

SOUTH AFRICA / JUDGMENT

Ergold Property No 8 CC and Another v Hersov (12627/2009) [2017] ZAGPJHC 16 (16 February 2017) [2017] ZAGPJHC 16

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

12627/2009

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
CASE
NO: 12627/2009

Reportable: No
Of
interest to other judges: Yes
Revised.
16
February 2017
In
the matter between
ERGOLD
PROPERTY NO 8 CC
FIRST
PLAINTIFF
BRISIGO
PROPERTIES (PTY)
LTD SECOND
PLAINTIFF
and
JAMES RONALD
HERSOV DEFENDANT

JUDGMENT

VAN OOSTEN J:

Introduction

[1] This action is concerned with the plaintiffs' investments, by way of loans, into a proposed township development, which never materialised, and their claim against the defendant on the basis provided for in s 424 of the Companies Act 61 of 1973 (the Act).

[2] Section 424 has been retained by Schedule 5 to the new Companies Act (71 of 2008), and reads as follows:

'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.

[3] The dramatis personae are, firstly, the lenders who are the first plaintiff, a close corporation of which Mr Magandhera Pillay was its sole member, and the second plaintiff, a company of which Mr Brian Hlongwa was the only shareholder and sole director. The proposed township development in Morningside, Sandton, Johannesburg, was to be known as Singaraja Village (interchangeably, Singaraja, or the development), on the development property consisting of four portions of the farm Zandfontein, 10 acres or 44 000 sq m in extent, of which the Hersov family was the registered owner and at the time, zoned for agricultural use (the development property). For present purposes the Hersov family is a joint reference to Ms Rhona Antoinette Hersov, who at all times was represented by her son, James

Ronald Hersov, who is the defendant in this action (interchangeably referred to as the defendant or Hersov), and Basset Investments (Pty) Ltd (a company controlled and owned by the Hersov family), the erstwhile second defendant in this action, which has been

deregistered (Basset). The defendant's interests in the development were monitored, administered and advanced by a firm of

attorneys, then known as Deneys Reitz, who were the appointed conveyancers in terms of the sales agreements in respect of the stands in the development. Deneys Reitz was represented by Mr Len Vorster, who primarily was tasked with the administration and maintaining of the record keeping in respect of the pre-proclamation sales (the pre-proc sales as they were referred to in the trial) as well as the deposits that were paid into trust by prospective purchasers, transmitted

to Hersov by way of weekly reports, and Mr Andrew Bembridge, who right from the outset not only assisted and advised the defendant, as the representative of the firm's 40 years' long standing client, the Hersov family, on all aspects relating to the development but also acted as overseer of the development 'as security for the Hersovs'.

[4] The development entity in respect of Singaraja, and the borrower of the loans advanced by the plaintiffs, was a company known as Panamo Properties 105 (Pty) Ltd (Panamo), which was a shelf company with no financial means or assets or trading background, incorporated on 11 March 2005 and wound up by an order of this court, on 13 June 2006. Panamo also, in the initial stages of the events, traded as Morningside Investments. One Sidney Ronald Wilmot Barlow (Barlow), the erstwhile first defendant in this action, an entrepreneur in the marketing of properties and property developments, was the only shareholder and appointed the sole director of Panamo, on 12 April 2005, until he was substituted by one Wolf Dieter Angermaier in January 2006. In 2003 Barlow was introduced to Hersov by Enrico Daffonchio, an architect and advisor friend of Hersov, and discussions ensued between them concerning the proposed development. Panamo was acquired by Barlow to be utilised as the vehicle through which a township would be developed. Sandton Estates CC, owned and controlled by Barlow, was the appointed agent in respect of the sales of erven in the development. In the period between 2004 and 2006, altogether 44 erven in the development were sold, to members of the public, by Barlow, initially ostensibly acting on behalf of a non-existing or de-registered company, Morningside Investments (Pty) Ltd. By way of a 'one pager' agreement, dated 18 January 2006, Morningside Investments (Pty) Ltd was substituted by Panamo as the seller of the property.

