REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 7855/2016

In the matter between:

SIVALUTCHMEE MOODLIAR N.O.	**1st Plaintiff**
RYNETTE PIETERS N.O.	**2nd Plaintiff**
MLAMLI BALISO N.O.	**3rd Plaintiff**

and

LAWSON TOOL DISTRIBUTORS (PTY) LTD	**Defendant**

Coram: Bozalek J

Heard: 28, 29 April & 3 May 2021

Delivered: 7 May 2021

JUDGMENT

BOZALEK J

[1] The plaintiffs are the joint liquidators of Vusela Construction (Pty) Ltd ('Vusela') which was placed into final liquidation on 4 December 2013 after spending less than a month under business rescue.

[2] In this action they claim payment of the sum of R1 287 088.00 from the defendant

being the total sum of eight payments made by Vusela to the defendant in the six-month period preceding its liquidation.

[3] The plaintiff's case is that such payments constituted voidable preferences in terms of sec 29 of the Insolvency Act, 24 of 1936 as read with sec 339 and 340 of the Companies Act, 61 of 1973.

[4] The defendant carries on the business of a supplier of building tools, equipment and cement to the construction industry. It was common cause that Vusela was a long-time customer of the defendant, that it enjoyed a credit facility with it and that the eight payments in question formed part of regular payments made by it on account. The first of the disputed payments was made on 5 June 2013 and the last on 9 October 2013, their amounts ranging from R42 108.60 to R514 694.19. This latter payment was made just less than six months before Vusela's liquidation.

[5] Section 26 of the Insolvency Act provides as follows:

'Voidable Preferences

(1) Every disposition of his property made by a debtor not more than 6 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 above another'.

[6] It follows that the plaintiff bears the onus of proving that there were disposition/s by Vusela of its property made not more than six months before liquidation to the defendant, being one of Vusela's creditors. None of these requirements are disputed by the defendant. In addition, the plaintiffs must prove that the dispositions had the effect of preferring the defendant above Vusela's other creditors and that immediately after making such dispositions, Vusela's liabilities exceeded its assets.

[7] In its plea the defendant denied the latter allegation but admitted that the effect of the disposition was to prefer it as a creditor above Vusela's other creditors. It pleaded further that the dispositions were made by Vusela in the ordinary course of business and were not intended to prefer one creditor over another.

[8] By the conclusion of the evidence the defendant, although not formally admitting that Vusela was hopelessly insolvent in the last six months of its existence, did not dispute the existence of this state of affairs. Having regard to the evidence in this regard it can be safely accepted that after each of the disputed dispositions Vusela's liabilities exceeded its assets.

[9] As a result of these concessions and findings the onus shifted to the defendant to prove, in accordance with its plea and in order to escape liability, that the dispositions were made by Vusela in the ordinary course of business and were not intended to prefer one creditor over another.

The evidence

[10] The plaintiffs led the evidence of a Mr Andrew Cawdry, a chartered accountant. He analysed Vusela's financial records with particular reference to its solvency during the six-month period in question and its record of payments to tis creditors over this period. In his evidence Mr Cawdry pointed to several instances in the six-month period where payments were made to the defendant whilst no payments were made to several creditors. In particular, SARS was owed amounts of approximately R42.5mil for VAT, R7.6mil for PAYE and R800 000 for UIF and this indebtedness went back to a time well before the six-month period. Thus while payments were being made to the defendant, SARS' indebtedness was outstanding and, Mr Cawdry testified, despite this no payments were made in the six-month period to SARS. Mr Cawdry also gave evidence as to Vusela's indebtedness to a number of creditors who eventually proved claims at the first and second meetings of creditors. In many instances the indebtedness of these creditors increased over the six-month period and this while the defendant was paid regularly and in full. The defendant did not prove a claim because it was owed an amount of only some R14 000.00 at liquidation.

[11] Mr Cawdry expressed the opinion that dispositions in question were not made in the ordinary course of business because many of Vusela's other creditors remained unpaid during this period. The plaintiff's counsel disavowed reliance on his opinion, however, on the basis that the issue was a legal question.

[12] The defendant called two witnesses including its managing director, Mr M Noordien. He testified that Vusela was a long-standing customer whose credit limit and

payment terms had been set over the years the by the defendant's credit guarantor. These terms required Vusela to settle its indebtedness in full within 30 days of presentation by defendant of a monthly statement. If full payment was not timeously made the defendant was required to suspend the account failing which Vusela's credit guarantee was placed in jeopardy. The defendant had faithfully complied with these terms over the years until Vusela's credit was suspended by the defendant's credit guarantor temporarily on 13 August 2013.

