

SOUTH AFRICA / JUDGMENT

Engelbrecht NO and Others v Du Toit (2723/2015) [2020] ZAWCHC 119 (19 October 2020)

[2020] ZAWCHC 119

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

2723/2015

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Source record**Republic of South Africa****IN THE HIGH COURT OF SOUTH AFRICA****WESTERN****CAPE DIVISION, CAPE TOWN****Case****number: 2723/2015****Before: The Hon. Mr Justice Binns-Ward****Hearing: 8 October 2020****Judgment:** 19 October 2020

In

the matter between:

RYNO

ENGELBRECHT N.O.

First

Plaintiff

YUNUS

ABOBAKER ISMAIL

N.O.

Second Plaintiff

SHONA

LE ROUX MARX

N.O.

Third

Plaintiff

and

LYNETTE

DU TOIT (formerly DE VILLIERS)

Defendant

JUDGMENT

BINNS-WARD J:

- [1] The plaintiffs in this action are the co-trustees of the insolvent estate of Alwyn Bernardus Smit, in respect of which a final order of sequestration was granted on 8 April 2014. They have sued under the Insolvency Act 24 of 1936 for the setting aside of allegedly improper dispositions by the insolvent to the defendant and for an order declaring that they are entitled to recover the amounts disbursed by Smit to the defendant.
- [2] It is common ground that the defendant lent and advanced R1 million to Smit prior to his sequestration. The amount was advanced in two transactions. In the first, an amount of R800 000 was advanced on or about 14 October 2010, and in the second an additional amount of R200 000 on or about 24 February 2011. Smit paid interest on the loans in an amount totalling R141 000 between 30 November 2010 and 7 October 2011. He repaid the capital amount owed to the defendant in four tranches
- between 3 October and 29 November 2011. A payment of R50 000 was made on 3 October, R250 000 on 5 October,
- R150 000 on 14 November, and R550 000 on 29 November 2011.
- [3] The evidence showed clearly that Smit was deeply insolvent at all material times. An investigation by Ms Eileen Fey, an experienced insolvency practitioner and forensic investigator, indicated that Smit's state of insolvency deteriorated from an excess of liabilities over assets of R15 661 199 as at 28 February 2010 to one of R25 727 095 as at 28 February
2012. The deficit had increased to at least R40 267 648 by 28 February 2014, very shortly before his estate was provisionally sequestrated. Smit said in evidence that he did not take issue with the content of Ms Fey's report.[1]
- [4] The plaintiffs' claim for a setting aside of the dispositions was brought in terms of s 26 and/or s 30 of the Insolvency Act. Their prayer for a declaration, consequentially upon the relief sought in terms of ss 26 and 30, that they are entitled to recover the amounts involved is founded in s 32(3) of the Act.
- [5] Insofar as relevant for current purposes, s 26 of the Insolvency Act provides for the setting aside of dispositions of property by an insolvent not made for value more than two years before the sequestration of his estate if it is proved that immediately after the disposition was made the liabilities of the insolvent exceeded his assets. Section 30 provides, insofar as relevant, that if a debtor makes a disposition of his property at a time when his liabilities exceed his assets with the intention of preferring one of his creditors above the others, and

his estate is subsequently sequestrated, the disposition may be set aside. Section 32(3) of the Act provides that '[w]hen the Court sets aside any disposition of property under any of the said sections [ss 26, 29, 30 or 31], it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.'

