THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 251/2019

In the matter between:

V[…] I[…] M[…]	**FIRST APPELLANT**
IPROLOG (PTY) LTD	**SECOND APPELLANT**

and

CLOETE MURRAY N.O.	**FIRST RESPONDENT**
MABATHO SHIRLEY MOTIMELE N.O.	**SECOND RESPONDENT**
JERRY SEKETE KOKA N.O.	**THIRD RESPONDENT**

Neutral citation: *M[…] and Another v Murray and Others* (251/2019) [2020] ZASCA 86 (9 July 2020)

Coram: PONNAN, DAMBUZA, VAN DER MERWE, MAKGOKA AND MBATHA JJA

Heard: 18 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 9th day of July 2020.

Summary: Pensions – protection of s 37B of the Pensions Fund Act 24 of 1956 – whether it operates if pension benefit paid before sequestration.

Insolvency – s 31 of the Insolvency Act 24 of 1936 – whether collusion established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Müter AJ sitting as court of first instance).

1 Save to the extent reflected in the paragraph below, the appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the other to be absolved.

2 Paragraph 1 of the order of the court a quo is substituted with the following:

'1 The payments made by the insolvent, Mr P[…] A[…] L[…] M[…], to or for the benefit respectively of the first respondent, V[…] I[…] M[…], in the sum R1 023 867 and the second respondent, Iprolog (Pty) Ltd, in the sum of R3 500 000, are set aside and the respondents are ordered to repay those monies forthwith to the applicants.

JUDGMENT

Makgoka JA (Ponnan, Dambuza, Van der Merwe and Mbatha JJA concurring):

[1] The primary issue in this appeal is whether a pension benefit paid out to the insolvent, Mr P[…] A[…] L[…] M[…] (Mr M[…]) before his estate was sequestrated, enjoyed the protection provided in s 37B of the Pensions Fund Act 24 of 1956 (the Act), which protects pension benefits against attachment by a trustee of an insolvent estate, subject to certain exceptions. If this is answered in the negative, a secondary issue arises, namely whether that pension money, which he disposed of to his then wife, the first appellant, Ms V[…] I[…] M[…]

(Mrs M[…]) and the second appellant, Iprolog (Pty) Ltd (Iprolog) should be set aside in terms of the relevant provisions of the Insolvency Act 24 of 1936 (the Insolvency Act).

[2] Mr M[…]'s estate was finally sequestrated on 1 August 2011. Some two years before the sequestration, he received a pension payout, which, as already stated, he disposed of to the appellants. Iprolog purchased immovable properties with that money. After the sequestration, the respondents, the joint trustees of his insolvent estate, obtained an order in the court a quo, the Gauteng Division of the High Court, Pretoria, setting aside the dispositions. That court also granted an order interdicting the appellants from alienating an immovable property indirectly purchased with the pension money. Mrs M[…] and Iprolog appeal against those orders with the leave of this court.

[3] Mr M[…] and Mrs M[…] had been married to each other out of community of property since 1980. Mr M[…] was a judgment debtor of Lowveld Cooperative Investments (Lowveld). Its action against Mr M[…] to recoup the debt failed in February 2006 before the trial court. However, this court granted Lowveld leave to appeal to the full court. While the appeal was pending, Iprolog was registered on 6 April 2009, and on 30 April 2009 Mr M[…] became its sole director. On 5 May 2009, Mr M[…] and Mrs M[…] became trustees of the Les Baux Family Trust (the Trust), which in due course became the sole shareholder of Iprolog.

[4] On 18 May 2009 the full court delivered its judgment, and overturned the order of the trial court dismissing Lowveld's claim. It ordered Mr M[...] to pay Lowveld the sum of R726 638.35, interest and costs. Mr M[…] immediately applied to this court for special leave to appeal. On 31 May 2009 Mr M[…] requested payment of his provident fund benefit from Mindkey Corporate

Selection Retirement Fund. On 15 June 2009 Mr M[…] received R4 639 000 from the provident fund, which was paid into his banking account. On 23 June 2009, he transferred R3 500 000 of that amount into an attorney's trust account for the credit of Iprolog. This money was used for the purchase of two farms in Kwazulu-Natal by Iprolog. The balance of R1 023 867 was paid directly to Mrs M[…].

