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

CASE NO: 13640/2020

In the matter between:

JOCHEN ECKHOFF N.O.	First Applicant
KOKETSO LEUWANCE SELAHLE N.O.	Second Applicant

And

MAURICE ERROL HARTSHORNE	First Respondent
RICHARD BUTTERFIELD	Second Respondent

Coram: Kusevitsky, J
Heard: 13 September 2021
Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date of hand-down is deemed to be 29 April 2022

JUDGMENT

KUSEVITSKY, J

Introduction

[1] This is an application in which the Applicants seek in terms of the Insolvency Act, No. 24 of 1936 ("the Act") to set aside aside a disposition made to the First and Second Respondents.

[2] The relief claimed is as follows:

> 2.1 Declaring that the disposition made to the First and Second Respondents on 18 April 2019 in the amount of R 3 094 606.00 :-
>
> > 2.1.1 Constitute a voidable preference in terms of section 29 of the Insolvency Act, No. 24 of 1936, and accordingly be set aside and/or;
> >
> > 2.1.2 Constitute undue preference in terms of section 30 of the Insolvency Act and accordingly be set aside, and/or
> >
> > 2.1.3 Constitute collusive dealings in terms of Section 31 of the Insolvency Act and accordingly be set aside, and/or
> >
> > 2.1.4 Constitute disposition without value in terms of Section 26 of the Insolvency Act and accordingly be set aside.

[3] The Applicants are the joint liquidators of Robicon Civils (Pty) Ltd (In Liquidation) ("Robicon"). Robicon was wound up by Special Resolution for Voluntary Liquidation in terms of section 352 (2) of the Companies Act, 61 of 1973[1].

Background

[4] Robicon was in the business of property development and construction. During or about February 2018, Robicon as contractor was invited by Richprop Developments (Pty) Ltd ("Richprop") as developer, to tender for the construction of civil roads and services for a development called Wilders View, located at Erf 14220, Brackenfell, Western Cape, owned by Petrus and Maria Wilders ("the Wilders").

---

[1] Read with section 9 to schedule 5 to the Companies Act 71 of 2008

[5] The tender was successful and on or about 23 April 2018, a construction of civil roads and services agreement was entered into between Robicon, duly represented by Neil Bettesworth and Richprop Development, duly represented by Desmond Kruis for an initial consideration of R 2 799 820.92.

[6] Robicon commenced with the construction of civil roads and services on 3 May 2018 and started to incur costs in respect of the development. Upon the first and subsequent drawings, Robicon could *inter alia* start with the preliminary construction which entailed electrical works and irrigation. Further drawings allowed the establishment of the site on 1 June 2018. By 26 June 2018, Kraaifontein Municipality's town planning approval was received. Some 41 days later, on 13 July 2018, Robicon left site due to a lack of funding to continue with the construction.

[7] According to Applicant, from 13 July 2018, Robicon tried to secure further funding to continue with the construction of the works at Wilders View. These efforts culminated in the conclusion of three interlinked agreements.

[8] The first was an "Advance Funding Agreement" entered into on or about 20 July 2018 between Robicon as contractor, represented by Neil Bettesworth ("Bettesworth") and Richprop as Developer, duly represented by Desmond Kruis ("Kruis") and the Wilders as the Landowners. In terms of the agreement, it was agreed *inter alia*, that Robicon would fund the costs of the civil works to an amount R 2.7 million, being the tender amount, as well as any adjusted figure as defined in the Contract Sum, the latter being the final amount measured and approved by the consulting engineers[2]; that Richprop would pay Robicon the contract sum and an additional amount of R 200 000.00 in consideration for Robicon agreeing to fund the Civil Works and this amount was to be paid within 30 days of the Completion Date[3].

[9] Since the Landowners also in this agreement acknowledged that by the installation of the services onto their property that they would be enriched at the expense of Robicon as a result, they consented to the registration of a bond over the property in favour of Robicon or its nominee as security for payment to Robicon of

[2] Clause 3 of the Advance Funding Agreement

[3] Clause 4 ibid

the Contract Sum.[4] In terms of Clause 5 of the Advance Funding Agreement, the registration of the Bond over the property would be in the amount of R 3 million plus an additional cost clause in the amount of 30% in favour of Robicon. In terms of clause 6, Robicon shall have a signed cession of its rights in and to this Advance Funding Agreement in favour of the parties who had agreed to provide it (Robicon) with the amount that it required to perform all of its obligations in terms of the Civil Works agreement.

