

SOUTH AFRICA / JUDGMENT

De Jongh Ontwikkelings (Pty) Ltd and Another v Kilotech Investments (Pty) Ltd and Others (63945/2013) [2021] ZAGPPHC 190; 2021 (4) SA 492 (GP) (25 March 2021) [2021] ZAGPPHC 190

COURT

North Gauteng High Court, Pretoria

BEFORE

Davis

CASE / FILE NUMBER

63945/2013

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 63945/2013

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

DE JONGH ONTWIKKELINGS (PTY) LTD First Plaintiff

ELIZABETH WILANDA PRINSLOO N.O. Second Plaintiff

and

KILOTECH INVESTMENTS (PTY) LTD

First Defendant

THE TRUSTEES FOR THE TIME BEING OF

THE MILA DE JONGH FAMILY TRUST

Second Defendant

Coram: DAVIS J

Insolvency – disposition without value – the issue of illusory or “adequate” value discussed – abandoning right to part payment of purchase price in favour of related company – impeachable transaction in terms of sections 26, 29, 30 or 31 of Insolvency Act.

J U D G M E N T

This matter has been heard partly in open court and partly by way of virtual hearing in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

On 22 April 2010 De Jongh Ontwikkelings (Pty) Ltd (DJO) sold a property situated on Knysna’s Eastern Heads for R 8,55 million (the Knysna property). Part of the purchase price, in the amount of R 5,5 million would be paid by way of transfer of another property, situated in nearby Sedgefield (the Sedgefield property). However, on 13 September 2010, transfer of the Sedgefield property was registered into the name of the first defendant, Kilotech Investments (Pty) Ltd (Kilotech). DJO was provisionally liquidated on 8 December 2010 and finally liquidated on 14 March 2011. Its final liquidator claims that the transfer of a portion of the value or agreed purchase price of the Sedgefield property constitute an impeachable transaction in terms of either section 26, 29, 30 or 31 of the Insolvency Act, no 24 of 1936.

[2] The parties and role players

2.1 DJO features as the first plaintiff and its subsequently appointed final liquidator features as the second plaintiff.

2.2 Kilotech is the first defendant and the trustees of a trust, the Mila De Jongh Family Trust (the Trust) have been cited as the second defendant.

2.3 An attorney of this court, Mr Neil De Jongh, was at all relevant times, a director of DJO and Kilotech. He was also the creator of the trust (Mila de Jongh is his daughter). At the time of the alleged disposition he was the principal shareholder of both DJO and Kilotech.

[3] Background facts

The following facts surrounding the alleged disposition are not in dispute:

3.1 On 22 April 2010 DJO, represented by Mr De Jongh, sold the Knysna property, to a Mr Sachs, for a purchase price of R 8,55 million in terms of a written offer to purchase which, upon acceptance thereof, became a valid sale agreement.

3.2 The terms of the above agreement which are relevant to the present dispute are the following:

“2. PAYMENT OF PURCHASE PRICE

2.3 See special conditions ...

25 SPECIAL CONDITIONS

1. Payment of the purchase price will be effected as follows:

1a. The transfer of the purchaser's property Erf 3198... Sedgefield valued at R 5 500 000, 00 to the seller.

1b. The balance of R 2 000 000, 00 plus the amount of R 1 050 000,00 to be paid in cash.

2. The transfer of the two properties will take place simultaneously”.

3.3 Mr De Jongh, on behalf of DJO (as seller) later granted Mr Sachs (as purchaser) a R 250 000,00 “discount” due to the fact that the dwelling that was being erected on the Knysna property was only between 70% - 80 % completed at the time.

3.4 Mr Sachs had paid the conveyancing fees together with the reduced balance of the cash portion of the purchase price of R 2,8 million in two payments, the first on 1 June 2010 (in the amount of R 1 088 215,50) and the second 10 September 2010 (in the amount of R 1 781 859,10 from which R 31 859,10 was deducted as Mr Sach's pro rata share of the rates and taxes).

3.5 What happened to the Sedgefield property, was the following: on 23 April 2010, Kilotech, represented by its sole director, Mr De Jongh, in writing offered to purchase the Sedgefield property from Mr Sachs at a purchase price of R 5,5 million, which offer Mr Sachs accepted. The relevant terms of this agreement were the following:

“2. PAYMENT OF PURCHASE PRICE:

2.2 For the balance of the purchase price of R 5 500 000.00 the purchaser will pay R nil as the transfer of the property is in part payment for ... [the Knysna Heads property] ...