[13] The guarantor suspended Vusela's credit facility with the defendant but reinstated it ten days later until 16 October when Vusela's credit was again suspended but on this occasion, indefinitely. At this stage Vusela's outstanding debt balance with the defendant was only some R14 600.00.

[14] Mr Noordien's evidence that neither he nor the defendant had any special relationship with Vusela of its directors and that the account was not more than an everyday business relationship, was unchallenged.

[15] The defendant also led the evidence of a chartered accountant, Mr Craig Stieger, who analysed the financial records of Vusela's account with the defendant in detail particularly as regards the pattern of payments. He testified that the defendant had two accounts in its customer ledger for Vusela; one in respect of cement supplied to Vusela and the other for a variety of building supplies excluding cement, eg tools, timber etc. Mr Stieger analysed the supplies in respect of both accounts and found that there was no specific trend in the quantity of material supplied and assumed that materials were

ordered as and when they were required for various building projects.

[16] In respect of the dispositions made by Vusela, Mr Stieger found that its payments were regular and consistent. Over the period from 31 August 2011 to 31 October 2013 payments of account balances on the cement account had an average range of 26 days and on the tool account an average range of 32 days. These ranges increased within the preference period but remained under 46 days. On the only occasion that one of the accounts had moved into a temporary credit balance on 3 May 2013 this had been due to a misallocation of a payment and fell outside the preference period.

[17] In short Mr Stieger found that Vusela's account with the defendant was well run and throughout showed a consistent pattern of regular timeous payments for materials sold and delivered.

[18] Against this background two issues fall to be decided; firstly, whether the dispositions in question were made *'in the ordinary course of business'* and secondly whether in making such dispositions Vusela intended to prefer the defendant above another creditor/s. It is trite that in order to escape liability the defendant bears the onus of proving these two requirements.

[19] Dealing with the first requirement, the principles applicable when considering whether a disposition was made *'in the ordinary course of business'* were conveniently drawn together and summarised in *Griffiths v Janse Van Rensburg N.O.* [1]:

[1] 2016 (3) SA 389 (SCA).

'The test is an objective one. The disposition should be evaluated in the light of all relevant facts. This must be done on a case-by-case basis. Put traditionally, the disposition –

> *"must be one which would not to the ordinary [person] appear anomalous or unbusinesslike or surprising".*

The question is whether ordinary, solvent businesspeople would, in similar circumstances, themselves act as did the parties to the transaction. Consideration should not be given to any intention to prefer or to the fact that the party making the disposition was insolvent at the time since these are considered separately under other parts of the section. The question to be answered is whether the transaction is one "with conventional terms which ordinary businesspeople would normally have concluded under the given circumstances. In other words, the disposition in question should not cause wrinkled noses or raised eyebrows among solvent businesspeople who know the circumstances in which it was made'.

[20] In the present matter the main contention on behalf of the plaintiffs was that the making of regular payments to the defendant whilst Vusela's other creditors remained unpaid could not have been payments made in the ordinary course of business. This approach however is tantamount to wishing away Vusela's state of insolvency at the time or implying an intention to prefer on its part when these are questions which are prematurely raised.

[21] To my mind the enquiry is a somewhat narrower one viz whether in the context of the business relationship between Vusela and the defendant, the dispositions would appear anomalous or unbusinesslike to the ordinary person of business.

[22] The terms of the credit facility which Vusela enjoyed with the defendant were

clear. It if wished to continue purchasing building materials from it, it had to settle its arrears outstanding within 30 days of statement failing which its account would be suspended. Vusela purchased such supplies (which it presumably required to carry on its own business as a major builder) and duly paid for them on a regular basis within the stipulated period. In these circumstances I can see no basis for any finding that such dispositions were made other than in the ordinary course of business. Accordingly, I find that the defendant has discharged the onus of proving the first element of its defence to the claim.

[23] This brings one to the heart of the matter which is whether the defendant has succeeded in proving the second element necessary for its defence to succeed viz that in making the dispositions there was no intention to prefer one creditor above another.