[10] On the same day on or about 20 July 2018, Robicon, represented by Bettesworth, entered into an Acknowledgement of Debt with the First and Second Respondent in terms of which the parties, *inter alia* acknowledged Robicon itself to be indebted to the Respondents in the sum of R 2.7 million in respect of monies loaned and advanced to Robicon by the Respondents at its special instance and request in order to enable Robicon to fulfil its contractual obligations under the Advance Funding Agreement; that the capital amount shall be paid to Robicon by way of electronic funds into Robicon's bank account and Robicon undertook to provide the Respondents with security in the form of the cession *in securitatem debiti* of Robicon's rights and benefits in and to the Advance Funding Agreement and the Bond.

[11] On 20 July 2018, Robicon entered into a Deed of Cession with the First and Second Respondents in terms of which it was *inter alia* agreed that Robicon ceded, made over and assigned jointly and severally to the First and Second Respondents, all of its rights and benefits in and arising from the Advance Funding Agreement.

[12] With funding of the development secured, Robicon on 26 July 2018 returned to site and resumed with the construction of the Civil works and services at Wilders View.

[13] According to the Applicant, on or about 3 August 2018, the First and Second Respondents partially complied with the terms of the Acknowledgement of Debt by making payment of the amount of R 1 350 000.00 and furthermore failed to

---

[4] Clause 2 ibid

materially comply with the terms of the AOD in that it failed to make payment of the remainder of the Contract Sum of R 2.7 million, in the amount of R 1 350 000.00.

[14] The Applicant further states that two further agreements were entered into as security. The first was an Addendum to the Acknowledgement of Debt, entered into on or about 11 September 2018 between Robicon and the Respondents. In terms of the Addendum, it was recorded *inter alia* that on 20 July 2018, the creditors (the Respondents) loaned and advanced the sum of R 2,700 000.00 to the debtor (Robicon)[5]; on the same date the creditor signed a Deed of Cession of its rights and benefits in and arising from the Advanced funding Agreement concluded, as well as bond registered over the property in the amount of R 3 million[6]; that on 11 September, Maurice Hartshorne, the First Respondent, loaned and advanced a further One Million Rand to Robicon on the same terms and conditions as set out in the original Agreement[7], the proof of payment of which was attached; and that the interest payable on the additional funds shall be paid at the rate of 20% compounded interest, calculated from the effective date until the date of repayment by the company of the capital amount[8].

[15] On or about 19 October 2018, a covering bond was registered in favour of Robicon over the property of the Wilders for an amount of R 3 million as contemplated in the Advance Funding Agreement.

[16] On 18 April 2019, an amount of R 3 094 606.00 was paid to attorneys firm Sohn & Associates, who received payment on behalf of the First and Second Respondents, from the proceeds of the registration of the erven in the development.

Liquidation of Robicon

[17] Robicon was wound up by Special Resolution for Voluntary Liquidation in terms of section 352 (2) of the Companies Act, No. 61 of 1973 on 16 May 2019. At

[5] Preamble Clause 1

[6] *ibid* clause 2

[7] *ibid* clause 3

[8] *ibid* clause 4

the first meeting of creditors, six claims in an aggregate amount of R 7 405 937.59 were proved. At the second meeting of creditors, which was held on 25 October 2019, Nedbank proved three claims against the estate of Robicon and for purposes of all three claims, it relied on its security being *inter alia*, the Deed of Pledge and Cession dated 29 March 2017.

Prior cession of debts

[18] At the time when Rubicon ceded, made over and assigned jointly and severally to the first and second Respondents all of Robicon's right and benefits in and to arising from the Advance Funding Agreement, Robicon had already ceded, assigned and made over to Nedbank Limited, *in securitatem debiti* , all its rights, title and interest in and to, and/or pledged and delivered to Nedbank, without any exception, all and any claims which exist or may thereafter come into existence in Robicon's favour in respect of all debts then owing or which may have become owing to it.

Impeachable transactions

[19] The Applicants allege that the First and Second Respondents received payment of the amount of R 3 094 606.00 on 18 April 2019 and therefore less than six months before the liquidation of Robicon.

[20] The First and Second Respondent's received payment of the above amount from monies due to Robicon, whereas the right(s), title and interest in and to these monies were ceded to Nedbank prior to the cession of the claim to those monies being ceded to First and Second Respondent's; and

[21] The First and Second Respondent's received payment of the aforesaid amount whereas the First and Second Respondent jointly only loaned and advanced an aggregate amount of R 2 350 000.00 to Robicon (R 1.35 million plus R 1 million).