[5] The appellants explained the two payments as follows. It was alleged that Mr and Mrs M[…] had been experiencing marital problems for a number of years, and that in April 2009, Mrs M[…] finally decided that she wanted a divorce. Therefore, the pension pay-out was requested specifically to cater for the proprietary consequences of the marriage at divorce. In particular, it was stated that Mr M[…] owed Mrs M[…] the sum of R4 746 080.14 made up as follows: in terms of the parties' antenuptial contract registered on 6 May 1980, Mr M[…] was obliged to purchase a property for Mrs M[…] for R100 000. According to Mr M[…] the equivalent value of that sum in 2009 was R3 722 213.14. The payment of R3 500 000 referred to above, was meant to cater for this. Mr M[…] explained that he did not wish to pay this amount to Mrs M[…] until the divorce was finalised. The balance of R1 023 867 was said to represent a loan amount comprising unpaid wages when Mrs M[…] worked for Mr M[…] as a bookkeeper in his business as a financial advisor. The explanation was that during her employment, he did not pay her an actual salary but a loan account was created and the amounts owing were credited to such loan account.

[6] It was further alleged that the parties 'separated' on 19 July 2009. On 21 July 2009 Mr M[…]'s application for leave to appeal against the full court's order was dismissed by this court. Two days thereafter, on 23 July 2009, Mrs M[…] issued summons against Mr M[…], in which she claimed only a

decree of divorce, and no patrimonial relief or maintenance. On 19 August 2009 they signed a settlement agreement in terms of which Mr M[…] undertook to pay maintenance of R100 000 per month to Mrs M[…]. In addition, Mr M[…] undertook to pay for various expenses on behalf of Mrs M[…]. It was also recorded that in terms of the parties' antenuptial contract, Mr M[…] was obliged to transfer certain assets, including an immovable property, to Mrs M[…]. In clause 4.3 of the Settlement Agreement it was recorded that:

'In settlement of [Mrs M[…]'s] claims . . . and in settlement of the sum of R1 023 867 due and payable in terms of a loan account held with Moreau and Associates as at 28 February 2008, [Mr M[…]] has liquidated his pension fund and after all statutory deductions and payment of all taxes are met, he has agreed to pay over the balance of the proceeds to [Mrs M[…]].

Lastly, the settlement agreement provided that Mrs M[…] would retain ownership of two farms in Mpumalanga.

[7] The divorce action was finalised on 21 August 2009, when an order was granted for a decree of divorce incorporating the settlement agreement referred to above. On 2 November 2009 Mr M[…] resigned as a director of Iprolog, and Mrs Moreau replaced him. In May 2010 Lowveld commenced proceedings for the sequestration of Mr M[…]'s estate. As of August 2010, on Mr M[…]'s own version, the unsatisfied judgment debt, interest and costs due to Lowveld amounted to R2 027 587.74.

[8] During October and November 2010 the farms purchased by Iprolog, as fully set out in para 3 above, were sold and a portion of the net proceeds thereof, R2 160 000, was used by Iprolog to purchase an immovable property in Edenvale, Gauteng Province (the Edenvale property) for cash, in December 2010. In March 2011 Mr M[…] moved into this property. A month later, April 2011, Mrs M[…] joined him on the property. As at the time when the application was finalised in the court a quo, the parties lived together on this

property. Mr M[…] explained that this was a purely convenient arrangement because of Mrs M[…]'s alleged ill-health. According to him, he felt morally obliged to care for her, though they lived in separate houses on the property. It is common cause that they continued to occupy this property together, at least until the judgment was handed down in the court a quo.

[9] On 6 June 2011 Mr M[…]'s estate was provisionally sequestrated, and the final order of sequestration was granted on 1 August 2011. The respondents were appointed joint trustees of Mr M[…]'s estate, and in terms of s 20(1)(*a*) of the Insolvency Act his estate vested in the respondents as trustees. During June 2012 Mr M[…] and Mrs M[…] were interrogated before a magistrate in terms of ss 64 and 65 of the Insolvency Act. Based on the evidence during the interrogation, the respondents on 1 March 2013 launched the application to which this appeal relates, to have the payments made by Mr M[…] to Mrs M[…] and to Iprolog, set aside.

