

SOUTH AFRICA / JUDGMENT

Eckhoff N.O and Others v Van Den Heever and Others (16404/23) [2025]

ZAWCHC 47 (11 February 2025)

[2025] ZAWCHC 47

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

16404/23

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

CASE NO: 16404/23

In the matter between

JOCHEN

ECKHOFF NO

1ST

APPLICANT

LEGADIMANE

ARTHUR MAISELA NO

2ND

APPLICANT

K2012076290

SOUTH AFRICA (PTY) LTD

3RD

APPLICANT

AND

PAUL
JOHANNES VAN DEN HEEVER
1ST
RESPONDENT
SONNET
STEMMET
2ND
RESPONDENT
OUDE
CHARDONNAY RETAIL (PTY) LTD
3RD
RESPONDENT
REGISTRAR
OF DEEDS, CAPE TOWN
4TH
RESPONDENT
ABSA
BANK LTD
5TH
RESPONDENT

Date of Hearing: 19 November 2024

Date of Judgment: 11 February 2025 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] The first and second applicants are the joint liquidators of The Vines Construction (Pty) Ltd, previously Oude Chardonnay Rusoord

(Pty) Ltd (the company). The third applicant is a creditor of the company with a claim against it of at least R2 million. The first

respondent was the sole director and controlling mind of the company prior to its liquidation, as well as the sole [i]director and controlling mind of a related company, Oude Chardonnay Retail (Pty) Ltd (Retail) prior to its liquidation. The applicants alleged that the second respondent was a personal friend of the first respondent who through collusion with the first respondent, was able to purchase the company's sole asset for half its value, to the obvious prejudice of all its creditors, whereupon the first respondent caused all the proceeds from the sale to be paid to Retail to settle Retail's revolving credit liability, before changing both the company and Retail's names and then winding them up as empty shells. The third applicant was left out of pocket to the tune of R2 million with no recourse against either the Company or Retail and its only hope of ever recovering what was due to it was in the relief it sought against first and second respondents. The

essential purpose of the application was to obtain orders setting aside the company's disposition of its immovable property to the second respondent, or to recover the value of the property from her, in terms of the provisions of section 31 of the Insolvency Act, 1936 (Act No. 24 of 1936) and an order declaring the first respondent liable for all the Company's debts in terms of section 424 of the Companies Act, 1973 (Act No. 61 of 1973) with costs of suit on attorney and client scale.

[2] The first respondent opposed the relief both on the merits and that the claim formulated against him in terms of section 424 had prescribed as contemplated in section 10 read with paragraph 11(d) of the Prescription Act, 1969 (Act No. 68 of 1969). The second respondent opposed the relief on the merits contending that the applicants have failed to make out a case that she colluded with the first respondent in respect of the sale but also on the basis that the claim against her had prescribed. The third and fourth respondent did not oppose the applications. The first and second respondents argue that the applicants chose to proceed in motion in a matter ordinarily run in action proceedings, to wit the section 424 relief, and in a matter exclusively dealt with

in action proceedings, to wit the section 31 relief, despite having been warned thereof and having been invited to consider their

position.

[3] The company conducted business as a property holding and developing concern prior to its name being changed shortly before its voluntary member's winding up on 27 November 2019. The third applicant and the company concluded a written deed of sale in terms of which the third applicant sold an immovable property described as sections 1 and 2 in the Vines sectional title scheme to the company for R6 million. The first addendum to the deed of sale changed the description of the property to erf 4[...] Paarl and R4 840 000-00 of the purchase price was made payable on registration of transfer with the balance of R2 million to be paid to third applicant on 30 April 2018. In the second addendum to the deed of sale it was agreed that the R2 million balance of the purchase price would be paid to the third applicant on or before 30 June 2-18 and that the company would cause a mortgage bond to be registered over that portion of erf 4[...] Paarl on which the old house was situated, that was the former section 1 and 2 The Vines, in favour of the applicant as security for the R2 million balance of the purchase price. The property was registered in the company's name on 30 January 2018 but the company failed to pay the third applicant the R2 million balance of the purchase price or to cause the mortgage bond contemplated in the second addendum to be registered in the third applicant's favour as security. The third applicant instituted proceedings against the company to compel it to register the bond. In its answering papers the tendered payment of R300 988-10. The company did not pay this amount as it intended to set it off in relation to a cost order made against third applicant. The company's position was that the amount was to be kept in trust and undertook that the funds would be paid over in the event that the third applicant succeeded in its appeal or be set off against possible future allocaturs once the third applicant's appeals had been exhausted and had been dismissed. The third applicant was successful on appeal and third applicant's position was that the

defence to the payment of R300 988-10 was eliminated. The company failed to pay the amount in response to third applicant's section 345 demand as a result of which, according to the third applicant, the company was and was deemed unable to pay its debts.