[24] The leading case dealing with this requirement is the majority judgment by Zulman JA in *Cooper, Brian St Clair and Janse Van Rensburg, Jakobus Hendrikus v Merchant Trade Finance Limited*[2] and which deserves quotation at some length. The learned judge commences as follows:

> *'[4] It is essential and indeed fundamental to any decision as to whether there has been an intention to prefer to examine and weigh up all of the relevant facts which prevailed at the time that the disposition was made in order to determine what, on a balance of probabilities, was the "dominant, operative or effectual intention in substance and in truth" of the debtor for making the decision.*
>
> *[5] In seeking to establish whether the requisite intention was present in the debtor's mind at the time of making the disposition the test is a subjective one. The*

[2] 2000 (3) SA 1009 (SCA).

Court is required to determine a question of fact. As Lord Greene MR, echoing the well-known language of Bowen LJ in an earlier case, asserted:

> *"A state of mind is as much a fact as a state of digestion, and the method of ascertaining it is by evidence and inference…'*

[6] The mere fact that the effect of the transaction is to prefer one creditor above another does not necessarily mean that there has been a voidable preference. Obviously in every case where one creditor is paid and other are not there is a preference in favour of the creditor who has been paid. …

[7] It is not incumbent upon the party who bears the onus of proving an absence of intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn… If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof. Viljoen JA put the matter as follows in AA Onderlinge Assuransie-Assosiasie Beperk v De Beer:-

> *"Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings."*

…

[8] The mere fact that the person who made the disposition does not give evidence does not ipso facto mean that one must infer that there was an intention to prefer. So for example in Gert de Jager (Edms) Bpk v Jones, N.O. en McHardy, N.O. the debtor did not give evidence. This notwithstanding, Rumpff, JA nevertheless, after remarking that it was the debtor who knew best as to what his intention was in regard to the disposition, still examined the probabilities in order to determine whether the inference of an intention to prefer was justified in the particular circumstances of the case. Indeed, as Catherine Smith points out, a debtor who has made a disposition to a creditor with the intention of preferring him above his other creditors is hardly likely to testify that he had that intention.

…

[10] In order to determine whether the debtor had the requisite intention it is necessary to enquire whether the debtor actually applied his mind to the matter. If there was no application of mind by the debtor to the question of whether in fact he was conferring a preference, it can hardly be said that he had an intention to do so. There is no room for treating as an intention to prefer "a culpable or reckless disregard of the possibility that the disposition might have the effect of preferring one creditor above another." An actual intention is required - not simply the fact that objectively viewed the debtor ought to have realised that a preference would occur if the disposition is made. Due regard being had to the party who bears the onus in English law, the matter is well put by Tomlin LJ in Peat v Gresham Trust Limited in these words:-

> *"It is contended on the appellant's behalf that once given the withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. My Lords, I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is*

> *satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred."*
>
> *[11] Mere proof that the insolvent's liabilities exceeded his assets at the time the disposition was made does not raise a presumption of an intention that the debtor's dominant motive in making the disposition was to prefer. Whilst contemplation of insolvency or inevitable insolvency is generally speaking necessary before an intention to prefer can be inferred it by no means follows axiomatically that the presence of such a state of mind, in itself, proves such an intention since other factors may nevertheless negate such an inference. ...*
>
> *[12] In accordance with general principles, if an inference of an innocent motive as opposed to an improper one can be drawn, this should be done.*
>
> *[13] The question which the Court has to decide is not whether the debtor should have known that the effect of the disposition made would have been to disturb the proper distribution of his assets but rather as a fact that he intended it to have that effect. As previously stated if the debtor never applied his mind to the matter it again can hardly be said that he had the requisite intention.*
>
> *[14] Any relationship between the insolvent and the creditor in addition to that of debtor and creditor, for example where the creditor is a close family member or relative, is relevant to the existence or non-existence of an intention to prefer.'*

[25] Applying these principles to the present matter several features stand out. Firstly, there was no direct evidence of the debtor's state of mind or intention in making the dispositions. Secondly, the dispositions which are sought to be set aside were regular payments on account over a four-month period, the last of which was made some two months prior to liquidation. This was not an instance of one or two substantial payments

falling outside of a regular pattern or made on the very eve of liquidation.

[26] There was no evidence of any particular reason why Vusela would seek to prefer the defendant above its other creditors. Indeed, all the evidence suggests that the relationship between the parties was entirely at arm's length. An important consideration was the nature of the parties' respective businesses. It seems clear that in order to conduct its business of building or construction Vusela needed the raw materials i.e. cement and building supplies, to do so. Without these materials Vusela would have stood no chance of trading its way out of the difficulties in which it found itself.