25. SPECIAL CONDITIONS

The purchaser will pay the transfer duty

Transfer of the two properties will take place simultaneously.

This offer is subject to Absa bank's valuation acceptable to the purchaser within 14 days hereof”.

3.6 Absa's subsequent valuation of the property was R 4,8 million.

3.7 The simultaneous transfers of the Knysna property to Mr Sachs and the Sedgefield property from Mr Sachs to Kilotech took place on 10 September 2010.

3.8 Against security of a bond passed over the Sedgefield property in the amount of R 4, 8 million, Kilotech was loaned and advanced R 3,6 million by Absa which was in turn on 15 September 2010 transferred by Absa by way of two journal credit entries of R 1,1 million and R 2,5 million respectively in discharge of outstanding debt on two accounts of DJO held at Absa.

3.9 Apart from the above payments neither Mr Sachs nor Kilotech made any other payments to DJO.

[4] The statutory provisions relied on

4.1 The relevant sections of the Insolvency Act relied on by the liquidator, are the following:

“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 for 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...

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 ...

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 ...

31 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 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.

- (2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent 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 benefited by such dealing if it had not been set aside; and if he is a creditor tor he shall also forfeit his claim against the estate”.

[5] The evidence

5.1 The only witness called by the plaintiff was Mr De Jongh himself. In summary, he testified as follows:

- Mr De Jongh and his brother Gideon, respectively held 70% and 30% of the shares in DJO. Although DJO was principally a property development company specialising in the development of townhouse complexes, the Knysna property was intended to be a family holiday home with a possible rental income as a guesthouse.
- Mr De Jongh and his later ex-wife (the mother of Mila de Jongh) had previously owned a series of properties prior to the acquisition of the Knysna property. The Knysna property was purchased in the name of DJO for VAT and tax benefit purposes. The property was bought as an empty stand upon which the construction of a dwelling was nearing completion at the time of the sale to Mr Sachs.
- Kilotech was a shelf company which Mr De Jongh had “bought”. Initially the intention was for Kilotech to acquire the Knysna property from DJO as the intention was not for DJO as a development company to retain the holiday home indefinitely. This acquisition, however, never took place.
- At the time of the sale of the Knysna property to Mr Sachs, who had been introduced to Mr De Jongh and the property by an estate

agent, Mr De Jongh and his wife had become divorced. Prior to the conclusion of the divorce settlement, it was contemplated

that Mr De Jongh’s then soon to be ex-wife would be given one or more sectional title units in one of DJO’s developments.

At the time of the actual divorce, however, there were no unbonded sectional title units “available” and the parties to the divorce then agreed that the Knysna property would be sold and that the ex-wife would be entitled to half of the nett proceeds of the sale instead of the intended unbonded sectional title units.

- Shortly after the conclusion of the sale of the Knysna property by DJO to Mr Sachs, the latter complained of expected unforeseen expenses which would be necessary to complete the construction on the property. This resulted in Mr De Jongh (on behalf of DJO) giving Mr Sachs a “discount” on the sale price which, on Mr De Jongh’s recollection, was between R 200 000,00 and R 300 000.00. This discount was, however, not recorded anywhere and the written agreement was not amended in this regard.
- Due to the non-completion of the construction of the house on the Knysna property, it had been difficult to obtain a purchaser.

Mr Sachs was also only prepared to purchase if he could “pay” a part of the purchase price by way of transfer of his Sedgefield property. It was described as a “swap” of the Sedgefield property for the Knysna property with Mr Sachs paying an additional amount in chash.

