also to the extent relevant, and as amended by this Court, in the *Fourie* matter, as follows:

‘1. It is declared that the investment scheme by Marietjie Prinsloo (formerly Pelser) during the period 1998 to June 2002 under various names including MP Finance Consultants CC, Madikor Twintig (Pty) Ltd, Martburt Financial Services Limited, M & B Ko-operasie Beperk and Krion Financial Services Limed (“the investment scheme”) was at all material times from and after 1 March 1999 insolvent in that its liabilities exceeded its assets.

2. All contracts concluded between the investment scheme and investors in the scheme were illegal and null and void.

3. All actual payments, whether as profit or interest, from and after March 1999 by the aforesaid investment scheme to the second, third, fourth, fifth and further respondents, in so far as they exceed the investments of each particular investor are set aside, under s 26 of the Insolvency Act as dispositions without value by the scheme to investors at times when its liabilities exceeded its assets, provided that the right of investors to rely on the provisions of s 33 of the Insolvency Act is in no way affected by this order.’

[14] The confirmation of both orders was preceded by the nationwide publication of a rule *nisi* intended, among other purposes, to serve as notice to all investors in the Krion scheme. Neither the names or whereabouts of every investor was known to the

liquidators and this, together with the substantial cost of effecting personal service on all identifiable investors, obviously persuaded the court that substituted service should be authorised. Publication of the terms of the rule in the first application was accompanied by a succinct summary of the application, the rule and its effects intended for the enlightenment of investors. The summary was as follows:

'Marietjie Prinsloo (voorheen Pelser) het haar beleggingskema bedryf deur verskeie entiteite naamlik MP Finance Consultants BK, Martburt Finansiële Dienste Bpk, Madikor Twintig (Edms) Bpk, M & B Ko-operasie Bpk en Krion Finansiële Dienste Bpk.

Almal behalwe M & B Ko-operasie Bpk, wat nooit geregistreer was nie, is reeds gelikwideer en die voorlopige likwidateurs het die Hooggeregshof gevra om die verskeie boedels te konsolideer sodat dit voortaan alles beskou sal word asof dit maar net een maatskappy was, wat bekend sal staan as die MP Finance (Groep) BK.

Die redes vir konsolidasie is onder andere dat dit deurentyd dieselfde besigheid was ten spyte daarvan dat verskeie name van tyd tot tyd gebruik was, dat die entiteite se sake nie afsonderlik bedryf was nie en het hulle onder andere mekaar se skulde betaal en was hul sake so in mekaar ineengestrengel dat dit vir die likwidateurs onmoontlik sal wees om afsonderlike bates en laste van die verskeie entiteite te identifiseer.

Belanghebbendes mag die aansoek bestry en redes aanvoer waarom so 'n konsolidasie bevel nie finaal gemaak moet word nie. Afskrifte van die aansoek stukke is beskikbaar by prokureurs Strydom & Bredenkamp Ing met Tel: (012) 342-0700, verwysing Judy Grobler.

Die beleggers se verteenwoordiger ondersteun die aansoek aangesien baie beleggers met meer as een entiteit sake gedoen het en dit baie moeilik sal wees om te bepaal hoeveel van elke entiteit ge-eis moet word.'

[15] No individual investor opposed confirmation of the rule in the first application. The so-called 'investors representative', Mr C S Edeling, contested several aspects, but abandoned his opposition before confirmation. The order was not appealed. It thus became binding on all investors including the respondents in the present appeals.[4] The order in case 1288/2003 was the subject of an appeal by Mr Edeling and certain investors. The appeal was substantially unsuccessful.[5] Although the court stated that it was open to any investor to challenge the enforceability of the order on the ground that he had not received notice or had not understood the order, it is clear that the order

4 See *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*; *Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 (4) SA 467 (SCA) at 476F-477B, paras 28 and 29.
5 See *Fourie NO v Edeling*, above.

was to remain prima facie binding on all investor who did not successfully challenge it on that basis. Neither Mr Botha in this appeal nor the appellants Steyn and Zwarts in the other two

appeals before us attempted to place evidence before the court which might justify their release from the effects of the order. As paragraphs 2 and 3 of the order in case no 21098/2002 expressly authorised and instructed the liquidators to proceed with liquidation of the four corporate entities as a consolidated estate the issue of *locus standi* was not one that could arise between an investor such as Mr Steyn and the liquidators. The orders are presumed to be correctly-made, whether they were or not.[6] The court a quo had no reason to enter upon the issue *suo moto* and could not sit as a court of appeal on the order made in those proceedings.