- [6] The plaintiffs' claim also involved an additional sum of R60 000 in respect of a loan in that amount by Smit to the defendant. The defendant did not contest the plaintiffs' claim for repayment of the R60 000 loan (a demand for payment was made by the plaintiffs on 1 August 2014), but she delivered a plea denying liability in respect of the rest of the plaintiffs' claim, viz. for the recovery of capital repayment she had received from Smit in the sum of R1 million and the interest that he had paid her in the amount of R141 000.
- [7] The trial was postponed on previous occasions for various reasons that I find unnecessary to particularise. The defendant's attorneys of record having withdrawn, notice of the set down of the trial for hearing on 8 October 2020 was served by the sheriff at the defendant's residential address on 10 September 2020 on the defendant's husband. According to the sheriff's return, the husband advised that the defendant was temporarily absent. The defendant failed to appear when the matter was called before me on 8 October, and the trial proceeded in her absence in the manner contemplated in rule 39.
- [8] It is convenient to treat first of the claim for the recovery of the amount paid by Smit as interest.
- [9] A loan agreement is a 'credit agreement' within the meaning of the National Credit Act 34 of 2005 (the NCA), and a lender is a 'credit provider' in the language of that statute. At the relevant time s 40 of the NCA required a credit provider to whom the total principal debt under 'all outstanding credit agreements' exceeded R500 000 to apply for registration as a credit provider. It was admitted that the defendant had not applied for or obtained registration as a credit provider. Section 89(2)(d) of the NCA provides (subject to certain other provisions that are not applicable on the facts of this case) that a credit agreement 'is unlawful if at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered'. In terms of s 89(5) of the NCA, a court seized of a claim in terms of such an unlawful agreement is enjoined to declare it to be void.
- [10] It follows from the aforementioned implications of the NCA that the transactions in terms of which the defendant advanced the sum of R1 million to Smit were legally void. The effect was that whereas she may well have enjoyed a claim for repayment of the capital on the grounds of unjust enrichment (cf. *National Credit Regulator v Opperman and Others* 2013 SA 1 (CC)), the defendant had no right to performance of the agreement, and accordingly, no entitlement to recover the stipulated interest from Smit. There is no doubting in the circumstances that the amount paid by Smit to the defendant in respect of interest

constituted a disposition without value within the meaning of s 26 of the Insolvency Act (see *Fourie NO and Others v Edeling NO and Others*

[2004] ZASCA 28 (1 April 2004), [2005] 4 All SA 393 (SCA) at para 17-19); and also *Estate Jager v Whittaker and Another* 1944 AD 246, in which it was held that a payment made in terms of an illegal agreement fell, for the purposes of s 26, to be equated with a donation. The plaintiffs' entitlement to recover the aforementioned sum of R141 000 was therefore established.

[11] The defendant would, however, have been able to sue under the *condictio ob iniustam causam* for the recoupment of the capital sum that she had advanced (cf. *Fourie NO supra*, at para 13). There is nothing to suggest that the defendant acted with turpitude in making the loans without having applied for registration as a credit provider. The inherent probability is that the loans were made in ignorance of the technical requirements of the NCA. Smit's payment in reimbursement of the R1 million capital payment made to him by the defendant was therefore clearly not a disposition without value because it was an amount that the defendant would have been able to recoup from him by condition. In the circumstances, the plaintiffs are able to establish a right to recover the capital repayment by the insolvent to the defendant only if they can show that the payment was made by Smit with the intention to prefer the defendant above his other creditors; in other words, only if they can bring their claim home in terms of s 30(1) of the Insolvency Act.

[13] The evidence showed that Smit - who had built up an established reputation as a financial adviser and broker, having been in business as such, originally acting as an agent for Old Mutual, since 1988 - enticed established clients and other persons referred to him in consequence of his reputation to entrust him with substantial sums of money on the understanding that he would be able to invest the entrusted funds at generous rates of return. His *modus operandi* emerged very clearly from the sample of affidavits submitted in proof of claim by various creditors in his insolvent estate that was put in evidence at the trial (exhibit H). He would sometimes even persuade clients to disinvest from safe investments with established financial institutions and induce them to understand that the proceeds of such disinvestments had been more favourably invested elsewhere, whilst they were instead misappropriated by him. He would make regular payments to the clients as ostensible returns on some of these purported reinvestments. It is obvious that such payments were made to mislead clients into believing that their monies had been reinvested as misrepresented by Smit, and equally plain that he funded the 'returns' with monies fraudulently obtained from other clients.

[14] Smit, who was called to testify in terms of s 32(2) of the Insolvency Act, stated that he took no issue with the content of those affidavits, thereby in effect confirming that they accurately demonstrated how his fraudulent activities were conducted. He confirmed that the funds that he used to redeem the defendant's loan had been sourced from a certain Mr and Mrs Herbst, whom he had led to understand that he would be investing the monies on their behalf.