[10] The respondents alleged that there was collusion between Mr and Mrs M[…] to strip the former of all his assets and income to avoid paying his debt to Lowveld. In particular, the respondents asserted that: Iprolog was 'the alter ego and corporate veil' of Mrs M[…] and Mr M[…] (paras 3.3 and 10.4); (paras 2.4 and 6.11.3); by making the Trust the sole shareholder of Iprolog they sought to distance themselves from the company (para 6.2) and 'create a further trench which had to be crossed by any creditor seeking to gain access' to Mr M[…]'s pension monies (paras 6.2 and 6.11.4); their 'separation' occurred only after the Full Court upheld Lowveld's appeal (para 6.4); their divorce was 'merely a sham' and a 'window-dressing' as it was instituted a mere two days after the application for leave to appeal had been dismissed by this court on 21 July 2009 (para 6.5).

[11] In the appellants' answering affidavit, deposed to by Mr M[…], it was averred that the payments which the respondents sought to set aside were pension monies and that such monies, including the assets purchased with such monies, were exempt from attachment by the respondents in terms of s 37B of the Act. The appellants denied that there was any disposition of money from Mr M[…] to Iprolog. Instead, they said, Mrs M[…] loaned an amount of R5 372 760 to the Trust (on an unnamed date in 2009). According to the appellants, on 26 August 2009, the Trust loaned the same amount to Iprolog. This, according to the appellants, was proof that no disposition was made by Mr M[…] to Iprolog, and that Mrs M[…] made no loans in 2009 to Iprolog. The loan, they stressed, was made by Mrs M[…] to the Trust, which in turn, loaned the same amount to Iprolog. The evidence before the court a quo included the oral evidence of Mr M[…] in terms of s 32(2) of the Insolvency Act, adduced at the instance of the appellants pursuant to rule 6(5)(*g*) of the Uniform Rules of Court.

[12] The matter came before Holland-Müter AJ, who considered the provisions of s 37B and reasoned that because Mr M[…] had received his pension payout before his estate was sequestrated, the money no longer enjoyed the protection provided by s 37B. The learned judge held that '[w]hen receiving the payment, the monies became *commixtio* with the estate of the now insolvent (although he was not yet insolvent then)'. The learned judge further found that there was collusion between Mr and Mrs M[…] to the detriment of Mr M[…]'s creditors. The learned judge considered, among others, the fact that Mrs M[…] and Mr M[…] still resided together on the same property as a 'further indication of the collusion' between them to prejudice the former's creditors. Accordingly, the court a quo had no difficulty in setting aside the dispositions made to Mrs M[…]. The court a quo concluded that the dispositions fell within the ambit of s 31 of the Insolvency Act. Consequently, it issued an order:

'1. The payment made by P[…] A[…] L[…] M[…] (the insolvent) in the amount of R4 639 000 towards the first respondent [Mrs M[…]] on or about 15 June 2009, alternatively the payment of the amount of R3 500 000 towards the second respondent [Iprolog] by or on behalf of the insolvent is set aside the payment of the difference between the amount of R3 500 000 and the amount of R4 639 000 made by the insolvent to Mrs M[…] and ordering that said amounts shall be repaid forthwith to the applicants [the respondents].

2. The sale of the immovable property situated at 89 Main Road, Edenvale, Gauteng and currently occupied by the first respondent and the insolvent is prohibited save in the event of same being sold at a market related price with the prior knowledge of the sale thereof to the applicants in which event the nett proceeds of the such sale shall be paid into trust at the applicants, pending the finalization of the repayment of the amounts referred to in par 1 above.'

[13] In this court, as in the court a quo, it was submitted on behalf of the appellants that the pension pay-out to Mr M[…] was exempt from attachment in terms s 37B, and that, in any event, the payments to Mrs M[…] could not be set aside as they were made in compliance with a court order. With regard to the Insolvency Act, it was submitted that neither of the provisions of the relevant sections had been established to justify setting aside the payments. I deal with these in turn.