Background

facts: the agreements in regard to the sale and development of the development properties

[5] Following upon the negotiations between the defendant, as the representative of the Hersov family, and Barlow, the defendant

obtained advice from Bembridge concerning the feasibility of a sale and the development of the development property which was provided to him by way of a memorandum, dated 30 September 2003. The memorandum sets out the general outline of the proposed transaction, the most salient features of which are the following:

- The sale of the development property to a development company (referred to as 'a Devco' which later became Panamo) for a price of R14m, on loan account, in terms of a sale agreement;
- The Devco would be owned and controlled by Hersov and Basset until their loans have been repaid;
- One Hinde (apparently a builder friend of Barlow) and Barlow would lend the sum of R700 000 to the Devco, to be paid as a non-refundable deposit by the Devco in terms of the sale agreement;

- After conclusion of the sale agreement the Devco would immediately obtain letters of intent from prospective purchasers to purchase the stands and enter into building contracts;
- Devco would approach the Municipal Council for consent under the Townships Ordinance to sell the stands before proclamation;
- All contributions, engineering services and the like, as well as all costs of the development, including legal costs of the agreements

would be borne by the Devco, funded by loans from Hinde and Barlow;

- After proclamation the prospective purchasers were to conclude final binding agreements of sale with the Devco;
- As one of the negatives: 'It is not possible to conclude land sale agreements prior to proclamation of the township without the consent of the local authority', and, finally,
- As a positive: Hersov and Basset would realise a higher price.

[6] On 27 November 2003 an agreement, styled Heads of Agreement (the HOA), was concluded between the Hersov family, as the sellers of the development land, and Barlow, in his personal capacity and on behalf of a Devco, which was yet to be established. In broad terms the HOA provided for the sale of the development properties by the Hersov family to the Devco for a purchase price of R18m 'on loan account', the development of the township and the sale of sub-divided stands in the development by Barlow to third parties. The HOA however, lapsed on the very day it was concluded, resulting from Barlow's failure in terms of a suspensive condition contained in clause 4 thereof, to furnish the sellers' attorneys on signature date with an irrevocable undertaking from attorneys to pay a deposit in the sum of R700 000 to the sellers' attorneys or, in the event of non-payment thereof, to make satisfactory provision for such payment. The fact of the lapsing of the HOA, for unknown reasons, seems to have been overlooked, in particular by Bembridge to which I shall revert. Although having lapsed, the HOA remains of significant importance and relevance firstly, as to the terms thereof in regard to establishing the relationship between the parties, to which I shall revert and secondly, because the steps taken subsequent thereto, for all intents and purposes, constituted implementation thereof.

[7] Some 19 months after conclusion of the HOA, on 5 September 2005, a further sale and development agreement was concluded between the Hersov family as sellers of the development land, on the one hand, and Panamo and Barlow on the other (the first Panamo sale agreement). It will be remembered that Panamo was registered and incorporated a few months earlier, on 11 March 2005. Clause 3.2 of the agreement records by way of introduction, that Barlow is an agent and property developer, and has formed the purchaser (Panamo) 'to take transfer of the property pursuant to heads of agreement concluded between the seller and Barlow on 26 November 2003' [emphasis added] (the lapsed HOC). The ineluctable inference to be drawn from the wording, used by Bembridge as the scribe of the document, lends credence and validity to the HOA which, legally, had lapsed on the very

day it was concluded. Bembridge in his testimony denied the inference and this aspect was thoroughly ventilated in cross-examination. I however remain unpersuaded that his denial is of any merit.

- [8] To revert to the terms of the first Panamo sale agreement, it contains substantially similar terms to the HOA but the agreed

purchase price of the development land had now risen to R20 406 553-83, which would be paid from the proceeds of the sale and transfer of the sub-divided stands in the development, such obligation to be secured by mortgage bond. In clause 8 it is

recorded 'that Barlow on behalf of the purchaser (Panamo) has paid to the seller's attorneys a deposit of R700 000,

which amount is held in an interest bearing account in trust ...until the transfer date whereupon the deposit and interest earned shall be paid to the sellers, on account of the purchase price' and which would be forfeited to the sellers in the event of the sellers cancelling the agreement. Under the suspensive conditions it is recorded that the entire agreement is subject to the suspensive condition 'that the purchaser cause the township register for the township to be opened simultaneously with the transfer of the properties to the purchaser, by no later than 1 January 2006, or such later date as the sellers may agree'. Lastly, clause 15 of the agreement in detail provides for Panamo's liability for a magnitude of costs, comprising inter alia its own costs of and incidental to the agreement, the sellers' attorneys costs of transfer of the properties, on demand, 'all and any development, engineering and/or service contributions in regard to the proclamation of a township and the costs of the provision of services and work to be carried out in connection with the properties or any requirements imposed by the local authority'.