- [4] In early December 2019 third applicant learned that the company had undergone a name change shortly before being placed in voluntary member's winding up. The first respondent failed to list or include the company's admitted liability towards the third applicant in his sworn CM100 statement of affairs submitted in terms of section 363 of the Companies Act. In 2022, during the enquiry into the company's affairs, the applicant became aware that the first and second respondents were personal friends. The 3rd applicant also came to know that the first respondent caused the entire proceeds of the sale of the company's property, which was its only asset, to be paid to Retail, where it was spent on settling Retail's revolving credit debt, despite having tendered to pay the 3rd applicant R300 988-10 under oath, and in breach of his undertaking to retain the R3 988-10 in trust, without having made any provision

whatsoever to settle the company's contingent liability of R2 million towards the 3rd applicant. The 3rd applicant's case was that this amounted to conducting the company's business recklessly or fraudulently and to the

prejudice of the company's creditors, or disregarded their interests, within the meaning of section 424 of the Companies Act. The applicants were precluded from becoming aware of the existence of the debt until 2022. On 22 January 2020 the liquidators were provided with the company's records and documents in the company's attorneys possession and these included the deed of sale of the property. On 23 January 2020 the first meeting of creditors was held. On 8 February the liquidators were appointed as the company's final liquidators. On 6 March 2020 the second meeting of creditors was held. On 17 March 2020 the liquidators filed the first liquidation and distribution account in which the property was nowhere listed as an asset of the company.

- [5] The respondents argue that the applicants knew material information by 22 September 2020, three years before the issuing of the application on 22 September

2023. These were that the company was unable to pay its debts, was insolvent and had been liquidated; the mortgage bond in favour of the third applicant had not been registered over the property; the property was sold to Ms Stemmet on 5 February 2019 and transferred to her and registered in Cape Town Deeds Office on 17 April 2019; that the property had been sold at a value of R1 000 000-00, well below that for which the third applicant had it valued, which was R2 000 000-00; despite the sale of the property, no portion of the debt due to the third applicant, including that portion of the debt that the applicants said was common cause was owed to the applicant, to wit the R300 988-00, was paid to the third applicant; the company had disbursed the funds received from the purchase price of the sale of the property to person or entities other than the third applicant;

that neither the debt the third applicant claimed from the company, nor any portion thereof had been provided for in the company's

statement of affairs and that the property was not listed as an asset of the company in the statement of affairs supporting voluntary

liquidation.

Should the relief sought as envisaged in section 31 of the Insolvency Act be exclusively through action proceedings and not on motion

[6] Section 31 of the Insolvency Act, 1936, read as follows:

“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 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 Nat Industries (Pty) Ltd (In Liquidation) and Others v Grindrod Bank Ltd (D10128/2022) [2023] ZAKZDHC 77; 2024 (2) SA 506 (KZD) (25 October

2023) at para 26 and 27 it was said:

“[26] Sections 30 and 31 of the Insolvency Act create a remedy, given to liquidators, to recover assets that have been removed from an estate before insolvency. In “prescribed circumstances”, liquidators have the right to have a person declared to be a debtor of the insolvent estate and to have a disposition set aside. This is the legal right that is claimed. The summary of the legal right and what is required to be proven and implied alleged in order to beget the right, set out in Venter v Volkas [1973

(3) SA 175 (T) at 179-180] is apposite:

‘Sec. 30(1)...provides for the recovery of the disposed property but only in those cases where the disposition was made with the intention of so preferring a creditor above other creditors or stated differently with the intention of disturbing what would be the proper distribution of the assets in the event of the sequestration of the debtor's estate. Such an intention would generally speaking not be present in the mind of the debtor who does not contemplate the sequestration of his estate as a likely event when he makes the disposition.... Being a question of intention, it

involves a subjective assessment of the debtor's action in having made the disposition. In the absence of direct evidence of an intention to prefer one creditor above another, it must generally speaking be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor, to whom the disposition was made, above another...a debtor may also have had other objects in mind when he made the disposition but in that event it is incumbent upon

the person upon whom the onus lies to establish that to prefer the creditor in question was the paramount, dominant or substantial object. A preference involves a free selection. Where therefore a debtor pays a creditor "out of his turn" under great pressure or to avoid a prosecution or for some other reason that negatives the inference that main object was to prefer the creditor, intention to prefer will not be proved.' (My underlining)

[27] Four facts must be alleged and proven in order to beget the setting aside of a disposition in terms of section 30(1). First, the insolvent must make a disposition of its property, not property it has stolen. Second, the disposition must be made at the time when the liabilities of the insolvent exceeded its assets, but prior to the insolvent's

liquidation. Third, the disposition must be made with the intention of preferring one creditor above another. Finally, liquidation must post date the disposition made."

[7] Courts of law will not be deceived by the form of a transaction and will rend aside the veil in which the transaction is wrapped and examine its true nature and substance [Kilburn v Estate Kilburn, 1931 AD 501 at p. 507]. Collusion is a conniving together between two persons to practise a fraud on the creditors [Finn's Trustees v Prior, 1919 E.D.L. 133 at p. 137; Gert de Jager (Edms.) Bpk. v Jones, N.O. en McHardy, N.O., 1964

(3) SA 325 (AD); Coetzer v Coetzer 1975 (3) SA 931 (E) at 936]. In Finn's the court said:

'In other words, was it the intention of the insolvent and the defendant in this case, the one to give and the other to obtain an undue preference for the defendant to the prejudice of the other creditors; that is to say, in common parlance, to do the other creditors out of their rights.'

In Pretorius, N.O v Stock Owners' Co-operative Co. Ltd., 1959

(4) SA 462 (AA) it was said:

'An intention to prefer exists when the debtor intends 'to disturb what would be the proper distribution of assets' in insolvency. Thurburn v. E Steward, supra (1871 L.R.P.C. 478). That must be the main object; see Swanepoel v The National Bank of South Africa, supra at

p. 39 (1923 OPD 35). Thus where a debtor pays a creditor 'out of his turn' under great pressure, or to avoid a prosecution, or for some other reason that negatives the inference that the main object was to prefer the creditor, intention to prefer will not be proved.'

[8] In this matter, the issues raised by the 3rd applicant goes to the heart of the transaction as it challenges whether that was a true sale done in good faith. To establish a collusion both parties must have knowingly participated in the reckless or fraudulent conduct. In *Simon NO and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (W) at 525C-526F it was said:

"I make the following preliminary remarks. It has to be alleged that the business was in one or more respects carried on with gross negligence or fraudulent intent. Ordinarily, if a company incurs debts at a time when, to the knowledge of those managing it, there is no reasonable prospect of the creditors being paid or of the creditors in whose favour they are incurred being paid, there is an intention to defraud (Henochoberg (op cit at 914)). 'Ordinarily' underlies the statement in Gore-Browne on Companies 44th ed at 35.014--15:

'In all cases, however, fraud in the sense of dishonesty must be shown (the English provision which corresponds with s 424 does not extend to the reckless carrying on of business as a basis of liability); it is not enough in itself to prove that the company or its officers preferred one creditor over others any more than it is enough in itself to show that the company continued to incur debts at a time when the directors were aware that it was insolvent. It has been said that the words "defraud" and "fraudulent purpose" in s 212 connote ". . . real dishonesty, according to current notions of fair trading among commercial men at the present day, real moral blame" (Re Patrick Lyon Ltd (1993) 1 Ch 786 at 790 per Maugham J) and that "if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors receiving payment of those debts, it is in general, a proper inference that the company is carrying on business with intent to defraud" (Re William C Leitch Bros (1932) 2 Ch 71 at G 77 per Maugham J (emphasis added). An inference such as this must, however, be properly capable of being drawn from the facts alleged; if those facts are equally consistent with an honest intention, no inference of dishonesty may legitimately be drawn. If, for example, it is alleged that a controlling company has promised support for its subsidiary which has been withdrawn, this allegation cannot be used as the basis of an inference of fraud unless it can be shown that the promise was false when made or constituted a continuing