[22] The Applicants further contend that when the payment of R 3 094 606.00 was made to the First and Second Respondents, Robicon was hopelessly insolvent and

its liabilities exceeded its assets. They also aver that the effect of that payment is that firstly, a portion thereof was a disposition without value and secondly, in regard to the remainder thereof, that it is a voidable preference which had the effect of preferring the First and Second Respondents.

[23] In opposition to the matter, the Respondents contend in a point *in limine*, that the matter should have proceeded by way of action as there are many real, genuine and *bona fide* disputes of fact which were well known to the Applicants prior to the launching of this application and were in any event, reasonably foreseeable by them. They also contend that if regard is had to the relief sought in prayer 1.3 under section 31 that there were collusive dealings, that this is a subjective test requiring the hearing of evidence. It is common practice that matters such as these are brought via action proceedings, especially, as suggested by the Respondents, where allegations of collusions and the like are made. Much was made by both parties in their heads of argument referring to the admitted disputes of fact in this matter. The Applicants on the other hand contend that they were not aware of the factual disputes until the receipt of the Answering Affidavit. This is when they formally tendered that the matter be referred to oral evidence. The liquidators contend that notwithstanding the fact that the First Respondent gave evidence at the section 415 enquiry and the Second Respondent was also present, Applicants letter of demand setting out the Applicants causes of action and the amounts claimed. They claimed that this was the basis that they failed to file their replying affidavit. I will deal with this aspect in due course.

[24] In reply, the Respondents declined to accept the tender to refer the matter to oral evidence. They also explain in a letter dated 29 June 2021 that the Respondents were never given an opportunity to present the version at the enquiry; that due to a power outage the enquiry was postponed and later informed that the liquidators had decided not to continue with the enquiry and the Respondent excused from attending, which was confirmed in a letter dated 2 March 2020. The Respondents further contend that there was no obligation on them to respond to the Applicants' letter of demand.

[25] It is now trite that an applicant in application proceedings has to make an election in the manner in which he approaches court given the relief that he intends seeking. Proceedings by way of motion is a risky business since the Applicant, generally speaking, has to stand or fall on his or her founding affidavit. Furthermore, the decision to proceed by way of motion is also fact specific and the oft-quoted rule in *Plascon Evans*[9] will determine the outcome should factual disputes on the papers arise. This brings me to the present application and the relief sought. As mentioned previously, a portion of the relief claimed by the Applicants include relief[10] that, by its very nature, would require evidence to be led in order to determine the subjective intention of the parties. Thus, given the election to proceed on motion notwithstanding, in my view an applicant does so at his own peril. He cannot now claim to suffer prejudice as a result of his own ill-advised election. Furthermore, applications under sections 26,29 and 30 of the Insolvency Act may well call for evidence as a general rule, as it is common cause that a decision by a liquidator to invoke these provisions would usually follow evidence provided at a section 415 enquiry. In fact, this approach is supported by, for example, section 32 (2) of the Insolvency Act, which provides in proceedings to set aside improper dispositions, that an insolvent may be compelled to give evidence on a subpoena issued on the application of any party to the proceedings or he may be called by the court to give such evidence. By its very nature thus, it would therefore make sense that these matters proceed by way of action, more specifically if the party is called upon to make good any loss, or a court is called upon to determine such amounts payable by the benefitting party.

[26] In *casu*, I am not convinced that the Applicants did not foresee the factual disputes. Central to the disputes is the director of Robicon, Mr Bettesworth who – both parties agree, should be subjected to cross-examination and of course, it would be unreasonable to assume that the liquidators failed to interrogate him as to the reason for the demise of Robicon. I am therefore in agreement with the Respondents that there is no justification for any referral of the factual disputes to oral evidence or for the referral of the matter to trial.

---

[9] Plascon Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) at 634H-635C

[10] Section 31 of the Insolvency Act

[27] This therefore brings me to the Respondents notice to strike out with costs, the whole of the Applicants replying affidavit deposed to by Jochen Eckhoff, alternatively, the striking out of new matter[11] raised in reply. The replying affidavit was delivered on 14 July 2021, one week before the matter was due to be heard on 21 July 2021. The matter was postponed to 2 September 2021. Had the matter proceeded on 14 July 2021, I would have had no hesitation in disallowing the replying affidavit and granting the relief claimed in prayer 1. I am however in agreement that the items alluded to the reply, as reflected in prayer 2 of the notice to strike out constitute new or hearsay matter that constitute prejudice to the Respondents and accordingly those paragraphs will be struck out and disregarded.

