

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

DELETE WHICHEVER IS NOT APPLICABLE.
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

24.02.2010
DATE
SIGNATURE

Case number: 42105/08

25/3/2010

In the matter between:

**RAMALHO NO: GEORGE DA SILVA
YEUN NO: AMORE
VENTER NO: ANNA FRANCINA**

**FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF**

and

VENTER: CARLO

DEFENDANT

JUDGMENT

RAULINGA, J

INTRODUCTION

- [1] The plaintiffs in their capacity as the duly appointed joint liquidators of Money Skills Limited (in liquidation) sought an order declaring the payment of the sum of R10099054.84 by certain creditors to the Defendant, which constitute dispositions of Money Skills' property within the meaning of Section 2 of the Insolvency Act 24 of 1936 as read with Section 340(1) of the Companies Act 61 of 1973 to be paid by the defendant in terms of Section 26 (1) (b) or the dispositions be

set aside in terms of the provision of Section (29) (1) of the Insolvency Act as read with Section 340 (1) of the Companies Act.

- [2] The plaintiffs allege that during the period September 2006 to January 2007 and at or near Centurion, Money Skills made the following payments to the Defendant:

13 September 2006	R354, 200-00
29 September 2006	R255, 000-00
30 September 2006	6,000-00
5 October 2006	2,500-00
9 October 2006	R201, 354-84
31 January 2007	R 95,000-00
28 February 2007	R 95,000-00

The said dispositions:

- (i) were not made for value;
- (ii) were made within two years of the winding-up of Money Skills;
- and
- (iii) fall to be set aside in terms of the provisions of Section 26(1) (b) of the insolvency Act as read with Section 340(1) of the Companies Act, in that Money Skills has been wound-up and unable to pay all its debts.

- [3] In the alternative to Claim 1, during the period September 2006 to January 2007 and at or near Johannesburg, Money skills made the said payments to the Defendant. The aforesaid payments made by Money Skills to the Defendant constitute dispositions of Money Skills property within the meaning of Section 2 of the Insolvency Act as read with Section 340(1) of the Companies Act.

The dispositions;

- (i) were made not more than six months before the winding-up of Money Skills;
- (ii) had the effect of preferring one of its creditors above another;
- (iii) were made in circumstances where, immediately after making of the dispositions, the liabilities of Money Skills exceeded the value of its assets, and
- (iv) fall to be set aside in terms of the provisions of Section (29) (1) of the Insolvency Act, as read with Section 340(1) of the Companies Act, in that Money Skills has been wound-up and is unable to pay all its debts.

[4] The defendant admits all other allegations save for paragraphs 3.1.2 to 3.1.3.3 as well as paragraphs 4.1.2 to 4.1.3.4 in the alternative claim. The plaintiffs are put to proof of these claims. The admitted facts appear in the pre-trial minute and during trial they were recorded as common cause issues. It is therefore not necessary to regurgitate same in this Judgment.

[5] There was consensus between the parties that since no witnesses were called to testify by both parties, the court would decide the matter on common cause issues. The plaintiffs have the duty to begin. The onus will be determined by the pleadings. The parties also agreed that no issue should be decided separately in terms of Rule 33(4) or otherwise. The cardinal common cause issues are the following:

- (i) All payments alleged in the particulars of claim are common cause and not in dispute

- (ii) It is common cause that at the date the payments alleged in the particulars of claim were made, Money skills was insolvent. Annexure "C" is a copy of a final winding- up order of Money Skills by the North Gauteng High Court (Pretoria) on 28 May 2007
- (iii) The Expert Report and its annexures prepared by Jaco Spies are common cause.
- (iv) The evidence given by the Defendant at the insolvency inquiry and the exhibits thereto are common cause.
- (v) Paragraphs 1.1 to 1.5 of the plaintiffs' pre-trial agenda is common cause.

- [6] The defendant was the Director of Money Skills Ltd. The total amount of proved claims is R78 276 718-22. The liquidators instituted 58 claims against investors who received payments. The value amounted to R12.2 million. Thirty claims have been finalised and an amount of R2.772 million has been recovered. There are twenty five unresolved claims worth R7.2 million.
- [7] A Mr Molakeng (one of the creditors) proved a claim of R350-000 and has received a dividend of R14461-60. A Mr Maphali (also one of the creditors) proved a claim of R500-000 and received a dividend of R20659-43.
- [8] The payments were made from 1st September 2006. It is apparent from the pre-trial minute and the insolvency inquiry that at the time of the payments the Defendant was aware that the pyramid scheme was unlawful and that it would not work. At that time the Defendant was aware that the company was insolvent. As a financial Director he ought to have advised the creditors of that danger, particularly because the Reserve Bank voiced concerns about the scheme.

[9] An interesting feature is that summons was issued on the 8th September 2008. There is evidence that at the date of each of the payments, Money Skills Limited (in liquidation) was unable to pay its debts.

[10] Section 340(1) reads:

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 the company being wound-up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition.