representation falsified by a subsequent change of mind uncommunicated to the company or its suppliers. (Re August Barnett & Sons Ltd (1986) BCLC 170 at 175.) In establishing the factual basis on which the requisite element of dishonesty or fraud may be found, it is not necessary (though it is sufficient) that those responsible know or believe that the debts will never be paid; the Court is entitled to find dishonesty and fraudulent purpose if a person obtains or helps to obtain credit or further credit when he knows that there is no good reason to think that funds will become available to pay the debt when it becomes due or shortly afterwards. (R v Grantham [1984] QB 675.)'

The mere making by the company of a disposition of its property which constitutes the giving of a voidable or undue preference does not per se amount to carrying on the business recklessly or with intent to defraud, but the circumstances may be such that the making of a disposition is a fraud on other creditors (Henochoberg (op cit at 915)). The failure to pay the sales tax or PAYE, which is referred to in the particulars of claim would not be said to be done fraudulently unless

there was, for example, fraudulent evasion which is not alleged (cf *Re L Todd (Swanscombe) Ltd* (1990) BCLC 454). 'Party to' means no more than 'participation in', 'takes part in' or 'concur in'; this could be constituted by a supine attitude amounting to concurrence in the reckless or fraudulent conduct (*Henochsberg* (op cit at 917); *Howard v Herrigel and Another* NNO [1991] ZASCA 7; 1991

- (2) SA 660 (A) at 674H). A person who colludes with the company's officers fraudulently to obtain credit or a creditor which accepts payment knowing that the money has been procured fraudulently for the very purpose of paying it could knowingly be a party to the carrying on of the business with intent to defraud (*Henochsberg* (op cit at 918--19)). 'Knowingly' means having actual knowledge or having knowledge in the form of *dolus eventualis*, which in the present context means that a party will be held to have knowledge if he or she subjectively foresaw the reasonable

or real possibility that conduct or a course of conduct would result in a preference or prejudice as contemplated in s 424 and reconciled himself or herself to the fact, that he or she nevertheless pursued the conduct or allowed it to be pursued when he or she could have prevented it. If a person has a suspicion that something unlawful is happening and deliberately shuts his or her eyes to what is going on, he or she is knowing (see *Frankel Pollak Vinderine Inc v Stanton* (case No 95/14069, WLD, 29 March 1996), especially at pp 29 and 33--9). It is, of course, a condition of liability of a person with knowledge that he or she was a party to the carrying on of the business. On this basis a person is not 'knowing' merely because his or her employee or agent has knowledge (*Ensor NO v Syfret's Trust and Executor Co (Natal) Ltd* 1976

- (3) SA 762 (D) at 766B--C; *Fisheries Development Corporation of SA Ltd v Jorgensen and Another*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980
- (4) SA 156 (W) at 167D--G).

The issue of a juristic person's knowledge arises in both criminal law and civil law. The matter is dealt with in s 332(1) of the Criminal Procedure Act 51 of 1977 in terms of which any act performed, with or without a particular intent, by or on instruction or with permission, express or implied, given by a director or servant of a corporate body (there is a similar provision for omissions to act) in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of

the corporate body are deemed to have been performed (and, with the same intent, if any) by the corporate body. The original forerunner

of this provision was introduced by s 117 of the Companies Amendment Act 23 of 1939.

A corporation's knowledge is possessed by its managing organ. Knowledge of the board of directors is knowledge of the company. When one moves away from the managing organ to individuals, such as executive directors or employees, the position is not so straightforward. Where a person authorises an act which gives rise to a crime the degree of his or her criminal

responsibility for that act depends on his or her own state of mind or mens rea (R v Shikuri 1939 AD 225 at 231). In describing the development of the English common law, De Wet and Swanepoel Strafreg 4th ed say that in the course of time

`word kriminele aanspreeklikheid van die regspersoon ook buite die gebied van vicarious liability erken, en wel vir handeling wat as handeling van die regspersoon self beskou kan word, tw handeling wat beheer word of kan word deur die opperste gesag van die regspersoon', pointing out that there are reservations on this aspect in some quarters (at 56).