Is the transaction impeachable as envisaged in the Insolvency Act?

[28] Section 26 reads as follows:

Section 26 – Disposition without value

> *"(1) 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:*
>
> *Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."*

[11] Paras 2.1 to 2.16 of the Notice to Strike Out

[29] A disposition without value is any transfer or disposal of right to property, excluding those mandated by a court order, for no value or for a consideration less than the risk incurred by the insolvent in the relevant transaction. A court has the discretion to set aside a disposition without value if it can be proved that immediately after the disposition, the insolvent's liabilities exceeded its assets. It is trite that whether a disposition is made for no value turns on whether the insolvent company obtained a benefit from making the disposition.

[30] In *Umbongintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barklays National Bank 1987 (4) SA 894 (AD),* the test for whether a disposition was made for value is whether there was a genuine commercial transaction with the expectation of some advantage at the time the transaction was entered into, which is equal to or more than the risk incurred by the party providing the security.

[31] According to the Applicants, with regard to the amount of R 1 350 000.00, this equates to a section 26 disposition without value in that a disposition or repayment was made by Robicon to First and Second Respondents within two years of the liquidation of Robicon having received value or payment from the First and Second Respondents in the amount of R 1 350 000.00.

[32] According to the Respondents, the Applicants' case against them is that they received payment of R 3 094 606.00. They state however that what led to the payment, on the Applicants' own version was their loan to Robicon in the aggregate amount of R 2 350 000.00 i.e. the R 1,35 million plus the R1 million. They accordingly claim that a portion of the disposition was one without value. The Respondents deny the absence of value and contend that the amounts of R 2 700 000.00 and R 1 000 000.00 were lent by them to Rubicon and proof of this is evident from the Applicant's own annexures to the founding affidavit, being the acknowledgement of debt signed by the director of Robison, Bettesworth in the sum of R 2 700 000.00 and the addendum to the acknowledgement of debt "*incorporating an additional amount loaned*", referencing the earlier loan and recording a further loan of R 1 000 000.00 on 11 September 2018 by the First Respondent. On any interpretation is it evident that the payment made does not meet the requirements of

a disposition without value and I am in agreement with the Respondents that this claim is without merit.

[33] Section 30 reads as follows:

Section 30 – Undue preference to creditors

> *"(1) 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."*

[34] An applicant who seeks to set aside a disposition as an undue preference must allege and prove[12] (a) that there was a disposition of property; (b) at a time when the insolvents liabilities exceeded his assets; and (c) that the disposition was made with the intention of preferring one of his creditors above another.

[35] The Applicants contend that the amount of R 3 094 606.00 was paid by Robicon to the Respondents at a time when its liabilities exceeded its assets, with the intention of preferring the First and Second Respondents above Nedbank.

[36] According to the Respondents, reliance upon section 30 is unnecessary as the payment constituting the alleged disposition took place within six months of the winding-up of Robicon and section 30 would only be applicable to a disposition effected a longer period prior to such a winding-up. Since the requirement of the '*intention to prefer*' overlaps with the remaining sections, I will deal with it under section 29.

[37] Section 31 reads as follows:

Section 31 – Collusive dealings before sequestration

---

[12] Venter v Volkskas Ltd 1973 (3) SA 175 (T) at 177; Jackson v Louw N.O and Another [2019] 2 All SA 145 (ECG) (13 December 2018) Full Bench decision para 27

"(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another."

[38] What distinguishes a disposition in terms of section 31 (1) from voidable and undue preference is the element of collusion and that a trustee in the insolvent estate may in addition to setting aside the disposition, recover from any person who was party to such collusive disposition any loss which the disposition caused to the insolvent estate, and a penalty in an amount determined by the court. To succeed with an action under section 31(1), the trustee in the insolvent estate must allege and prove[13] the following – (a) The insolvent made a disposition of his property; (b) the disposition was made in collusion with another person; and (c) the disposition had the effect of prejudicing creditors or preferring one above another.

[39] The Applicants argue that section 31 finds application because an agreement was entered into whereby Robicon colluded with the First and Second Respondents that an amount of R 3 094 606.00 would be paid to the unsecured / concurrent First and Second Respondents instead of to the secured creditor, Nedbank, which had the effect of preferring First and Second Respondents above Nedbank.