[15] Ms Fey categorised the transactions with Smit by his clients as either 'investments' or 'loans'. His 'investment creditors' placed funds with him on an indefinite basis as against a promised return, whilst his so-called

'loan creditors', including the defendant, advanced funds in terms of lending transactions with fixed dates of repayment.

Smit testified, however, that he drew no particular distinction between his transactions. I understood by this that he indiscriminately solicited capital payments from clients, whether as loans or ostensible capital investments, as the means of funding his fraudulent scheme.

[16] Smit admitted that he was conscious from the outset that his fraudulent mode of operation was unsustainable and would lead inexorably to his eventual sequestration when the whistle would be blown by an unhappy investor whose promised returns he would be unable to provide or whose loan he would fail to repay. He kept the scheme going by the using the funds that he was able to borrow or solicit for 'investment' to pay the returns due on the 'investments' already supposedly made for those of his clients who had invested earlier. It was a type of 'rob Peter to pay Paul' operation, and in that respect corresponded in essential respects to a classic Ponzi scheme. The solicited funds were also used to fund Smit's lifestyle.

[17] There is no reason to question Smit's evidence that he appreciated from the outset, and certainly at the time of the transactions in issue in the current case, that his scheme would end in disaster, including inevitably, the sequestration of his estate. Contemplation by the insolvent of sequestration at the time of the disposition was an express requirement in the equivalent provisions of earlier iterations of the Insolvency Act and, although not expressly referred to in s 30, remains a relevant consideration because it is impossible to conceive how an intention to prefer can subsist in the pertinent sense absent such a contemplation.

[18] However, as noted in *Mars on Insolvency*, proof of a contemplation of insolvency when a disposition is made 'does not of itself necessarily establish a desire to favour a creditor'.^[3] The case of *Giddy, Giddy and White's Estates v Du Plessis* 1938 EDL 73 is cited in illustration of the proposition. In that case the insolvent was an attorney who paid out an amount due to one

of his firm's clients from the firm's business account at a time when the firm was hopelessly insolvent and had been operating for some time on funds misappropriated from its trust account. The partners' estates were sequestrated just over a week after the impugned disposition was made. In refusing the trustees' application to set the disposition aside Pitman AJP found that the

intention to prefer had probably not been the insolvent attorney's dominant intention when making the disposition, but rather his fear of the consequences of exposure of his thievery. The learned Acting Judge President said the following in that regard (at pp.79-80):

The intention to prefer must reside in the mind of the debtor, and its presence there is ordinarily to be inferred from his conduct. If, when he is contemplating sequestration, he selects for payment out of a number of creditors one, who has no right to such selection, the inference from his conduct seems a fair one, that he intended to prefer such creditor above the rest, to disturb in his favour the proper distribution of his assets in insolvency. Such is the only apparent explanation of his action. Where, however, behind

the selection and payment there appears to be some other compelling intention, the intention to prefer is not necessarily to be regarded as the dominant intention. The former intention indeed may so powerfully animate the debtor, that the intention to prefer may be said to have been wholly inactive. In this case the debtor had received this money only some fourteen days previously. In receiving it, as he did, into his own possession he had acted in breach of his instructions. There was nothing to lead him to suppose, that his creditor would not be vigilant in claiming his money, and enforcing the trust, with which it was affected. Breach of this trust he knew must almost inevitably carry in its train the most disastrous consequences to himself. As an attorney his perception must have been all the keener, that to withhold this money from the man entitled to it, who at his elbow was demanding it, was to confess, indeed to proclaim, himself a thief. The evidence as to his recent dealings with trust moneys sweeps away all doubt as to his consciousness of guilt, or as to his realization that to refuse to pay this money must involve him in the most serious danger of immediate prosecution. It is true that no threats thereof were expressly uttered by the defendant, but such utterance could scarcely have increased the debtor's apprehensions, or enlivened his sense of the duty cast on him and of the consequences of neglecting it. It seems to me in the circumstances, that the intention animating him to the virtual exclusion of all others, was an intention to escape a criminal prosecution. This conclusion seems to me to derive support too from the complete absence of anything between this debtor and this creditor, which could prompt the former to prefer the latter above his other creditors.'