- When the above was agreed, Mr De Jongh then discussed this with his ex wife and agreed that the Sedgefield property would be “given” to her instead of the intended half share of the proceeds of the sale of the Knysna property. The ex Mrs De Jongh had no option but to agree. Kilotech was described by Mr De Jongh as the vehicle by which he would comply with his obligations in terms of the divorce settlement. That is how the sale agreement between Mr Sachs and Kilotech came into being.
- At that time, both Mr de Jongh and DJO enjoyed preferred client status with Absa, being DJO’s banker and principal creditor. Mr De Jongh explained the proposed result of the property transactions as follows to Absa (my translation – original in the footnote): “We wish to confirm the following: The Knysna property to be sold for R 8 550 000.00 and the Sedgefield property to be purchased for R5 500 000.000. The amount of cash available would then be R 3 050 000.00 to be applied as follows: The current facility of Absa on the Knysna property is R 4,8 million which facility would be completely settled upon registration and replaced with a R 3,6 million facility on the Sedgefield property. In other words, a capital reduction of R 1, 2 million in order to terminate the current facility of R 4,8 million. The balance of R 474 087. 36 on account number as at 30/4/2010 will also be paid off together with interest on date of registration which will result in the total exposure at Absa to be reduced by R 1 677 087, 36 plus interest ...”[1].
- Although the above email was sent as a proposal on 3 June 2010, its contents were implemented by the actual facts as set out in paragraphs 3.5 – 3.7 above, as also confirmed by Mr De Jongh during his evidence with reference to specific bank statements.

Lastmentioned also confirmed the repayment of the abovementioned R 477 087, 36 plus interest, which was done by way of transfer

into the specific account by the conveyancers from the funds paid by Mr Sachs.

- What also happened, was that Absa had indeed valued the Sedgefield property at R 4,8 million, which value was accepted by Mr De Jongh as it was sufficient so that a R 3,6 million bond could be passed over it (being 75% of the bank valuation).
- This acceptance of Absa's valuation was reflected by Mr De Jongh in an addendum to the Sedgefield sale agreement of Kilotech,

dated 7 May 2010 as follows: "Notwithstanding the provisions of the conditions of sale The purchaser hereby declares that he is satisfied with Absa Bank's valuation of R 4 800 000.00". The addendum also made provision for the purchase of R 40 000.00 of movables but nothing turns on this. It also provided that nothing changed regarding the agent's original commission earned on the sale. Factually also, Mr Sachs was not required to pay in the difference between the R 4,8 million and the R 5,5 million. Neither the transfer particulars nor any other agreement was amended, hence the letter of 3 June 2010 by Mr De Jongh to Absa still reflected the purchase price as R 5,5 million as did the subsequent particulars of the transaction in the Deeds Office records. There was also another addendum, the contents of which were irrelevant to the current dispute.

- The Sedgefield property was used as a holiday home by Mr De Jongh, his ex-wife and his in-laws and otherwise rented out. The R 3,6 million bond was serviced by the rental proceeds.
- Upon or shortly before Mr de Jong's sequestration, which took place simultaneously with the liquidation of DJO and which followed as a result of he being a surety for DJO, his shareholding in Kilotech was transferred to the Trust.
- Mr De Jongh testified that the arrangement regarding Kilotech and the Sedgefield property had been reached so that Mr De Jongh's

divorce settlement obligations can be fulfilled. Never in his wildest dreams did Mr De Jongh at that stage foresee a looming

liquidation of DJO, least of all at the instance of Investec Bank, who, as liquidating creditor, had a single bond facility and little exposure when compared to Absa's exposure secured by multiple bonds.

- Mr De Jongh maintained that, according to his estimates, DJO's assets exceeded its liabilities at the time the transfer of the Sedgefield property to Kilotech.
- Adv Greyling, who appeared for the Defendants, led Mr De Jongh in cross-examination to confirm the following: The sale price

of the Knysna property was R8,55 million, which was VAT inclusive. This meant that the capital value to be received by DJO, would be the sale price, less VAT of R1,05 million, less R250 000.00 discount, less estate agent's commission of R 513 000.00,

leaving a balance of R 6 737 000.000. Of this, DJO has received R 2 870 074, 60 from Mr Sachs, R 3,6 million from Kilotech who had paid off some of DJO's debt to the same value from the proceeds of the bond over the Sedgefield property, leaving a shortfall of R 266 295.40, according to Adv. Greyling calculations. Neither DJO nor the liquidator at any stage sought to recover this shortfall from Mr Sachs.