Section 26(1) (b) reads:

Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-within two years of the sequestration of his estate, and it is proved that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities

Section 29(1) reads:

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.

- [11] It is also relevant to quote the definitions of "disposition" and "property" found in Section 2 of the Insolvency Act. ".....Disposition" means any transfer or abandonment of rights to property and includes a sale, mortgage, pledge, delivery, payment, release, compromise, donation, any contract therefore, but does not include a disposition in compliance with an order of court and "dispose" has a corresponding meaning".

"property" means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fideicommissary, heir or legatee."

- [12] By the Defendant's own admission payments were received by him from the Plaintiffs. What remains to be decided by the court is whether these payments amount to dispositions. Section 26 (1) (b) of the Insolvency Act, requires that a person who alleges disposition must prove that immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.

On the contrary Section 29(1) imposes a duty on the person in whose favour the disposition was made 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. It is my view that although the Plaintiffs bear the onus to prove the implication of Section 26(1) (b) the Defendant is imposed with the duty to prove the implication of Section 29 (1) of the Insolvency Act.

- [13] A case of similar nature came before Sithole AJ in Geyser NO and Others vs Telkom SA Ltd 2006(2) All SA 148 (T). The first plaintiff was appointed as liquidator of the second plaintiff medical scheme. In his capacity as liquidator of the scheme the plaintiff sued the defendant in an action where an order was sought for the setting aside of

dispositions made in favour of the defendant by the scheme on behalf of certain of its members. The dispositions were made within two years of the scheme's provisional liquidation. According to the plaintiff the payments were made without value in that the scheme received no benefit therefrom. It was therefore contended that the payments constituted dispositions without value within the meaning of Section 26(1) (b) of the Insolvency Act 24 of 1936. The Defendant's plea was based on the provisions of Section 33(1) of the Act.

- [14] The court held that in order to succeed with the above defence the defendant bore the onus of proving on a balance of probabilities that it had lost a right against another person; such loss of right was in return for a disposition which was liable to be set aside; and that it had acted in good faith. The purpose of Section 33(1) is to ensure that in the stated circumstances when a disposition is set aside there is restitutio in intergrum, that is, the restoration of both parties to their position before the disposition was made.....It was found that the payments were dispositions without value, and the remaining question was whether the defendant was able to prove the requirements of Section 33(1). In *casu* there is no need to analyse the provisions of Section 33(1) of the Act.

However in the Geyser case (*supra*) it was further held that as the payments were invalid, the debts of the account holders in question were not discharged, and the defendant retained the right to proceed against them for the debts. This may not hold in the instant case because what need to be decided is whether the defendant preferred certain creditors over the others.

- [15] Of interest, is that the court also held that the defendant did not act in good faith, first because our courts have recognised the requirements of "good faith" for more than 150 years and that proof of *bona fide*

includes a consideration of all the circumstances surrounding the transaction.

- [16] In *casu* one is dealing with dispositions as expounded in Section 26 of the Act, which has to do with dispositions without value, and Section 29 of the Act, which caters for voidable preferences. The Plaintiffs contend that the payments are dispositions without value and alternatively that one Venter was preferred over Messrs Molakeng and Maphali: They also aver that the Defendant did not act in good faith in that he knew from the outset that the pyramid scheme was a fraud and that it was not working. They also base this on the fact that since the Defendant was a Financial Director he could have advised the creditors that there was danger in the operations of the scheme. Although, the Defendant admits that at the date of payment Money Skills was unable to pay its debts and it was therefore insolvent, it is however not clear whether immediately after the dispositions were made, the assets of the insolvent exceeded its liabilities. However, payments were made on 1st September 2006 and Money Skill was provisionally wound-up on the 29th March 2007 and finally wound-up on the 28th May 2007, long after the creditors had become aware of the "debt" of Money Skills.

- [17] In *Duet and Magnum financial Services CC(in Liquidation) v Korster* 2010(1) SA 312 (T), the plaintiff, represented by its joint liquidators, sued the defendant for an order setting aside, in terms of Section 26(1) (b), alternatively Section 30(1) read with Section 66 of the Close Corporations Act 69 of 1984, further alternatively, in terms of Section 29(1) of the Insolvency Act 24 of 1936, certain dispositions in the total amount of R459 446-71 and also an order for payment of the said sum.

[18] Defendant raised a special plea of prescription in terms of Section 10, 11 (d) and 12 of the Prescription Act 68 of 1969 in that-

- (a) the disposition had been made, at the latest, in March 2002;
- (b) the plaintiff had been wound-up in 2001 and the joint liquidators appointed on 18 July 2001;
- (c) summons had been served on 12 July 2005, by which time the plaintiff had been aware of the defendant's identity and the facts from which each of the debts arose for a period of more than three years.

What the dispute boiled down to in the end was the question whether-

- (a) the preliminary step, being the order that the disposition be set aside before the claim for payment of the amount due could be instituted, was a bar to the commencement of the running prescription of the claim for payment; or
- (b) The preliminary step and the claim for payment jointly constituted a debt in respect of which the running prescription commenced as soon as the necessary facts were known to the plaintiff.