[40] The concise Oxford English Dictionary[14] defines '*collude'* as follows: "*come to a secret agreement in order to deceive others"*; conspire. '*Collusion*" is a "*secret or illegal cooperation in order to cheat or deceive others"*. A collusive disposition in the context of which it is used in section 31(1) means an agreement which had a fraudulent purpose, and not merely an agreement which had the consequence that one creditor is preferred above another. The Full Bench in *Louw*, *supra* had this to say about the requirements of section 31, "**. . .** *collusion is a conniving together between two persons – in this case the insolvent and the defendant – to practice a fraud on the creditors. In other words, was it the intention of the insolvent and the*

[13] Louw NO v DMA Fishing Enterprises (Pty) Ltd and Another 2002 (2) SA 163 (SECLD) at 165 E-F

[14] Twelfth edition

defendant in this case, the one to give and the other to obtain an undue preference for the defendant to the prejudice of the other creditors; that is to say in the common parlance, to do the other creditors at of their rights?"[15]

[41] To establish a collusive dealing there must accordingly be proof that two minds were concurring to defraud the creditors[16]. I have read the founding affidavit of the Applicants and can find no evidence of collusive dealings perpetrated by the Respondents. Since these are motion proceedings and it is trite that an applicant must make its case in its founding affidavit, I am satisfied that the Applicants have failed to make out a case for the relief sought under section 31.

[42] Section 29 reads as follows:

Section 29 – Voidable preferences

> "(*1) 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 above another*."

[43] From a reading of section 29 (1), it is clear that in order to succeed with a claim in terms of this section, that the Applicants are required to allege and prove[17] that (a) the debtor made a disposition of his property; (b) the disposition was made not more than six months before the sequestration of the insolvent's estate and (c) the disposition had the effect of preferring one of the insolvent's creditors above and

---

[15] Jackson v Louw NO and Another [2019] 2 All SA 145 (ECG) (13 December 2018) at para 71

[16] Jackson supra at para 72

[17] Simon NO & Others v Coetzee [2007] 2 All SA 110 (T) at 112; Louw *supra* at para 24

other; and (d) immediately after the disposition was made, the insolvent's liabilities exceeded the value of his assets.

[44] Once an applicant has proved the four requirements in section 29, a disposition is presumed to confer a preference of one creditor above another, unless the person in whose favour the disposition was made can prove that: (a) the disposition was made in the ordinary course of business and (b) it was not intended to prefer one creditor above another. The creditor is required to prove both requirements in order to avoid a claim in terms of section 29 (1).[18] The onus is on the plaintiff to prove that the company is unable to pay its debts at the time when the proceedings to set aside the disposition are instituted.

[45] According to the Applicants, the First and Second Respondents received payment of the amount of R 3 094 606.00 on 18 April 2019, which is less than six months and also less than two years before the liquidation of Rubicon on 16 May 2019. When First and Second Respondents received payment, Robicon was insolvent. It contends that it had been trading in insolvent circumstances since the book year ended 28 February 2018 and therefore for a period of more than one year. First and Second Respondents were not lawfully entitled to receive payment of any amount as these debts were already ceded to and payment should have been made to the secure creditor, Nedbank, of the amount due to it of approximately R 2.2 million and only then could payments have been made by Robicon to the First and Second Respondents. Thus the payment of the concurrent claim of the First and Second Respondents had the effect of preferring the First and Second Respondents above Nedbank.

[46] The Respondents argue that in terms of item 9 of Schedule 1 of the Companies Act, 71 of 2008, Chapter 14 of the 1973 Companies Act continues to apply with respect to the winding-up and liquidation of companies under the 2008 Act. These provisions accordingly render applicable sections 339 and 340 of the 1973 Companies Act, resulting in the provisions of the law relating to insolvency in

[18] Paterson NO v Trust Bank of Africa Ltd 1979 (4) SA 992 (A); Louw at para 25

the winding-up of a company unable to pay its debts to be applied and, *inter alia*, the impeachable dispositions of the Insolvency Act also to be applicable.