[14] Section 37B reads as follows:

'Disposition of pension benefits upon insolvency

If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit or any part thereof which became payable after the commencement of the Financial Institutions Amendment Act, 1976 (Act No. 101 of 1976), shall. . . .not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.'

[15] 'Benefit' is defined in s 1 of the Act as 'any amount payable to a member or beneficiary in terms of the rules of that fund'.[1] The reference to 'payable', instead of 'paid' clearly envisages a sum to which a member of a pension fund or a beneficiary is entitled to receive, but has not yet received. So construed, the amount remains a 'benefit' to the extent it has not yet been paid to the member or beneficiary. Once the benefit is paid to him or her, the beneficiary ceases to be a 'member' of the pension fund according to the rules of the fund,[2] and the money ceases to be a 'benefit'. It loses its character once in the hands of the beneficiary and ceases to be a benefit. The beneficiary may do as they please with it. Such a beneficiary can thus hardly complain if creditors lay their hands on the money to satisfy outstanding debts.

[16] Thus, all that s 37B entails is that, while in the hands of a pension fund, the insolvent's pension interest cannot be attached by his or her trustee on the basis that it forms part of the insolvent's assets. It protects only the pension benefit of a person whose estate is sequestrated, which Mr M[…]'s estate was not when he received his pension pay-out. The effect of a sequestration order is to divest an insolvent of his or her estate and to vest it in a trustee. Section 37B seeks to establish an exception to the provisions of s 20(1)(*a*) of the Insolvency Act. When Mr M[…] received the payment, his estate had not as yet been sequestrated. There was thus no insolvent estate or trustees to speak of. Section 37B therefore could not find application when the payment was effected. For that reason, Mr M[…] could not bring himself within the exception, and payment could only have been made into his 'regular estate'. Having then disposed of those monies in the manner in which he did, renders them susceptible to attack. This is fortified by s 23(7) of the Insolvency Act which

[1] 'Benefit' was inserted to the Act as a defined term in 2007 by s 1(*c*) of Act 11 of 2007.
[2] Compare *Absa Bank Ltd v Burmeister and Others* 2004 (5) SA 595 (SCA); [2005] 3 All SA 409 (SCA) para 9 where the court considered s 37D(1)(*b*) of the Act.

provides that during the sequestration, 'the insolvent may for his own benefit recover any pension to which he may be entitled. . .'.

[17] It follows that if the pension benefit is received before a beneficiary's estate is sequestrated, s 37B does not find application. This construction of s 37B finds support in cases where similarly worded statutory provisions have received consideration.

[18] *Jones & Co. v Coventry* [1909] 2 KB 1029 concerned s 141 of the Army Act of 1881, which prohibited an assignment or charge on a pension payable to any officer or soldier. The issue was whether a garnishee order could attach monies in a bank account into which a soldier's pension money was paid. Darling J held that the money did not come within the provisions of s 141. He explained:

'Pension, when it has been paid to the person entitled to receive it, ceases any longer to be pension; it has lost its character of pension, just like dividends which, after payment, lose the character of dividends. It becomes part of the pensioner's ordinary money. . . .'

[19] In *Gibson v Howard* 1918 TPD 185, s 37 of the Miner's Phthisis Act 44 of 1916[3] was considered. Section 37 provided:

'No amount payable as a benefit under this Act or the prior law shall be assignable or transferable or be capable of being hypothecated or pledged, nor shall any such amount be liable to be attached or subjected to any form of execution under a judgment or order of any court of law.'

[20] In that matter, the appellant, who was a judgment debtor of the respondent, received an amount as compensation from the Miner's Phthisis Board under the Phthisis Act. The respondent obtained a garnishee order on the

[3] This was in response to a pulmonary tuberculosis called phthisis which affected mine workers in the Witwatersrand area, Johannesburg, in the early 1900s.

bank account into which the money was deposited. The applicant contended that in terms of s 37 the amount was not attachable or subject to any form of execution, as the object of the Act was to benefit a person suffering from phthisis, and to prevent creditors from attaching any compensation paid to him under the Act.

[21] The court rejected this interpretation and held:

'Section 37 says "no amount payable" etcetera. There is nothing in the Act to justify us in saying that the Legislature meant that an amount actually paid over shall not be attached. All the Legislature means is that if money is awarded to a miner's phthisis patient and still in the hands of the Board it cannot be assigned, ceded or attached so long as the Board controls it. When the money is paid over to the patient and is mixed with his ordinary money it has no longer any different character and therefore according to our common law it can be attached.'

