



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 14143/2020

In the matter between:

EXOTIC FRUIT COMPANY (PTY) LTD

Applicant

and

**EVGUENI VICTOROVITCH ZAKHAROV
IRINA PETROVNA KARAVAENA**

First Respondent

Second Respondent

Matter Heard 16 March 2021

Judgment Delivered 30 March 2021

Coram: Mr Acting Justice Hockey

JUDGMENT DELIVERED ON 30 MARCH 2021

HOCKEY AJ:

- [1] The applicant is a company in liquidation, duly represented by its liquidators (I shall refer to them as "the applicant" or "the liquidators"), who applies for the estate of the first respondent ("the respondent") to be placed under provisional sequestration in the hands of the Master of the High Court, Western Cape.
- [2] The applicant alleges that the respondent was the controlling mind of the applicant before the latter was liquidated.
- [3] Within the period of six months prior to its liquidation, the applicant paid the amount of R3 317 188.24 to the respondent. The liquidators claim that such payment was not for value, preferred the respondent over other creditors and was made under circumstances where the liabilities of the applicant exceeded its assets.
- [4] The applicant relies on sections 29 and 30 of the Insolvency Act, 24 of 1936 ("the Insolvency Act") read with section 340 of the Companies Act, 61 of 1973. The latter section provides:

"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 provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition."

- [5] Section 29(1), on which the liquidators of the applicant rely for the setting aside of the disposition made by the applicant in favour of the respondent, therefore finds application. It provides:

"Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made

proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor are above another."

- [6] Section 30(1) of the Insolvency Act, on which the liquidators also rely, reads as follows:

"If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition."

- [7] It is trite that a creditor, with a claim of R100, or two or more creditors whose claims aggregate R200 may apply for the compulsory sequestration of a debtor's estate. A creditor must establish his or her claim when applying for the provisional sequestration of the estate.
- [8] What is clear, therefore, is that an applicant applying for the sequestration of an estate, must establish a debt (of at least R100) against such estate for standing to be established. In the present matter, the "debt" which the liquidators rely on is the disposition of R3 317 188.24 which they allege was one as described in either or both sections 29 or 30 of the Insolvency Act.
- [9] The critical question to determine is whether the disposition relied on by the liquidators is in fact a "debt" which would entitle them to bring the application for the sequestration of the respondent. I raised this issue during argument with Mr Daling who appeared for the applicant, but he was of the view that the court can make the determination that the disposition is impeachable and the court can make a declaration setting it aside in the present proceedings. I do not agree. I am of the view that the liquidators must approach the court in separate proceedings under sections 29 and/or 30 of the Insolvency Act and ask for a declaration that the disposition falls under either of these sections, and for it to be recoverable under section 32(3). Only once the disposition has been so set aside, and the court ordered for it to be recoverable, would a debt come into existence on which the liquidators may rely.

- [10] In **Duet and Magnum Financial Services CC (in Liquidation) v Koster** 2010 (4) SA 499 (SCA), the court dealt with the issue of prescription relating to an impeachable disposition. In that matter, the liquidators issued summons against the respondent, Mr Koster, wherein they alleged that certain dispositions had been made which fell within the ambit of either of sections 26(1)(b), 29(1) or 30(1) of the Insolvency Act. A special plea of prescription was raised against the liquidators' claim. In opposition to the claim of prescription, counsel for the liquidators argued that the respondent (Mr Koster) was not yet liable to repay the moneys claimed as no "debt" was in existence, and they were not entitled to recover the disposition until the court made the order sought by them. In this regard, the court held (at para 10):

"It is perfectly correct, as counsel for the liquidators submitted, that Mr Koster has no present obligation to pay the moneys that are claimed. It is also perfectly correct that Mr Koster will become obliged to pay the money only once a court has made a declaration to that effect."

- [11] The court held further (at para 13) that once it is shown that a disposition that falls within the terms of sections 26 to 31 of the insolvency Act has occurred, *"then s 32(3) entitles the liquidator to ask a court to set aside the disposition and to declare that 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."*


- [12] The conclusions reached in **Duet and Magnum** discussed above were confirmed by Cachalia JA in **Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others** 2016 (6) SA 181 (SCA) where the learned judge of appeal opined (at para 45):

"The provisions of the Insolvency Act (ss 26 – 31) ... referred to in [Duet and Magnum], which the High Court considered comparable to a shareholder's entitlement under s 266, dealt with declarations

that had the effect of bringing into existence a debt that did not previously exist. The liquidator's right to approach the court for such relief arises when certain events occur, for example, a disposition of property under ss 26-31 of the Insolvency Act. The liquidator becomes entitled to approach the court to set the disposition aside and to declare the liquidator entitled to recover the property. And the corresponding 'obligation' or 'liability' of the debtor arises immediately upon the liquidator's entitlement to recover the property." (Internal references removed.)

[13] In the present matter, therefore, the liquidators have not shown the existence of a "debt" owing by the respondent to the applicant and they have no standing to apply for the sequestration of the respondent.

[14] In the result, the application is dismissed, with costs.


S HOCKEY
ACTING JUDGE OF THE HIGH COURT

Appearances for the Applicant:

Adv. M Daling instructed by
Morkel De Villiers Attorneys

Appearances for the Respondent:

Adv. K Iles instructed by Dockrat
Attorneys