The learned Judge called in aid the approach adopted in comparable circumstances in *Sharp (Official Receiver) v Jackson and Others*

[1899] A.C. 419, *In re Lake* [1901] 1 QBD 710 and *Michau's Trustee v De Wet* 1909 EDC 44.

[19] Pitman AJP's dicta in *Giddy*, were referred to with approval by Zulman JA in the latter's majority judgment in *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000

(3) SA 1009 (SCA), in which mention was made, also with reference to Lord Macnaghten's remarks in *Sharp v Jackson* supra (at p. 427), of the disposition in issue in that case having been made 'under an overwhelming sense of imminent peril' rather than as in the exercise of a free choice to prefer. Zulman JA considered that the following remarks of Boshoff J in *Venter v Volkskas Ltd* 1973 (3) SA 175 (T), at 180E-181B, gave 'a useful summary' of most of the pertinent considerations to determine, for the purposes of s 30(1) of the Insolvency Act,

whether a disposition was made with the intention to prefer:

‘Whether a disposition was made with the intention of preferring one creditor above another within the meaning of s 30(1), 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; see Pretorius NO v Stock Owners’ Co-operative Co Ltd (supra [1959 (4) SA] at 471 - 2 and 476)[[4]]; Gert de Jager (Edms) Bpk v Jones NO en McHardy NO 1964 (3) SA 325 (A) at 331. 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. This is so because the onus is on the person who claims to avoid the

disposition

to establish what the debtor really intended (what the object in his mind was) and that his real intention (or real object in his mind) was to prefer the creditor to whom the disposition was made above the other creditors. It is conceivable that 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 the main object was to prefer the creditor, intention to prefer will not be proved.’[5]

[20] The defendant was reportedly pressing for repayment of her loan (which was overdue) because she had the opportunity to use the funds in an alternative investment in a business venture together with her sister, which would provide her with employment and an income. Smit testified that he understood that the defendant needed to liquidate R2,5 million for this purpose. It may readily be inferred in the circumstances that the defendant would have put him under pressure to redeem her loan to him; as Smit put it, when I asked him why the defendant’s claim was paid, ‘... the only reason is that she was in a hurry that I need to pay her back so that she can support her sister. That’s the reason why I paid her first’.

[21] Smit testified that, when required, he had to make payments to clients to keep his scheme in operation and to delay his cover being blown. He at all times appreciated, however, that the exposure of his fraud and insolvency was inevitable and that by making the payments he

was merely buying time. He also appreciated that the payments he made to ‘investors’ like the defendant advantaged the recipients over the other ‘investors’ and, in the circumstances of his hopelessly insolvent state, would consequently ‘disturb what would be the proper distribution of assets’ in insolvency.[6]

[22] All of that did not establish, however, that Smit’s dominant intention was to prefer the defendant, rather than to delay his day of reckoning by keeping his scheme alive for longer. By using funds obtained from the Herbsts to pay the defendant, he was merely doing what his scheme required to keep going, viz. robbing Peter to pay Paul. The advantage or preference that accrued to the recipients of such payments seems to me to have been an incidental aspect of Smit’s *modus operandi*, not the consequence of a particular intention on his part to confer an advantage on one or the other of his creditors. He appreciated that the recipients were being advantaged but, in making the payments to them, his dominant intention was to prevent or delay the exposure of his fraudulent activities rather than to prefer the recipient over his other creditors. It seems to me that the

predominant pressure placed on Smit by the defendant’s anxiety to obtain repayment of her loan was the concern that not accommodating her might precipitate measures that would lead to his exposure, not any particular concern about the reasons for which the defendant needed the funds. Mr Smit’s object was to exploit his ‘clients’ for his own benefit, not to advantage them. The evidence suggests that his dealings with the defendant were indistinguishable in their character from the general run of transactions with his victims.

[23] Mr Rogers conceded in his oral argument that a payment that was made with a primary motive other than to advantage the recipient would not

qualify for the purpose of s 30 as one made with the intention to prefer. The concession was well-made because it is established that ascertaining the insolvent’s state of mind in making the payment entails the application of a subjective test. It is often said that one is taken to intend the consequences of one’s actions. However, that is only a matter of inference. Whether it is the appropriate inference depends on the peculiar circumstances of the given case.[7] What a trustee advancing a claim in terms of s 30 is required to prove is an actual, not just an apparent, intention by the insolvent to prefer. The court is not bound by the insolvent’s *ipse dixit* as to his state of mind or intention; it arrives at its determination assessing any evidence the insolvent might give in the context of all of the available evidence, and with regard to the probabilities. In matters in which the probabilities are finely balanced the incidence of the onus can be the determining factor.