- [9] On 18 January 2006 the same parties as to the first Panamo sale agreement concluded yet another sale and development agreement (the second Panamo sale agreement), except that Angermaier now signed on behalf of Panamo and Barlow as surety. It once again records that Barlow had formed the purchaser (Panamo) 'to take transfer of the property pursuant to heads of agreement concluded between the seller and Barlow on 26 November 2003' (the lapsed HOC). The purchase price for the development land had now further increased to R20 843 251-53 and the date for opening of the township registered was extended to 'by no later than 1 April 2006'. The payment of the purchase price was to be secured by a mortgage bond to be registered against the development property in favour of the sellers.

- [10] On 28 March 2006 the sellers cancelled the second Panamo sale agreement on the ground that the Panamo had failed to pay transfer

duties, which was estimated would have amounted to some R2m, which it was liable to pay in terms of clause 15 of the second Panamo sale agreement, within 14 days after demand was made for the payment thereof.

- [11] Some three months later, and on 11 July 2006, the sellers sold the development property to a company known as Micawber 473 (Pty) Ltd (Micawber), which was wholly owned by the Hersov family, for a purchase price of R28,5m (the first Micawber agreement). In that agreement (clause 7) Micawber assumed liability for payment, in addition to the purchase price, for payment firstly, of the sum of R6,5m plus VAT, owing to Angermaier 'in respect of full and final settlement of the engineering and other work done in the installation of services' on the development property, and secondly, the total sum of R266 000 comprising varying amounts to certain specified professionals being town planners, architects, surveyors and Deneys Reitz attorneys 'in respect of 'services rendered to date in respect of the anticipated opening of a township register'.
- [12] On 27 March 2007 a further agreement was concluded between the same parties on substantially similar terms, except for an absence of the provisions in respect of the additional obligations of the sellers referred to in clause 7 of the first Micawber agreement and the purchase price which now was R27,6m (the second Micawber agreement). On 31 October 2007 the development land was transferred to Micawber.

The Singaraja development

- [13] The layout of the proposed Singaraja development reflects that 62 stands were to be sold. The average price of the 44 erven that were sold, was R460 000-00, amounting to a total sales proceeds of R28,52m. After conclusion of the HOA, and despite it having lapsed, Barlow already in February 2004 launched the development project and actively marketed the erven until February
2006. Both Hersov and Deneys Reitz were aware of the marketing of the erven. As mentioned altogether 44 contracts of sale were concluded. The agreements of sale were in standard printed template form and concluded between Panamo, trading as Morningside Investments, as the seller and each individual purchaser, combined with a building contract in respect of the building the purchaser was obliged to build on the property.
- [14] The second Panamo sale agreement, as I have alluded to, was cancelled by the sellers on 28 March 2006.
- [15] The development and establishment of the township however, continued in terms the first and second Micawber agreements and final proclamation followed in May 2008. In the interim the deposits paid by the prospective purchasers in respect of the stands were all refunded, with interest, by Deneys Reitz, and they were advised to obtain independent advice.

Post liquidation

- [16] Following upon Panamo's liquidation on 13 June 2006, three liquidators were appointed. Both plaintiffs proved claims in the insolvent estate. The evidence of Mr Louis Stefanus Coetzer, an insolvent estate administrator at Kaapvaal Trust, and working under supervision of Mr CF de Wet, the 'lead liquidator' of Panamo (in liquidation), and this is not in dispute,

establishes its inability pay its debts (six claims in excess of some R8m have been proved as contrasted to the value of assets recovered of less than R800 000), including the loan amounts.

[17] Pillay and Hlongwa moreover testified and were interrogated in support of their claims, at an enquiry in terms of s 44(7) of the Insolvency Act 24 of 1936, following upon a request by a creditor in the insolvent estate, Singaraja Developments (Pty) Ltd, at the second meeting of creditors for a postponement thereof in order for the enquiry to be conducted. The record of the enquiry proceedings is before me but was not referred to either in evidence or argument.

[18] An insolvency enquiry in terms of s 417 of the Act, was convened pursuant to an application to the Master of the High Court, by Ergold, represented by Pillay. A number of witnesses testified, including Barlow, Hersov and Angermaier and they were extensively

cross examined. The record of the proceedings, running into 1627 pages, forms part of the discovered documents and bundles before me and, although objected to by counsel for the defendant, was referred to both in evidence and in argument.