- Both Adv Amm, who appeared for the plaintiffs, and Adv. Greyling also had Mr De Jongh traverse the Liquidation and Distribution account in his evidence. Mr Amm concentrated on the fact that the total liabilities of creditors reflected therein amounted to R 30 318 994, 77 while the total amounts distributed from the proceeds of the sale of assets amounted to only R 13 095 444.16, constituting a deficiency in excess of R 17 million. Adv Greyling, on the other hand, pointed out that virtually all of the creditors had relied on the proceeds of their securities and thereby, in terms of Section 89 (2), limited their claims to those amounts.

5.2 The defendants closed their case without calling any witnesses.

[6] Evaluation

6.1 Was there a disposition?

6.1.1 There can be little argument that Mr De Jongh has, on behalf of DJO, failed to demand transfer of either the Sedgefield property or the agreed value thereof, which had become due to DJO by virtue of the express terms of the agreement whereby the Knysna property had been sold. To clarify this further: had the payment terms agreed on by Mr De Jongh with Mr Sachs in respect of the sale of the Knysna property been complied with, DJO would have ended up with the both Sedgefield property and R 3,05 million in cash

(subject to the later discount of R 250 000.00).

6.1.2 Mr Sachs had upheld his end of the bargain. He has surrendered the Sedgefield property to Mr De Jongh and he had paid what he had to, after he had negotiated a discount. The disposition came about by Mr De Jongh, no longer acting in the interest of DJO, but in his own interests in respect of his divorce settlement obligations, and acting on behalf of a dormant company, Kilotech as a vehicle, having devised to have Kilotech "acquire" the Sedgefield property. The sale agreement between Kilotech

and Mr Sachs is a sham. Kilotech did not buy the Sedgefield property. It did not pay Mr Sachs a cent (and was never able to do so right from the start). The sale agreement was simply the instrument whereby Mr De Jongh contrived the transfer of that which should have gone to DJO, to Kilotech as agreed with his ex wife, in lieu of his personal obligations. This contrivance clearly amounts to a disposition.

6.2 What was the extent of the disposition?

In simple terms, the disposition had the result that DJO was dispossessed of that which it had previously possessed. After the conclusion of the sale agreement with Mr Sachs regarding the sale of the Knysna property, DJO "possessed" two claims for payment of the purchase price, one

of R 5,5 million and one of R 3,05 million. The agreement was that the second claim was to be satisfied in cash and the R 5,5 million claim be satisfied in specie, that is by way of a transfer of an immovable property, the Sedgefield property. This transfer never happened and consequently DJO never “possessed” the Sedgefield property itself. DJO could therefore, not be “dispossessed” of the property, or, to put it in the language of the Insolvency Act, a disposition thereof could not take place. It could be dispossessed of its claim though. The claim for payment of R 5,5 million initially remained unsatisfied until the amount of R3,6 million was transferred by way of journal entries in Absa’s books. DJO thereafter remained “dispossessed” of the balance of its claim in the amount of R1,9 million. There was therefore a disposition of the R 1,9 million portion of DJO’s claim of R 5,5 million.

6.3 Does the disposition quality as one contemplated in section 26?

6.3.1 Adv Greyling argued on behalf of the Defendants that section 26 contemplates dispositions for no value and not for dispositions for “inadequate” value. For this proposition, reliance was placed on the line of cases starting with *Swannee’s Boerdery (Edms) Bpk v Trust Bank* 1986 (2) 850 AD which has held that the following dictum in *Bloom’s Trustee v Fourie* 1921 TPD 591 at 601: “It seems to me that the word “value” means “adequate value” or “just and valuable consideration”, is no longer applicable. *Swannee’s Boerdery* followed the defining of “value” as set out in *Estate Wege v Strauss* 1932 Ad 76 and *Estate De Jongh v Whitaker and Another* 1944 Ad

246. The latter decision determined at 250 that “The words “disposition not made for value” mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*”. In *Estate Wege* the issue was dealt with at 82 as follows: “What is meant by value? It certainly does not bear the same meaning as valuable consideration in English Law. There is nothing in the insolvency Act which would lead us to infer that the legislature meant to give some technical meaning to the word ‘value’. It can therefore only mean value in the ordinary sense of the words ... the object is to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or contingent advantage in return”.