[24] There are material points of correspondence between the facts in the current case and those in *Fourie NO supra*, in which it was held the payments there in issue had not been made with the intention to prefer. The background to *Fourie* was the infamous Krion ‘investment scheme’ conducted by a certain Marietjie Prinsloo (formerly Pelsner). As appears from the judgment, in its essential characteristics the Krion scheme operated in a comparable manner to that operated by the insolvent in the current case. As in the current case, it was

intrinsically doomed to failure. Conradie JA noted in that regard that ‘The nature of the scheme dictated its insolvency. It had no assets of any importance and huge liabilities, all of which were due and payable and very few of which could be met except by incurring further liabilities; so later investors were clearly prejudiced’.[8] The learned judge proceeded ‘But the effect of the transactions does not by itself demonstrate any undue preference. The issue is whether earlier investors were

deliberately unduly preferred, not whether they [? the later investors] were prejudiced.’[9] He concluded that the payments made to the earlier investors had not been made by the operators of the scheme with the intention to prefer them in the sense posited by s 30 of the Insolvency Act. In this respect Smit’s mode of operation mirrored that in Fourie; viz. he ‘knew that in continuing to make dispositions to creditors was the only way to give credibility to the scheme and so keep it afloat and that this was [his] dominant intention’.

[25] When I asked Mr Rogers to give me a post-hearing note on the coincidence between the current matter and that of Fourie, counsel sought to distinguish the cases, pointing out that Conradie JA had followed the last remark quoted in the preceding paragraph by noting ‘She [i.e. Prinsloo] envisaged not the liquidation but the continuation of her fraudulent business. Depending on how convincingly she did this, and Marietjie Prinsloo was a gifted swindler, liquidation might be some way off. She also made attempts to recapitalize the scheme by converting loan into equity capital and issuing share certificates to investors. This exploit, as deceitful as the rest of her business dealings,

nevertheless demonstrates that she did not consider her enterprise lost.’ The point of distinction was validly made, but it did not derogate from the learned judge’s indication earlier in the judgment that even proof of a contemplation of sequestration will not necessarily carry the day for a claimant in terms of s 30(1) in all cases.[10]

[26] In the current case there is no reason to doubt Smit’s evidence that he regarded his sequestration as inevitable. The making of payments that would prefer certain of his creditors over the others was an intrinsic feature of his scheme, and he made them appreciating that their effect would be to ‘disturb what would be the proper distribution of assets’ when the sequestration that he regarded as inevitable occurred. However, as the authorities to which I have referred show, that is not necessarily enough to bring the plaintiffs’ claim under s 30 home.

[27] In my view, the probabilities suggest that Smit made the payments to the defendant to keep his scheme afloat and to avoid the discovery of his fraud at that point, rather than to prefer the defendant. He must have appreciated that if he did not pay the defendant when she was pressing for the money so as to be able to invest it elsewhere that he would put himself in immediate danger of the balloon going up. There was no special relationship between Smit and the defendant that would have given him any reason to prefer her above her fellow creditors, some of whom faced far more parlous consequences than she did when, rather than if, the scheme failed. I find it more probable that he did so because the continued

operation of his scheme required it, than with

the special intention to advantage her. The continued operation of his scheme was something that Smit must have appreciated was the only thing standing between him and sequestration and (in a properly functioning system) probable lengthy imprisonment.[11]

[28] In his post-hearing note, Mr Rogers also made something of the fact that the ‘investment scheme’ in Fourie was given the appearances of a formal investment structure, something entirely lacking in Smit’s operation. On that basis, he contended that Smit had not operated a ‘scheme’ in the true sense of the word. I recognise the distinction between the modes of operation evident in the two cases, but I fail to see how it demonstrates any material difference in the intention with which the dispositions to creditors were made in both matters.