[9] In Venter v Volkscas Ltd 1973 (3) SA 175 (t) the headnote reads:

“Whether a disposition was made with the intention of preferring one creditor above another within the meaning of section 30 (1) of Act 24 of 1936, as amended, is in each case a question of fact which can be established either with direct evidence or by inference from the circumstances in which the disposition was made. Being a question of intention, it involves a subjective assessment of the debtor's action in having made the disposition. In the absence of direct evidence of an intention to prefer one creditor above another, it must generally speaking be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor to whom the disposition was made, above another. It is not sufficient that the circumstances show that the debtor should have realised that the effect of the disposition would be to disturb the proper distribution of his assets in the event of the sequestration of his estate. They must show that he as a fact intended it to have that effect.”

Where the case was based on collusion, it follows that it must also be alleged and proved that the recipient of the disposition knew that the debtor contemplated sequestration when the disposition was made and that the recipient intended to be preferred above another or others and that the recipient intended to disturb the proper distribution of the debtor's assets in the event of the sequestration of the debtor's estate. Motion proceedings are not geared to deal with factual disputes, and are principally for the resolution of legal issues [Minister of Police v SA Metal and Machinery (462/13) [2014] ZASCA 95 (1 July 2014)]. Disputed alleged collusions involve the resolution of factual issues including what was known, the intention and the impact. In this matter the factual disputes required evidence to prove and it would have been appropriate for the applicants to institute action proceedings. In the circumstances, motion proceedings were inappropriate. I am not inclined to state this as a matter of principle applicable to all section 31 matters. I am restrained by the court's inherent power to regulate its own processes in the interest of justice in deserving cases, informed by the merits and demerits of each case. I am unable to state it as a matter of principle that when legal practitioners make a judgment call on the proceedings to be instituted, they must approach such a decision on the basis that there should not be motion proceedings in section 31 matters. The decision-maker must consider the course of proceedings, mindful of what was in issue. Usually, because disputes of facts are anticipated, section 31 proceedings are instituted through action and not motion. It follows that it is unusual that they are on motion.

Section 424 of the Companies Act, claim.

[10] Section 424 of the Companies Act reads as follows:

“424 Liability of directors and others for fraudulent conduct of business

- (1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.”

A final determination that the first respondent as the director acted recklessly can only be made on a balance of probabilities. It was not sufficient for the applicants to merely make out a prima facie case [Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T)]. It must be established that the first respondent had acted recklessly or fraudulently in the conduct of the business of the company. Where no more than suspicion of such conduct may have been aroused but the threshold of a balance of probabilities was not met, the claim must fail. To determine the threshold, the merits should be referred to. The conduct of the respondent needs to be examined into, and the most effective procedure is by way of summons to determine the facts in which the court is asked to make a final order [Joh-Air at 426D-F and the cases referred therein]. Where the facts are not in dispute on the findings on and on the law may be determined by motion [Joh-Air at 427F-428B]. The disputes in the papers were obvious and known to the applicants at the launch of the application proceedings. The applicants were aware, at the time of the institution of the application, or at least when the matter reached a stage where it was ready to be argued, that the conflict could not be resolved without hearing evidence. The word "application" in s 424 (1) of the Companies Act 61 of 1973 was not intended to have the narrow meaning of proceedings by way of motion only, but was intended to embrace proceedings by way of action as well [Food & Nutritional Products (Pty) Ltd v Neumann 1986 (3) SA 464 (W)].