6.3.2 The line of cases relied on by the defendants continued to *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (A) which at 604 referred with approval to the dictum in *Goode, Durrant and Murray Ltd v Hewitt and Cornell* NNO 1961 (4) SA 286 (N) where it was stated: “The word “value” is not confined to a monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. Whether an insolvent has received “value” for a disposition, must be decided by reference to all the circumstances under which the transaction was made”.

6.3.3 A further case heavily relied on by the defendants was *Terblanche NO v Baxtrans CC and Another* 1998 (3) SA 912 (CPD), which referred to all the abovementioned cases and found at 917 B – C that “... the rejection in *Swannee’s Boerdery* of the dictum in *Bloom’s Trustee* relates to the

defining of “value” in relation to adequacy as also in relation to the concept of just and valuable consideration”. The learned judge continued: “The question of adequacy should, however, not be equated with the concept of illusory or nominal value. Illusory or nominal value is what those words suggest – no value at all. “Illusory value” is value in name only. Adequacy, on the other hand, in relation to value connotes a far more extensive idea”.

6.3.4 The above dictum was followed in the unreported case relied on by Adv Greyling in *P. H Strydom NO and Another v Snowball Wealth (Pty) Ltd and Others* (10287/2019) [2020] ZAWCHC 103 (11 September 2020) which concluded, on the facts of that case, “The Plaintiffs’ own factual allegations are destructive of any claims in terms of Section 26 of the Insolvency Act … . Even if accepted that the value paid was less than the reasonable market value, no basis was laid nor suggested that there was anything remiss therewith. In would be an absurdity to equate the position that, when paying a discounted price, it can be said you gave no value”.

6.3.5 Two important observations need to be made about the judgments relied on: the first is that a distinction should be made between those cases where the disposition was in the form of a surety and the “value” given and received in return was either intangible or not easily quantifiable (such as in *Swannee’s Boerdery, Langeberg Koöperasie and Goode, Durrant and Murray*) and secondly, the dicta in cases which dealt with the question of “no value” at a pleadings and exception stage (only). The latter should be read in the context in which it had been given.

6.3.6 Dealing with the “surety-cases”: the sum total of the judgments in those cases, as I read them, determined that where an insolvent furnished a suretyship to another party, often a related or holding company (which furnishing, it has been held, constitutes a disposition) then if there is “some” benefit, be it for example in the support of a group structure or maintenance of financial stability in business ventures, to be derived from the furnishing of the surety, then the disposition occasioned thereby would not be without value. The value may not be immediate or empirically quantifiable, but it would still have some beneficial consequence. On that basis, those dispositions were held to fall outside the ambit of section 26: those dispositions would not be “without value” as contemplated by that section. Those cases are, however, distinguishable on the facts, from the present case.

6.3.7 I do not read the second line of cases, the “exception” cases, to find, as a rule of law, that once a value, which is not an illusion or nominal only, but simply an “inadequate” value, has been given, section 26 cannot apply. In fact, in the *PH Strydom NO* case, the learned judge, in dealing with the pleadings to which his judgment was limited, opened the door by contemplating possible scenario’s where a disposition at an inadequate value might still be impeachable under section 26. This much is clear from his words: “The pleadings excepted against must be taken as it stands, the truthfulness thereof is accepted for these purposes ... no basis

was laid or suggested that there was anything remiss ...”. This was in the context where shares were sold under their alleged “reasonable market price”. Similar difficulties with the pleadings were expressed in *Terblanche NO* at 917 G – H as follows: “Plaintiff concedes that Malo received

some value and refers to R 383 639, being the settlement amount paid to the banks. There is, however, no allegation that the value conceded should be treated as equivalent to no value being received". The learned judge made the position clear as follows: "(the) submission that section 26 can only apply where there is an absence of value cannot be upheld The answer in my view is that where a party who wishes to rely upon section 26, alleges that the monetary or other benefit is illusory or nominal and that it therefore amounts to no value at all must plead that fact".