[22] The reasoning in *Gibson* was followed in *Foit v FirstRand Bank Bpk* 2002 (5) SA 148 (T), where ss 2(1) and 3 of the General Pensions Act 29 of 1979 (the Pensions Act) were in issue. Section 2(1) provides:

'No annuity or benefit or right in respect of an annuity or benefit payable under a pension law shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 11(2) of the Maintenance Act, 1963 (Act No. 23 of 1963), be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.'

In turn, s 3 provides that '[t]he annuity received under any pension law by any person whose estate is sequestrated, shall not form part of the assets in his insolvent estate'.

[23] As in this case, it was contended in *Foit* that the relevant sections had to be interpreted to mean that 'pension benefits' did not form part of the assets in the insolvent estate of the applicant and her husband. D Basson J was unpersuaded, and pointed out (at 153H) that the meaning of s 3 was that a 'benefit received under any pension law' indicated a benefit, ie an amount of

money received in terms of a pensions law, in terms of which the beneficiary had a right of action against the pension fund to receive the money. When the amount was paid out by the pension fund, the benefit was 'received' as provided in s 3 of the Act. Accordingly, the learned Judge held that the pension benefit paid out and received on 25 January 2000 became part of the assets of the estate of the applicant and her husband.

[24] Section 37A(1), which was raised in argument, does not assist the appellants, either. It protects any benefit or right to any benefit provided for in the rules of a registered pension fund payable to a member of such fund, against any reduction, transfer, cession, pledge, hypothecation, attachment or judicial execution.[4] I have already pointed to the definition of 'benefit' above. With regard to s 37A(1) the key is the definition of 'member' in s 1 of the Act, which is defined in relation to two categories of pension fund organisations.[5] In the first category, it means 'any member or former member of the association by which such fund has been established', while in the second category,[6] 'member'

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[4] In its redacted form, s 37A(1) reads as follows:
'(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund . . . be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, . . . and in the event of the member or beneficiary concerned attempting to [do so] the fund concerned may withhold or suspend payment thereof. . . .'

[5] Pension fund organisation in turn is defined as follows:
'(*a*) [a]ny association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members; or
……..
(c) any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits that became payable in terms of the employment of a member on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (*a*), (*b*) or (*c*) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or collect contributions from or on behalf, of members.

[6] (*b*) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons.'

means ‘a person who belongs or belonged to a class of persons for whose benefit that fund has been established’. Significantly, in respect of both categories, the definition excludes ‘*any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund*’ (Emphasis added.)

Although s 37B refers to ‘any person entitled to a benefit’ as opposed to a ‘member’, the difference in the terminology does not appear to be of any significance. Both must be taken to mean a beneficiary of a pension benefit. Thus the definition of ‘member’ applies with equal force to any construction of s 37B. It follows that Mr M[…] is excluded from protection under s 37B of the Act by this definition, as he had ‘received all the benefits’ and his membership of the provident fund had been terminated thereby.

[25] To conclude on this aspect, I am constrained to comment on the appellants’ reliance on certain remarks made by Rogers J in respect of the protection provisions of s 37A(1) in *Van Heerden and Another v NDPP and Another* [2015] ZAWCHC 96. The learned Judge remarked that since these were meant for the protection of pension fund members and their dependants, ‘it is legitimate to ask what the point would be of shielding from execution a member’s right to receive payment of a benefit but not the benefit once received’. Later (at para 45) the learned Judge remarked that ‘[t]he restrictive interpretation of “benefit” seems to render the protection afforded by the section largely hollow’. In this case, the appellants placed strong reliance on these remarks for their submission that the protection of s 37B extends to the pension benefit after it is paid out.