- [11] Only the third applicant would know why under the circumstances they decided not to institute an action and preferred motion proceedings to seek to resolve dispute of facts. The disputes set out in the papers were foreseeable and it would have been more appropriate if the action proceedings were instituted for trial. On the facts, motion proceedings, were incorrectly instituted. The declaration of personal liability must be established for debts of the company against a person who knowingly carried on business of company recklessly or fraudulently. The applicant for such declaration was required to prove, on balance of probabilities, that person who was sought to be held liable had knowledge of the facts from which a conclusion could properly be drawn that the business of the company was carried on recklessly or with intent to defraud creditors of company or creditors of any person or for any fraudulent purpose [Howard v Herrigel and Another NNO [1991] ZASCA 7; 1991 (2) SA 660 (A)]. It was an evidential test [Philotex (Pty) Ltd and Others v Snyman and Others; Braitex Ltd and Others v Snyman and Others [1997] ZASCA 92; 1998 (2) SA 138 (SCA)]. The section is

aimed at discouraging fraudulent, dishonest and reckless people from abusing the protection which is provided by a corporate entity [Harri and Others NNO v Online Management CC and Others 2001 (4) SA 1097 (T)]. Where fraud was alleged, the knowledge and the state of mind of the person whose conduct was questioned was relevant. It was necessary for the applicants to show that the first respondent had with mala fides or recklessly performed acts to induce benefits for another company or the second respondent, knowing that the company was insolvent and without reasonable prospects of meeting its obligations. This meant carrying of the business of the company by actions which evinced a lack of any genuine concern for the company's prosperity [Anderson and Others v Dickson and Another NNO 1985

(1) SA 93 (NPD) at 110D-H].

[12] The dispute between the parties required that a court scrutinise the company's minute-books, correspondence, books of account and other records in order to gain a picture of the responsibilities undertaken and the part played by the first respondent in the conduct of the company's affairs; to calculate the approximate date by which the company had lost its capital (its assets reduced to the level of its liabilities); to estimate the possible date or dates by which the first respondent was likely to have become aware of the fact that the company had lost its capital and whether the first respondent, after the date on which he probably knew of the insolvency of the company, caused or permitted the company to carry on business (1) recklessly or (2) with intent to defraud creditors of the company or (3) creditors of any other person than the company or 94) for any fraudulent purpose [Headnote of Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 and at page 110E-H]. One of the primary intentions behind section 424(1) was to provide a meaningful remedy against abuses of fraud and fraudulent purposes in the conduct of a company's business. It is not wrong, in the interests of justice and where appropriate, to order the parties to trial, for the remedy provided by the subsection not to be lost to innocent creditors to whom the debts are owed [Pressma Services (Pty) Ltd v Chuttler and Another 1990

(2) SA 411 (CPD)] and for the section 424(1) itself to be an effective for creditors.

Prescription

[13] The personal friendship between first and second respondent was piece of evidence necessary for the 3rd applicant to prove collusion but was not a fact necessary to prove collusion [Truter and Another v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA)]. Friendship was not a material fact which fact must be alleged and proven to prove collusion or to beget the setting aside of a disposition. I am not persuaded that belated knowledge of the friendship on its own, when other material facts were known earlier, was sufficient for the claim to survive prescription. Long before the discovery of the friendship, the 3rd applicant had the minimum facts that were necessary to institute action, in particular the details of the transaction which involved

the second respondent. It was at that point of knowledge that prescription started to run.

[14] On the other hand, it was only during the enquiry in 2002 that the applicants became aware that the first respondent caused the entire proceeds of the sale of the company property, which was its only asset, to be paid to Retail, settling Retail's revolving credit debt, without having made any provision whatsoever to settle the company's contingent liability of R2 million towards the 3rd applicant. The first respondent did this despite having tendered to pay the 3rd applicant R300 988-10 under oath and in breach of his undertaking to at least retain R300 988-10 in trust. Some of these facts are disputed. However, if proved, a case may be made out for the section 424 (1) remedy. Before the enquiry in which the first respondent was forced to testify, the applicants were not and could not be aware of some of these material facts. I am not persuaded by the defence of prescription under the circumstances. In any event, the first respondent disputes that his conduct amounted to carrying out the business of the company recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. Justice demands that the disputes be referred to trial.

[15] For these reasons I make the following order:

- (a) Prayer 1 of the notice of motion is granted.
- (b) Prayer 2 and more specifically based on 2.2 is dismissed with costs, including the costs of counsel on scale C.
- (c) The application against the 1st respondent is referred to trial.
- (d) The notice of motion, answering affidavits and replying affidavits shall stand as a combined summons, plea and replication respectively.
- (d) Further trial procedures may follow.
- (e) In respect of the claim against the 1st respondent, costs in the cause.

DM THULARE

JUDGE OF THE HIGH COURT

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