6.3.8 The dicta quoted in paragraph 6.3.3 above, indicate that the mere giving of "some" value, would not necessarily "save" a disposition. For example, if R 10.00 is disposed of in return for R 5.00, then clearly value was only given for half of the disposition and for the balance of R 5.00 no value was given at all. If either the insolvent or the recipient attempts to create the illusion that the furnishing of R 5.00 in return for a disposition of R 10.00 constitute the furnishing of value, then the value given is illusory and section 26 would still apply. It might well be that such a disposition (also) falls to be impeached in terms of the other sections of the Insolvency Act, such as those relied on by the liquidator in this case in the alternative. This possibility was also alluded to by Selikowitz J in Terblanche NO at 917 D – F as follows: "Dispositions which have the effect of preferring a creditor (section 29) or which are intended to prefer a creditor (section 30) or which prefer a creditor or prejudice others as a result of collusion (section 31) are the stuff of inadequacy. Inadequate value by its nature results in preferring a creditor and proof of inadequate value is evidential material to be weighed in assessing preference as also collusion and fraud and in deciding whether a disposition was in the ordinary course of business".

6.3.9 My reading of the authorities referred to, is therefore that they determined the following:

- In matters where the disposition was in the form of the furnishing of a guarantee or suretyship, it may be that the value given in return was intangible or indeterminate, but such a disposition would not, by reason thereof, be for "no value" at all;
- In the case of other dispositions where some value was given, it must be determined whether that value was illusory or nominal. If so, then "no value" was given.
- In each case, however, if reliance is placed on illusory, nominal or absence of value and, when reliance is placed on section 26 of the Insolvency Act, the facts relied on must be pleaded.
- In each case, all relevant facts must be taken into consideration.

6.3.10 Was the disposition of that portion of the R 5,5million for which no value was received sufficiently pleaded? After some amendments, the relevant portions of the liquidator's particulars of claim read as follows:

“4. On, during or about mid to late 2010, De Jong Ontwikkelings made a payment, donation or disposition to and/or on behalf of the first defendant alternatively the Trust in an amount of R 3 400 000,00 alternatively R 5 500 00.00 further alternatively in a lesser amount as can be proven by the plaintiffs and which payment alternatively disposition pertained directly and/or indirectly to the payment of the purchase of an immovable property being Erf 3198, Sedgefield Township, Western Cape Province.

6. The disposition falls to be set aside by virtue of the provisions of section 26(1)(b) of the Insolvency Act in that:

6.1 It constitutes a disposition not made for value and/or was made for nominal or inadequate value, such that it was not made for value as contemplated, understood and meant by section 26 of the Insolvency Act; and

6.2 It was made within two (2) years of the winding-up of De Jong Ontwikkelings ...”

6.3.11 In my view, the amended pleading satisfied the requirements referred to in Terblanche NO and PH Strydom NO. The facts proven and as determined above, particularly in paragraph 6.2 earlier in this judgment, have satisfied the alternatives pleaded.

6.3.12 I find that DJO had disposed of a claim of R 5, 5 million in favour of Kilotech and insofar as the payment or discharge of DJO’s obligations to Absa in the amount of R 3,6 million was supposed to create the illusion that the claim of R 5,5 million had been satisfied thereby, it is illusory to the extent of constituting “no value” as contemplated in section 26 of the Insolvency Act for the balance of the amount. The alternative, more simple construction of the facts is that, for the balance of R 1,9 million, DJO has received no value when it abandoned its claim for R 5,5 million and only contrived to receive R 3,6 million in return.

6.3.13 Once a determination as above has been made, a liquidator is entitled to the recovery of the amount of the disposition. See: Barnard and Lynn NNO v Schoeman and Another 2000 (3) SA 168 (NPD). In this case, it will be for the recovery of the nett disposition or, put differently, for that portion of the

disposition

for which no value had been received. That is the R 1,9 million.

6.4 Is the amount claimed recoverable in terms of the other sections of the Insolvency Act relied on in the alternative by the liquidator?

Even if I am wrong in either my reading of the case law discussed in paragraph 6.3 above or in the determination of the recoverability of the R 1,9 million in terms of section 26 of the Insolvency Act, I further find as follows:

6.4.1 The disposition of the claim of R 5,5 million and the arrangement whereby Mr De Jongh, with the acquiescence and co-operation of his bank manager (who was also the bank manager of DJO) created a reduction of Absa’s exposure, clearly had the effect of preferring one creditor

above another. The effect of the transactions, as detailed in Mr De Jongh's e-mail of 3 June 2010 was, not only to limit Absa's overall exposure in respect of the accounts of Mr De Jongh and the companies under his control, but to decrease DJO's indebtedness to one of its creditors, Absa, without a similar or pro rata decreasing of its

indebtedness to its other creditors. Absa was preferred by having received alternate security for the R 3,6 million from a company other than the insolvent company. The liquidator however, does not seek to set aside the R 3,6 million preference but only claims recovery of the "nett" amount of the disposition, being the R 1,9 million referred to in paragraph 6.3.13 above. The preference of Absa was therefore a mere ancillary effect of the disposition in favour of Kilotech. The disposition of R1, 9 million was, however not to a creditor of DJO. The disposition which the liquidator seeks to recover is therefore not impeachable in terms of section 29(1) of the Insolvency Act. >

6.4.2 Mr De Jongh's contrivance of the disposition of DJO's claim for R 1,9 million in favour of Kilotech was furthermore not done with the intention of preferring Absa as creditor, but merely to enable Mr De Jongh to discharge his obligations to his ex-wife in terms of oral amendments to their divorce settlement. In my view, the disposition does not fall within the category of those dispositions contemplated in section 30(1) of the Insolvency Act, which has intent as a requirement.

6.4.3 Mr De Jongh, both in his evidence and clearly in his e-mail of 3 June 2010 to Absa, was often oblivious of the boundaries between personal and corporate entities. The lines were so blurred, that he considered himself, DJO and even Kilotech as "me" or "us". He therefore saw no problem in "transferring" a claim or even the immovable property constituting the means of payment of such a claim, from one company to another. In all these dealings, he represented either or both of the corporate entities and even their shareholders. The corporate entities must however, in law, be seen as "other persons" to each other. Considering these circumstances and the facts of the case in relation to the provisions of section 31 of the insolvency Act, I find that a debtor (DJO) had, before its liquidation, in collusion with "another person" (Kilotech and Mr De Jongh) "disposed of property" (the R 5,5 million claim or at least the nett amount of R 1,9 million thereof) belonging to it "... in a manner which had the effect of prejudicing his (DJO's) creditors" (in the words of section 31). The nett result of Mr De Jongh's collusion on behalf of the respective corporate entities was that DJO was R 1,9 million short at the end of the day (and Kilotech R 1,9 million richer). The fact that there was R 1,9 million less in DJO's

"kitty" at the time of liquidation, was to the prejudice of its creditors. This clearly renders the disposition

impeachable in terms of section 31 of the Insolvency Act.

6.5.1 The first aspect is DJO's timing of the disposition and DJO's asset and liability position at the time of commencement of its winding up. Mr De Jongh estimated that DJO was solvent by a large margin but the following aspects point in the other direction:

- In his e-mail of 3 June 2010, DJO was heavily indebted to Absa and sought to reduce its debt.
- The liquidating creditor, Investec, clearly had sufficient grounds to apply for, and obtain a liquidation order. Mr De Jongh's only surprise was that Investec only had one bond over property of DJO while Absa had many. No detail was furnished as to Nedbank's position, but clearly, the granting of the order and the successful sequestration proceedings against Mr De Jongh as surety, do not paint a picture of solvency.
- The total value of the claims of creditors reflected in the liquidation and distribution account was not disputed and neither were any of the values of the realised assets disputed. These clearly indicate a factual insolvency. The ex post facto limitation by those creditors to the extent of the proceeds their securities does not mean that at the time of winding up, i.e. before they exercised their discretion to limit their claims during the subsequent winding-up process (for whatever reason), DJO was solvent.
- There is no evidence to indicate that the insolvent position of DJO at the time of its liquidation, was any better at the time of the disposition.
- In terms of Section 26(1)(b), if the disposition occurred less than two years prior to the liquidation (as it did in this case), then, the onus is on the person who benefitted from the disposition, that is either Kilotech alone or Kilotech and its shareholders, to prove that, immediately after the disposition was made, the assets of DJO exceeded its assets. Apart from Mr De Jongh's oral guestimate, no other evidence was produced and this onus was not, on a conspectus of the facts, discharged on a balance of probabilities.
- The second aspect is the issue of the valuation of R 4,8 million placed by Absa on the Sedgefield property. On a reading of the agreement (despite it being a sham) and its addendum whereby Kilotech purported to "purchase" the Sedgefield property from Mr Sachs, the bank's valuation was merely an aspect with which Kilotech had to be "satisfied". Its valuation did not amend the agreement nor the purchase price payable. If it had, DJO would have claimed a payment of the difference from Mr Sachs. This was not done and neither was the agent's commission recalculated or the transfer fees reduced. None of the particulars regarding a sale at a R 5,5 million price as it later appeared in the Deeds office records, were amended or reduced. The R 4,8 million valuation, which "satisfied" Mr De Jongh, resulted in Kilotech's ability to pass a bond over the property in the amount of R 3, 6 million, which in turn, fulfilled Mr De Jongh's proposal to his and DJO's banker, Absa. The actual value of the balance of the purchase price remained unaltered by Absa's valuation and the disposition therefore remained the difference between the R 5,5 million price as agreed with Mr Sachs in respect of the Knysna property sale and the R 3,6 million as already indicated in paragraphs 6.1.3 and 6.2 above.