[26] These remarks should be seen in their proper context. First, they are not an authoritative pronouncement on the question whether the provisions of s

37A(1) extends beyond payment of the pension benefit, as that issue did not directly arise in that case, and did not need to be decided – a fact acknowledged by the learned Judge (at para 42). Second, the learned Judge acknowledged (at para 41) the difficulties which would arise if one construed the word 'benefit' in s 37A(1) as meaning the money paid to the member or dependant as distinct from such person's right to receive payment thereof at a future date. These included the fact that a beneficiary could possibly be subject to the prohibition of s 37A(1) and be precluded from freely dealing with the money in that he would not be permitted to cede, pledge, hypothecate or transfer it.

[27] In *Van Aartsen v Van Aartsen* 2006 (4) SA 131 (T) para 23, De Vos J remarked obiter in relation to s 37A(1) that 'it could also be argued that once [the beneficiary] had received his pension payout, it was no longer a pension benefit as intended in the Act, but rather a sum of money, that is, a movable thing and not a legal right or claim'. It was suggested in *Van Heerden* (at paras 38 and 42) that *Foit* and *Van Aartse* were wrongly decided. The correctness of those decisions was endorsed by this court in *Sentinel Retirement Fund and Another v Masoanganye and Others* [2018] ZASCA 126 para 16. The appellants' reliance on *Van Heerden* is thus misplaced.

[28] I turn now to the provisions of the Insolvency Act with regard to the setting aside of dispositions. This may be done in terms of either of s 26 (as dispositions without value),[7] s 29 (as voidable preferences)[8] or s 31 (as collusive

[7] '(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. . . .'

dealings before sequestration). The court a quo, correctly in my view, identified s 31 to be the applicable section on the facts of this case. Section 31 reads as follows:

'**Collusive dealings before sequestration**

(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before 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.

(2) Any person who was a party to such collusive disposition shall be liable to make good any

loss caused to the insolvent's estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefitted by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

In terms of s 32(1)(*a*) proceedings for the recovery of compensation or penalty under s 31 may be taken by a trustee.

[29] It was submitted on behalf of the appellants that absent an application to impugn the decree of divorce, the payments made in terms thereof cannot be set aside. A similar contention was correctly rejected in *Sackstein en Venter NNO v Greyling* 1990 (2) SA 323 (O) at 327D-E. The appellants also relied on the exclusionary clause in the definition of 'disposition' in s 2 of the Insolvency Act

[8] '(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 this 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. . . .'

for the contention that the payments cannot be set aside. The definition of 'disposition' in s 2 is as follows:

'Disposition means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, *but does not include disposition in compliance with an order of the court*; and "dispose" has a corresponding meaning.' (Emphasis added.)

[30] It brooks no debate that the payments made by Mr M[…] to Mrs M[…] constitute 'dispositions' within the meaning of the Insolvency Act. As I have already stated, there were two of those. The first was for R3 500 000 into an attorney's trust account for the credit of Iprolog on 23 June 2009 and used towards the purchase of property in Iprolog's name. The second payment was made shortly after the divorce decree was finalised. It was submitted that despite the payment date for the R3 500 000 being June 2009, the money only accrued to Mrs M[…] on 26 August 2009, after the decree of divorce was granted and the property had been transferred into Iprolog's name. Thus, it was said that Mrs M[…] was only 'paid' after the divorce order was granted, and 'in terms' thereof.

[31] This submission has merely to be stated, to be rejected. It was contrived to bring the disposition within the ambit of the exclusionary provisions of the definition of 'disposition' in s 2 of the Insolvency Act referred to above. As I have said, the disposition was to Iprolog and occurred on 23 June 2009 when the money was paid into the attorney's trust account. That Iprolog was only free to use it later is irrelevant. The exclusionary provisions of s 2 did not apply to this payment, and it was accordingly susceptible to being set aside in terms of one or other of the three sections of the Insolvency Act referred to above. The payment of R1 023 867 stands on a different footing, as it was made after the divorce decree was granted on 21 August 2009, thus notionally protected by the

exclusionary provisions of s 2. However, those provisions do not serve as an absolute bar.

[32] In *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) (at para 7) this court recognised that in certain instances, a disposition made in terms of a court order may be set aside. It was pointed out that where that is sought to be done, it is not sufficient merely to bring the disposition within the ambit of one or more of the relevant provisions of the Insolvency Act, as was done in *Sackstein*. Hefer ADCJ explained, with reference to *Swadif (Pty) Ltd v Dyké NO* 1978 (1) SA 928 (A); [1978] 2 All SA 121 (A) at 938B-939H), that under those circumstances, additional allegations have to be made in order to nullify the effect of the exclusion in s 2. If either fraud, collusion or any other reprehensible conduct is relied upon, it must be alleged.