[29] In the result the following orders are made:

1. The loan agreements evidenced by annexures ‘A’ and ‘B’ respectively to the defendant’s reply to the plaintiffs’ request for trial particulars are declared void as from the dates on which they respectively were entered into.
2. Each of the first ten dispositions reflected on annexure ‘PC2’ to the particulars of claim, which dispositions total R141,000, is set aside as a disposition without value in terms of s 26 of the Insolvency Act 24 of 1936 (‘the Insolvency Act’).
3. It is declared, in terms of terms of s 32(3) of the Insolvency Act, that the plaintiffs are entitled to recover from the defendant the amount of each disposition mentioned in paragraph 2 above.
4. The defendant is directed to pay to the plaintiffs the amount of each disposition mentioned in paragraph 2 above.
5. The defendant is directed to pay the plaintiffs, in addition, the amount of R60 000 in respect of the loan by the insolvent to her of that amount on 13 September 2012, with mora interest thereon at the prescribed rate from 1 August 2014 to date of payment.
6. The plaintiffs’ claim in terms of s 30(1) of the Insolvency Act for the setting aside of the disposition by the insolvent to the defendant of the sum of R1 million, ostensibly in repayment of

the capital sum owed in terms of the aforementioned purported loan agreements is dismissed.

7. The defendant is directed to pay the plaintiffs’ costs of suit.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Plaintiffs' counsel: John Rogers

Plaintiff's attorneys: Biccari Bollo Mariano Inc.

Cape Town

No appearance by or on behalf of the defendant.

- [1] A copy of Ms Fey's report was provided to the defendant on or about 15 October 2019 by way of a notice and summary in terms of rule 36(9)(a) and (b) of the Uniform Rules.
- [2] Footnotes omitted. My underlining.
- [3] Bertelsmann et al, Mars: The Law of Insolvency in South Africa 10 ed (Juta) at §13.3.9.
- [4] The pagination in the current version of Jutastat (i.e. as at 14 October 2020) differs from the hardcopy in that what appears on Jutastat as p.474 corresponds with p. 476 in the hard copy edition of the SALR.
- [5] Cooper supra, at para 16.
- [6] Pretorius NO v Stock Owners' Co-Operative Co Ltd 1959 (4) SA 462 (A) at 474 D-F (borrowing the expression from the judgment of the Privy Council in *Thurburn and Another v Steward and Another* (Cape of Good Hope) 1871, L.R. 3 P.C. 478 at 518; [1871] UKPC 7 (26 January 1871) at pp. 10-11 – a case decided under one of the s 30 of the Insolvency Act's statutory predecessors, s 84 of Ord. 6 of 1843 (C)), cited with approval in *Gert de Jager Bpk v Jones NO en McHardie NO* 1964 (3) SA 325 (A) at 331E–F and in *Fourie NO supra*, at para 15.
- [7] Cf. *Fourie supra*, at para 14 and *Sharp v Jackson supra*, at 421-422.
- [8] In para 13.
- [9] Id.
- [10] See *Fourie supra*, at para 15, where Conradie JA observed that 'proof of such a contemplation [i.e. of sequestration] (of which there was none) would have brought the appellants some distance but possibly not far enough since the inference to be drawn from a contemplation of sequestration is not necessarily that the insolvent's subjective 'dominant, operative or effectual intention' in making the disposition (see *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 SA 1009 (SCA) at 1026G) was the intention to prefer'. The learned Judge of Appeal proceed to say that what was necessary was 'a resolve' by the insolvent to "disturb what would be a proper distribution of assets" on insolvency'. A resolve to achieve that object is obviously distinguishable from a mere appreciation that that will be a consequence of one's actions taken with another object primarily in mind. It is conceivable that an insolvent fraudster might make a disposition with the resolve to avoid the detection of his crime whilst appreciating that its effect would be to disturb the proper distribution of his assets on insolvency. In such a case the fraudster's intention would be to ward off detection, not to

prefer the recipient.

- [11] To paraphrase Lord Halsbury LC in *Sharp v Jackson* supra, at 422: It appears to me that he was not actuated by any feeling of bounty towards the defendant in whose favour the payments were made, but was doing what he did for his own protection and benefit.
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