[47] The Respondents placed reliance on *Gore & Others NNO v Shell South Africa (Pty) Ltd 2004 (2) SA 521 (C)* and stated that what the Applicants are required to prove in order to succeed are the following:

> *"[3] Having regard to the above interrelated statutory provisions, the plaintiffs, in order to succeed, must prove*
>
> *(a) that there was a disposition, as defined in s 2 of the Insolvency Act, by the company of its property;*
>
> *(b) that such disposition was made not more than six months before the liquidation of the company;*
>
> *(c) that the disposition was made to the defendant, who was a creditor of the company at the time;*
>
> *(d) that the disposition had the effect of preferring the defendant above the company's other creditors; and*
>
> *(e) that, immediately after the making of such disposition, the liabilities of the company exceeded the value of its assets.*
>
> *Once the plaintiffs have established these requirements, the onus then shifts to the creditor (the defendant in this case) to prove*
>
> *(f) that the disposition was made in the ordinary course of business; and*
>
> *(g) that it was not intended thereby to prefer one creditor above another."*

[48] The Respondents are in agreement that items items (a) to (c) are not in dispute. What the Applicants are required to prove is that the disposition had the effect of preferring the Respondents above Robicon's other creditors and that immediately after the disposition, the liabilities of Robicon exceeded the value of its assets. Once these are proven, the Respondents are obliged to prove that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

[49] Reliance was placed on *Cooper & Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)* where Zulman JA restated[19] the well-known general principles applicable to the concept of '*an intention to prefer'* in section 29 (1) of the Insolvency Act. As indicated by Bozalek J in *Moodliar NO and Others v Lawson Tool Distributors (Pty) Ltd 2022 (2) SA 220 (WCC*)[20], the quotation needs to be set out in full:

> *"[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 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.*

[19] paras 4 to 12

[20] (7855/2016) [2021] ZAWCHC 99; 2022 (2) SA 220 (WCC)

[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 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."

[50] Bozalek J[21] also cited the principles applicable when considering whether a disposition was made '*in the ordinary course of business'* , referring to *Griffiths v Janse Van Rensburg N.O.*[22]

'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'.

---

[21] para 19 in Moodliar supra

[22] 2016 (3) SA 389 (SCA)

[51] The Respondents contend that the payment to the Respondents from the proceeds of the registration of the erven in the Wilders development was entirely pursuant to what was contemplated in the funding arrangements in terms of which the developer would pay Robicon '*on registration of the proceeds of the bankable sales on the first four erven sold and transferred in the development*." They also argue that the only reference that the Applicants make insofar the solvency of Robicon is concerned is the six claims with an aggregate total of R 7.4 million proved at the first meeting; Nedbank's claim of R 2.3 million at the second creditors meeting; a repudiated claim; and an allegation that "*to-date only an amount of R 2.244 million has been realised from the sale of assets and recovered from the debtors, leaving a shortfall of R 13,008 million'*. This is the sum total of the allegations pertaining to solvency.

[52] The Respondents in answer to the allegations under section 29, set out fully how the payment to them came about, succinctly summarised as follows: the two directors of Robicon concluded an agreement with the developer to provide funding to install services; as security, the owners of the property agreed to register a covering bond; all the parties concluded an advance funding agreement and the bond was registered; Bettesworth and Mr Mostert, another director of Robicon approached the First Respondent to lend the money and offered to cede Robicon's rights in terms of the advance funding agreement; in terms of that agreement, Robicon would be paid by the developer once the first four properties in the development had been sold; when this occurred, Robicon's attorney contacted the Respondents attorney and advised that the properties had been sold and proceeded with the cancellation of the covering bond; the final amounts due to the Respondents were requested and an undertaking provided that the amount would be paid on date of registration of the transfers. The Respondents contend that the repayment of the bridging finance, which enables Robicon to continue and complete the works, was due and payable in terms of the acknowledgement of debt and was a transaction in the ordinary course of Robicon's business. Since these are motion proceedings, I am unable to find the explanation by the Respondents so far-fetched or untenable which would oblige me, in terms of the *Plascon-Evans* rule, to reject their version. I am also furthermore mindful, given the reverse onus on the Respondents to show that the

payment was in the ordinary course of business, that I am satisfied in terms of the *dicta* cited above, that they have discharged their onus in this regard.

[53] Since I have found on the one leg in favour of the Respondents, it is not necessary for me to deal with the second leg, suffice to say that, for the sake of completeness, the test with regard to an intention to prefer is a subjective one and can only be present if the debtor actually applied his mind to the matter. There is no such evidence before me that there was such an application of or presence of mind in this regard and the simple act of payment does not justify the conclusion of an intention to prefer. Accordingly, I am satisfied that the Applicants have not discharged their onus in this regard.

[54] For the reasons as stated above, the application cannot succeed.

ORDER

1. The application is dismissed with costs.

KUSEVITSKY, J
JUDGE OF THE HIGH COURT