[27] As stated in *Cooper* the fact that the debtor does not testify as to his/its intention in making the dispositions does not mean that the Court can only conclude that the dispositions were made with the intent to prefer. Nor is it sufficient to make such a finding that the insolvent Vusela must, in the light of its parlous financial state, have contemplated insolvency or even inevitable insolvency. As the dicta in Cooper make clear, any inference that an intention to prefer a particular creditor existed may be negated since other factors may negate such an inference.

[28] Once such factor could well be the debtor's belief that, equipped with the necessary building supplies, it could trade his way out of its financial difficulties or at least gain a temporary respite from some of its creditors.

[29] No reason or motive, other than as discussed above viz to keep its business afloat for the time being, was suggested on behalf of the plaintiffs nor any reason why it would favour the defendant over any other of its numerous creditors. In seeking to counter the

defendant's arguments regarding Vusela's dominant intention, the plaintiffs sought to rely on the distinction drawn by Griesel J between motive and intention in *Gore and Others NNO v Shell South Africa (Pty) Ltd*. In that case, on the very eve of liquidation, in fact two days before the winding up process commenced, the insolvent, a long distance haulier, made a payment of a substantial sum to the respondent arguably to obtain further supplies of diesel for its fleet of trucks without which its business would come to an immediate halt. In seeking to defeat the setting aside of the payments on the basis that it was made with the intention to prefer one creditor over others, it was contended that the dominant intention was rather to keep the company operative in the hope that it could restructure itself or trade out of its predicament.

[30] The Court found that that argument failed to differentiate between intention on the one hand and motive or reason on the other. The Court stated:

> *'The purpose or motive of the company in making the payment to the defendant on 17 February 2000 may have been to obtain further supplies of diesel. This does not negative the immediate intention of the company to prefer the defendant. It merely furnishes the reason. By analogy, the primary intention of the thief is to steal, while his motive may be to feed his starving children'.*

[31] By analogy in the present matter, plaintiffs' counsel argued that if Vusela's reason for making the dispositions was to secure building supplies and to keep trading, this had to be distinguished from its intent to prefer the defendant over other creditors.

[32] Whilst a distinction between reason and intent might, in certain situations, be a tool in determining whether a disposition was made with the intention to prefer, its utility

should not be overvalued.

[33] Firstly, seen in the correct perspective the act which is accompanied by an intent or intention in the strict sense, is that of making the disposition, usually in the form of a payment. That act is accompanied or impelled by reasons, motive or intent and where this is predominantly to favour the particular creditor over another such a disposition, all other statutory requirements being met, is voidable.

[34] In this sense seeking to make a distinction between intent on the one hand and reasons or motive on the other hand is of limited value, if not potentially misleading. It is noteworthy in this regard that in *Cooper* Zulman JA uses the words intention and motive synonymously.

[35] Secondly, in a civil law context the distinctions between motive, intent and underlying reasons are by no means always clear and to a certain extent exist in the eye of the beholder. Thirdly, making fine distinctions between motive or underlying reasons or intent runs the risk of undermining the settled test of seeking the dominant, operative or effectual intention and of concentrating unduly on the effect of the payment vis-à-vis other creditors rather than the subjective intention of the payer.

[36] In the circumstances of the present matter it seems strained to relegate to a secondary role what appears on the probabilities to have been Vusela's primary concern, to continue trading as a builder, and to view its dominant intent as being to favour one of its suppliers of building materials – with whom it had an entirely regular customer/supplier relationship reaching back many years. Having regard to the evidence

as a whole, and notwithstanding the lack of direct evidence, it appears to me that the defendant has succeeded in proving that the most plausible inference is that Vusela's *'dominant, operative or effectual intention in substance or in truth'* for making the eight dispositions was not to prefer the defendant over other creditors but simply to obtain building supplies to keep Vusela's business afloat and with some prospect of surviving its financial activities.

[37] In the result the defendant has succeeded in establishing the second leg of its defence to the plaintiffs' claim viz that the disputed dispositions were not made with the intention to prefer it above any other creditor.

[38] For these reasons the plaintiffs' claim cannot succeed and is dismissed with costs.

BOZALEK J

For the Plaintiff	:	Adv P Myburgh et Adv G Samkanga
As instructed by		ENS Africa
For the Defendant	:	Adv M Verster
As instructed by		Pienaar Attorneys