[19] After referring to a number of decisions Preller J was in agreement with the decisions in **Barnard NO v Bezuidenhout en Ander 2004 (3) SA 274 (T)** and **Burley Appliances Ltd v Grobelaar NO and Others 2004 (1) SA 602 (c)**. In this two judgments it was held that prescription starts to run in respect of the entire "debt" including the preliminary question that has to be decided, as soon as the creditor is aware, or should be aware, of the identity of his debtor and the facts giving rise to his claim.

I cannot find anything untoward with the finding of Preller J. I cannot agree more with him.

In *casu* the defendant argues that Section 340 of the Companies Act makes Sections 26 (1) (b) and alternatively 29 (1) of the Insolvency Act applicable at the date of impeachment or liquidation, whereas the plaintiffs argue that it is at the date of the institution of the action.

As already indicated above, prescription in this case started to run in respect of the entire "debt" as soon as the creditors were aware of the identity of the Defendant and the facts giving rise to the claim. The fact that the Defendant admitted that at the date of payment Money Skills was unable to pay its debts and was insolvent bears proof of the fact. Further that the Plaintiff's were aware that Money Skills was finally wound-up on the 28th May 2007.

- [20] In **Barnard and Lynn NNO v Schoeman and Another 2000(3) SA 168 (N)** the court dealt with claims instituted by the liquidators of a company against defendants to whom the company had paid back loans under circumstances that constituted dispositions which prefer one creditor above another in terms of Section 340 (1) of the Companies Act. The defendants raised prescription as a defence and the plaintiff argued that in terms of Section 29(1) of the Insolvency Act, the court has discretion to set aside such a disposition. Once that discretion has been exercised, the court shall, in terms of Section 32(3) declare the liquidator entitled to recover anything alienated under that disposition. The court upheld this submission and it found that the claim had not become prescribed. In this matter the plaintiffs submit that the court should apply its discretion.

I am of the view that while discretion is a tool available to the court in matters such as this, discretion should rather be used sparingly,

particularly when there are other avenues to manoeuvre. However in the instant case I do not find any avenues which may persuade me not to apply my discretion. I therefore apply my discretion in favour of the Plaintiff.

- [21] The decision in ***Gunn and Another, NNO vs Barclays Bank D.C.O 1963 (3) 678 (AD)*** concerned the interpretation of whether the repeal of Section 29(2) of the Insolvency Act destroyed or rendered ineffective a right which has arrived before the passing of Act 64 of 1960. The court then decided that the applicable Section of the repealed Companies Act would be applicable to Sections 26 and 29 of the Insolvency Act on the date of the disposition and not at the date when proceedings were instituted.
- [22] In the recent case of ***Sackstein NO vs Proud food SA (Pty) Ltd 2006 (6) SA 359 (SCA)*** the court held that the company's inability to pay must exist at the date the impeachment proceedings are brought.
- [23] In *casu*, the summons was issued on the 8th September 2008, long after the plaintiff had become aware of the identity of the defendant. There is evidence that at that time the liabilities exceeded the assets. The contention that the defendant did not act in good faith is a factor that overshadows the other factors.
- [24] I am of the view that the decision in ***Sackstein*** (*supra*) is not applicable in the instant case in that the creditors were aware of the entire "debt" before the institution of the action. The plaintiffs have as such discharged their onus in proving that the payments made to the Defendant constitute dispositions of Money skills' property within the meaning of Section 2 of the insolvency Act as read with Section 340 (1) of the companies Act.

CONCLUSION AND ORDER

Based on the admissions made by the Defendant one can conclude that he failed to prove that the dispositions were made in the ordinary course of business and that it was not intended to prefer one creditor above another. I am therefore persuaded to agree with the plaintiffs on their submissions on these aspects. I would therefore also find that the Defendant was not candid with the court in that he did not act in "good faith". The Defendant preferred Mr Venter over Mr Molakeng and Mr Maphali.

[25] **In the light of the findings above the following order is made:**

- (1) The dispositions as mentioned in the alternative to claim 1 (i.e. claim 2) are set aside in terms of the provisions of Section 29 (1) of the Insolvency Act as read with Section 340(1) of the Companies Act.**
- (2) The Defendant is ordered to pay the Plaintiffs the amount of R10099054, 84 being the total sum constituting the dispositions as mentioned in claim 2.**
- (3) The Defendant is directed to pay the plaintiffs' costs.**



**T J RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT**

DATE OF HEARING	: 10 February 2010
DATE OF JUDGMENT	: 25 March 2010
PLAINTIFF'S ATTORNEYS	: Brooks & Brand Attorneys
PLAINTIFF'S ADVOCATE	: Adv J W Steyn
DEFENDANT'S ATTORNEYS	: Marais Mthembu Attorneys
DEFENDANT'S ADVOCATE	: Adv C Harms