[33] In this case, the respondents' founding affidavit is replete with allegations of collusion between Mr and Mrs M[…]. I have referred to some of those allegations in para 10 above. In fact, the entire premise of the respondents' case rests on the existence of such collusion. In my view, the respondents' assertions are credible. From the papers filed in the court a quo and the record of the oral evidence, it is clear that there was a carefully designed plan by Mr M[…] to keep the pension money from his creditor, Lowveld. Mrs M[…] and Iprolog were very much part of that plan.

[34] This commenced in April 2009 when Iprolog was incorporated. Both served as directors of Iprolog, albeit at different times. This was followed by both becoming trustees of the Trust in May 2009. The Trust became the sole shareholder of Iprolog. After payment of R3 500 000 was made into the attorney's trust account, the money was used by Iprolog to acquire two farms in Kwa-Zulu Natal. When those farms were sold, part of the profit was used to

enable Iprolog to purchase the Edenvale property, which Mr and Mrs M[…] continue to jointly occupy.

[35] Furthermore, the divorce between the parties was undoubtedly a sham. Their continued co-habitation at the Edenvale property serves, among others, as proof of that. Their explanation for this is unconvincing. Mrs M[…] is the one who instituted the divorce, significantly, a mere two days after Mr M[…]'s application for leave to appeal was dismissed by this court. She took an active part in the settlement agreement, which resulted in her receiving virtually all of Mr M[…]'s assets and money. Given all these, the conclusion is inescapable that there was collusion between Mr M[…] and Mrs M[…] in respect of the disposition of the former's pension money. Mr M[…]'s receipt – and almost immediate disposal - of his pension in the manner described herein, had the effect of his liabilities exceeding his assets.

[36] In sum, I find that neither of the protective provisions in ss 37B or 37A of the Act apply to Mr M[…]'s pension once paid to him. The dispositions by him became susceptible to being set aside pursuant to the provisions of s 31 of the Insolvency Act, which, in my view, have been met: Mr Moreau made a disposition of his money to Mrs M[…] in collusion with the latter, which had the effect of prejudicing Mr M[…]'s creditor (Lowveld). The prejudice is self-evident. Iprolog was not a creditor of Mr M[…] and even if one accepts for present purposes the appellants' contention that Mrs M[…] was also Mr M[…]'s creditor, the disposition had the effect of preferring her above Lowveld.

[37] The dispositions were correctly set aside by the court a quo. The appeal falls to fail. The learned judge set aside the payment of the whole amount of R4 639 000 to Mrs M[…], alternatively the R3 500 000 to Iprolog, further

alternatively, the difference between the R4 639 000 and R3 500 000 paid to Mrs M[…]. This needs to be clarified. Both the main and alternative orders cannot, as framed by the learned Judge, stand. It is clear that R3 500 000 was paid on 23 June 2009 into the trust account of Venn Nemeth & Hart Attorneys, which was then transferred to Iprolog, Mrs M[…] retained the balance of R1 023 867, which became available to her on or about 21 August 2009.

[38] In the result the following order is made:

1 Save to the extent reflected in the paragraph below, the appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the others to be absolved;

2 Paragraph 1 of the order of the court a quo is substituted with the following:

'1 The payments made by the insolvent, Mr P[…] A[…] L[…] M[…], to or for the benefit respectively of the first respondent, V[…] I[…] M[…], in the sum R1 023 867 and the second respondent, Iprolog (Pty) Ltd, in the sum of R3 500 000, are set aside and the respondents are ordered to repay those monies forthwith to the applicants.

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T M Makgoka

Judge of Appeal

APPEARANCES:

For Appellants:	J Marks c/o June Stacey Mark Attorneys, Johannesburg Claude Reid Attorneys, Bloemfontein
For Respondents:	T A L L Potgieter SC Instructed by: Pieter Swanepoel Attorneys, Mbombela McIntyre Van der Post, Bloemfontein