Relief sought by plaintiffs

[19] The plaintiffs' claims are based on the allegation that the business of Panamo was carried on recklessly and that the defendant was knowingly a party thereto, as contemplated in s 424 of the Act.

[20] Having set out the background facts concerning the development, the plaintiffs rely in their particulars of claim for the conclusion that Panamo's business was carried on recklessly, on the following circumstances: that, at all material times, Panamo's

liabilities exceeded the value of its assets, alternatively, that Panamo was financially unable to discharge its liabilities; Barlow

and/or Hersov and/or Basset knowing that in order for Panamo to achieve its purposes, particularly those referred to in the HOA, it would be necessary for Panamo to incur credit and/or borrow funds and/or procure investments; Barlow and/or Hersov and/or Basset

knowing that it was a prerequisite for Panamo to achieve its purposes, that valid and enforceable sale agreements be put in place

in respect of the unproclaimed erven so as to generate the proceeds thereof in favour of Panamo and that such proceeds would be required to be utilised to make payments of amounts owing by Panamo to its creditors and that they knew or ought reasonably to have known that a sale of unproclaimed erven pursuant to void and unenforceable agreements, would not generate the aforesaid proceeds.

[21] The plaintiffs in conclusion plead that the pre-proclamation contracts were illegal and therefore void, being specifically

prohibited in terms of the provisions of s 67 of the Town Planning and Townships Ordinance 15 of 1986 (the Ordinance), and that they are accordingly invalid and that the defendant is to be held personally liable for Panamo's debts, consisting of the aggregate sum of the claims of the first and second plaintiff against Panamo.

[22] This brings me to the plaintiffs' claims against Panamo. The first plaintiff's claims arise from three written loan agreements concluded with Panamo, the first on 21 April 2005 (Claim

1) and the second and third, both on 30 June 2005 (Claims 2 and 3). The respective loan amounts were R200 000-00; R200 000-00 and R500 000-00, thus a total of R900 000-00. The loans were made as an investment in the Singaraja Village development and instead of repayment of the capital sum loaned, the first plaintiff would become entitled to delivery of a specific unit in Singaraja Village within 6 months of proclamation, failing which the first plaintiff would become entitled to claim immediate payment of the larger of a specified sum of money or the amount equal to the market value of the unit. The first plaintiff pleads that Panamo has breached each agreement in failing to comply with its obligations in terms thereof, as a consequence of which it claims the contractually specified amounts of money it has become entitled to, being R1 030 000, R860 880 and R2 843 460 respectively together with interest and costs.

[23] The second plaintiff's claim against Panamo is likewise based on a written loan agreement, concluded on 21 April 2005, in terms of which an amount of R800 000-00 was loaned and advanced to Panamo. Instead of repayment of the loan amount the first defendant would have become entitled to delivery of a specified unit in Singaraja Village within 6 months of proclamation. Alleging and relying on Panamo's breach of the loan agreement in failing to comply with its obligations in terms thereof, the second plaintiff claims the contractually specified amount of R1 376 000-00 it has become entitled to, together with interest and costs.

The trial

[24] Altogether five witnesses testified at the trial which lasted 10 court days: Coetzer, Pillay and Hlongwa on behalf of the plaintiffs

and Vorster, Hersov and Bembridge on behalf of the defendant. At the closure of the plaintiffs' case the defendant applied for absolution from the instance. That application was dismissed and costs reserved. My typewritten judgment furnishing the reasons for the dismissal was delivered on 6 December 2016.

[25] During the course of the trial I raised with counsel for the defendant whether the expert opinions of the expert witnesses the defendant had given notice of and intended calling, were admissible. At my request counsel on both sides addressed the issue in argument and in the ruling I made I upheld the plaintiff's objection to the admissibility of the expert opinions and further that the defendant shall not be entitled to conduct any cross-examination of the plaintiffs' witnesses. My reasons for the ruling are contained in a typewritten judgment which was delivered on 2 December 2016.