Compliance with s 29 of the Insolvency Act

[16] The orders go beyond *locus standi*. Properly interpreted[7] they

1. deem the whole operation of the Krion scheme to have been conducted under a single corporate entity, MP Finance Group CC;
2. authorise that the administration of the separate estates of the various corporate entities be carried on as one consolidated estate, MP Finance Group CC (in liquidation);
3. declare the estates, treated as one, to have been insolvent from 1999 because their liabilities exceeded their assets;
4. relieve the liquidators of the necessity of identifying assets and liabilities as attaching to any of the individual constituents of the consolidated estate.

[17] So understood, the order disposes of all the perceived difficulties which moved the learned judge to refuse the order. The liquidators' allegations must be read as relating to a specific insolvent debtor, viz the deemed corporate entity that embraced all temporary corporate vehicles and trade names used by Ms Prinsloo in implementing the fraudulent scheme, whether to attract investment or to discharge debts or perceived debts.

Interest

[18] The appellants claimed interest at the statutory rate of 15.5 per cent per annum *a tempore morae* to date of payment. In the application for default judgment the

6 *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564B-F.
7 As to which see *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H. No judgments were delivered in either application.

demand relied on was the service of the summons on 30 May 2005. There was some debate in counsel's heads of argument as to whether such an order was permissible.

[19] In Meskin's *Insolvency Law and its operation in winding up*, ed Magid *et al*, Issue 33, the authors submit (at 5-121) that

'the fact that section 32(3) does not empower the Court to make any order for the payment of interest does not preclude its awarding mora interest to the judgment creditor from the date of judgment. . . [A]n award of such interest from some earlier date is not competent since there is no obligation to restore or pay until the Court orders accordingly.'

That there is no such obligation before the court sets aside an impeachable disposition and makes an order for recovery has recently been made clear in *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 (SCA) in which Nugent JA explained the operation of s 32(3), pointing out (at para 10) that the defendant sued for the setting aside of a disposition under the sections and payment has no present obligation to pay the moneys that are claimed and only becomes obliged to pay once the court has made a declaration to that effect. Further (at para 12):

'the order obtained by the liquidator or trustee is one that brings a debt into existence once it has been shown that a disposition that falls within the terms of ss 26 to 31 has occurred. Once it is so shown the liquidator is entitled to recover the property or its value . . . [T]he declaration that is made by the court brings into existence debts that did not exist before and simultaneously enables the debts immediately to be enforced through the ordinary process of execution. . .'

[20] Thus the ordinary incidence of demand by means of service of the summons giving rise to *mora ex persona* must yield to the effect of the statute as explained in *Duet and Magnum* because the debtor is in mora only from date of judgment.

[21] It would therefore appear that the order for payment of mora interest from date of service of the summons made in analogous circumstances (although without motivation) in *Paterson NO v Trust Bank of Africa Ltd* 1979 (4) SA 992 (A) at 1003G should be regarded as having been made *per incuriam*.

[22] In the result the appeal succeeds. The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with the following:

‘1. The payments totalling R117 100.00 made by the Krion Scheme to the defendant are set aside in terms of s 29 of the Insolvency Act 24 of 1936.

2. Judgment is entered against the defendant for payment of R117 100.00 and interest thereon at the prescribed rate from date of judgment to date of payment.

3. Costs of suit.’

_____

J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS: F du Toit SC

Thys Cronje Inc, Pretoria

C/o Van der Merwe Sorour, Bloemfontein

RESPONDENT: -