[7] Conclusions

7.1 I therefore find that DJO had made a disposition of its property in the amount of R 1,9 million in circumstances contemplated in section 26(1)(b) and /or section 31(1) of the Insolvency Act and that DJO's liquidator is entitled to the recovery of that amount from Kilotech. For purposes of clarity and certainty the full names of these parties shall be included in the relevant part of the order.

7.2 The liquidator claims costs on the attorney and client scale. One of the important factors in considering a claim for such higher scale of costs, is the nature of the cause of action and the conduct of the party who had caused it. Kilotech was a willing participant in the impeachable transaction which resulted in the disposition. It colluded with DJO (through the shared directorship of Mr De Jongh) in effecting the disposition. There is no reason why the insolvent company should bear the attorney and client portion of its costs and why the other willing participant should not pay it. This was no arm's

length transaction, it was one whereby an insolvent estate with a body of creditors was prejudiced at the time (irrespective of how the subsequent winding-up process unfolded). In the exercise of any discretion, costs should be awarded at higher scale.

7.3 In view of the above, in the exercise of my discretion further, no order in respect of costs needs to be granted in favour of or against the Trust who had been cited as second defendant as Kilotech's shareholder.

[8] Order

1. The disposition by De Jongh Ontwikkelings (Pty) Ltd in favour of Kilotech Investments (Pty) Ltd in the amount of R 1,9 million is hereby set aside.
2. The first defendant is ordered to pay the aforesaid amount of R 1,9 million together with interest thereon at the prescribed rate of interest as amended from time to time in terms of the Prescribed Rate of Interest Act, 55 of 1975, calculated from 11 September 2010 to date of payment, to the second plaintiff in her capacity as the liquidator of De Jongh Ontwikkelings (Pty) Ltd.
3. The first defendant is ordered to pay the plaintiffs' costs of suit on the scale as between attorney and client.
4. No order is made against or in favour of the second defendant.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 01, 02 and 03 February 2021

Judgment

delivered: 25 March 2021

APPEARANCES:

For the Plaintiff: Adv GW Amm

Attorney for Plaintiff: Lowndes Dlamini Attorneys, Pretoria

For the Defendants: Adv PJ Greyling

Attorney for Defendants: Schabert Inc, Pretoria

- [1] “Ons wens soos volg te bevestig: Die Knysna huis word verkoop vir ’n bedrag van R 8 550 000.000 en die Sedgefield huis gekoop vir ’n bedrag van R 5 500 000.00. Die bedrag kontant beskikbaar is dus R 3 050 000.00 welke bedrag as volg angewend moet word: Die huidige Absa fasiliteit op die Knysna eiendom is R 4, 8 miljoen welke bedrag ten volle afgelos word teen registrasie en vervang word met die R 3, 6 miljoen fasiliteit op die Sedgefield huis. Met ander woorde ’n kapitale delging van R 1, 2 miljoen ten einde die huidige fasiliteit van R4, 8 miljoen te kan aflos met registrasie. Rekeningnommer ... se balans van R 477 087, 36 soos op 30/4/2010 word ook afgelos tesame met rente tot op datum van registrasie wat inhou dat die blootstelling by Absa Bank verminder word met ’n totale bedrag van R 1 677 082, 36 tesame met rente”.

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Prepared on 13 October 2026 · Esheria