- [26] During the course of presenting the defendant's case, counsel for the plaintiffs objected to the defendant's proposed calling of its expert witnesses on the facts set out in the expert summaries, excluding their opinions. Argument was advanced and in the ruling I made, the objection was upheld. I shall revert to the reasons for the ruling later in the judgment.
- [27] Counsel on both sides prepared and handed in comprehensive, well prepared and helpful heads of argument on the merits of the matter. In regard to the special plea and defences raised by the defendant, to which I shall revert, I indicated to counsel that no further oral argument was required in view of those having been dealt with fully and comprehensively in the heads of argument.
- [28] I should mention that neither Barlow nor Angermaier was called to testify. Some ambivalence in this regard occurred: counsel for the plaintiffs at the commencement of the trial explicitly disavowed any possibility of calling Barlow as a witness. The approach underwent some change later on during the course of the trial before the plaintiffs' case was closed. Counsel asked for the matter to stand down until the next court day, on Monday, in order to consult over the weekend with Balow and attorney Jacqueline Ellis, who features in the judgment on absolution from the instance. Nothing came of it, the matter proceeded on the Monday and the application for absolution from the instance was made and argued. Both in argument in respect of that application and the merits, counsel for the defendant made much of the plaintiffs' failure to call Barlow and attorney Jacqueline Ellis. In the closing argument on the merits that failure was extended, and now included Angermaier, any of the 44 purchasers, the town planners and City Council officials. Indeed, counsel for the defendant's heads of argument commences with the somewhat startling proposition: 'This is a case of the missing witnesses'.
- [29] The strong reliance on the plaintiffs' failure to call all those witnesses, in my view, is not only opportunistic but also misconceived. I am unable to find that the plaintiffs deliberately or with intent to deceive, decided not to call any of the witnesses they are now blamed for failing to call. I do not think it is proper for me to speculate as to the possible reasons for not calling any of those witnesses. Suffice to say that Barlow, for one, and as testified by him at the s 414 enquiry, played a dubious, if not fraudulent role in the handling of Panamo's affairs.
- [30] I am unable to draw an adverse inference against the plaintiffs simply because the witnesses were not called to testify. The approach I propose to adopt is to decide this case on the totality of the evidence placed before this court, alive to the plaintiffs bearing the onus of proof. In that context, of course, and merely by way of a general observation, the absence of evidence may result in a finding that the plaintiffs have failed to discharge the onus of proof. But, to lay this aspect to an early well deserved rest, as will become apparent, the body of evidence before me is sufficient to enable me to finally adjudicate this case.
- [31] In what follows I propose to deal first with the defendant's special plea and defences, and then to turn to the merits of the matter.

The defendant's special plea

Prescription

- [32] The defence of prescription is raised by way of a special plea to the plaintiffs' particulars of claim. The defendant contends that the plaintiffs' claims against Panamo, and accordingly against the defendant, had become prescribed on 12 June 2009, and thus three years after the winding-up of Panamo, on 13 June 2006, premised on the contention that 'the plaintiffs, for the first time, purport to base their claims against [the defendant] on a series of loan agreements alleged to have been concluded on 21 April 2005 and 30 June 2005' when the plaintiffs' notice of intention to amend was served by email on 29 September 2016.
- [33] The true issue concerns the consideration of the true nature of the plaintiffs' claim pre-amendment and post-amendment to establish whether recovery of the same or substantially the same debt as originally claimed, is claimed. It is therefore necessary to compare the allegations and the relief claimed in the original particulars of claim with the amended particulars.
- [34] In the original particulars of claim the plaintiffs plead as follows:
- '3.4 As at the date of its winding-up as aforesaid, Panamo was and still is indebted to:-
- 3.4.1 the First Plaintiff in the sum of R4 734 340.00 plus interest in respect of which the First Plaintiff proved a claim against Panamo at a duly convened meeting of its creditors and accordingly the First Plaintiff is a proved creditor of Panamo;
- 3.4.2 the Second Plaintiff in the sum of R1 376 000.00 plus interest in respect of which the Second Plaintiff proved a claim against Panamo at a duly convened meeting of its creditors and the Second Plaintiff is accordingly a proved creditor of Panamo;'
- [35] In the proposed amendment to the particulars of claim, the plaintiffs set out the material facts upon which their claims against Panamo are based, namely the loan agreements. Counsel for the plaintiffs referred me to *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) 626H, where it was held that the word 'debt' has a wide and general meaning and that it does not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings. The following passage from *Evins v Shield Insurance Co Ltd* was quoted with approval:
- "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act.'
- [36] On 30 January 2011 the plaintiffs, in response to the defendant's request for further particulars, made available to the defendant certain documents, including copies of the loan agreements relied upon in the amendment.

[37] On a conspectus of all the facts and the documents the defendant was in possession of, the plaintiffs' cause of action remained premised on the loan agreements, with the result that, as in my view was correctly submitted by counsel for the plaintiffs, they are still seeking recovery of the same debt (See *Makate v Vodacom Ltd* 2016

(4) SA 121 (CC) para [85]).

[38] It follows that the defendant's special plea of prescription is without merit and that it falls to be dismissed.

The defendant's special defences

The Conventional Penalties Act

[39] The first special defence raised in the defendant's main plea is that the stipulation contained in each of the loan agreements,

namely that, upon breach of Panamo's obligations in terms of the loan agreements the plaintiffs became entitled to claim either the value of the unit referred to in each agreement or a specified amount of money, constitutes a penalty as contemplated in the Conventional Penalties Act 15 of 1962.

[40] In the view I take of this matter, as will become apparent in the order I propose to make, this defence is of no longer of relevance and I accordingly refrain from commenting any further on it.

Disposition

not for value

[41] The next special defence raised by the defendant is that the loan agreements constitute dispositions not for value, as contemplated in section 26 of the Insolvency Act 24 of 1936.

[42] Section 26 of the Insolvency Act provides:

'Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.'

[43] The meaning to be attributed to 'value' is determinative of this defence. In *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (A) 604 the then Appellate Division confirmed the dicta in previous judgments of that court, which are the following:

'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 word.'

'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 quid pro quo.'

and, finally,

'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 C which the transaction was made. (*Hurley and Seymour, N.O v W. H. Muller and Co.*, 1924 NPD 122 at p. 133). In this case, as I have said, the company is one of a group of companies, and it guaranteed the obligation of another member of the same group as a result of financial pressure upon the fellow member, and on the parent company. On these facts, it

seems to me impossible at this stage to say that no 'value' was given for there are more important benefits which such a transaction might bring to the company, such as, for example, the continued financial stability of the whole group of companies.'

[44] Applied to the facts of the present matter, Panamo received the loan amounts advanced to it and accordingly a quid pro quo has been established.

[45] The special defence as to disposition not for value, accordingly must fail.

The Usury Act

[46] In this special defence the defendant attacks the validity of the loans premised on the allegation that they constituted money lending transactions within the meaning of s 1 of the Usury Act 73 of 1968 (the Usury Act) and further contravened s (2)(1)(a) of the Usury Act. Given the return stipulated for in terms of the loan agreements, the defendant contends, the finance charges thereunder 'were several times higher' than the maximum rate provided for in the Usury Act resulting in the loans being void.

[47] The defence should not detain me for long. It is premised on a misconstruction of the loan agreements as 'money lending

transactions', within the meaning of s 1 of the Usury Act, which defines those as 'any transaction which, whatever its form may be, is in substance one of money lending...' In my view the loan agreements, although providing for loans, in substance are investment agreements primarily aimed at obtaining a unit in the development, which it was clearly envisaged would have been some time in future: as much is clear from a plain reading of the loan agreements as a whole.

[48] On this basis alone the special defence is doomed to failure. Further, and in any event, its relevance fades into oblivion in the view I take of this matter as will become apparent later in the

judgment.

In duplum

[49] The defendant further contends that recovery of an amount in excess of double the amount originally advanced, is in breach of the in duplum rule.

[50] In the order I propose to make, due allowance is made in respect of the application of the in duplum rule. In the light thereof, I do not consider it necessary to comment any further on this defence, save to hold that it falls to be dismissed.

Bona fides

[51] Finally, some lame allegation is made in the defendant's main plea that 'the conduct of the first plaintiff is unconscionable and contra bonos mores'. The contention is premised on the disparity between the amounts of the loans advanced and the amounts claimed. I am unable to find an absence of bona fides by any of the plaintiffs, nor has anything of substance in support of the allegation been advanced.

[52] The defence is seemingly without merit and it falls to be dismissed.

Non-joinder

[53] Somewhat surprisingly and rather belatedly, after conclusion of the trial, counsel for defendant in an email raised the defence of non-joinder. Barlow was the erstwhile first defendant in this case and counsel for the plaintiffs, at the commencement of the trial, indicated that the plaintiffs are not proceeding against Barlow, 'as there is another action pending on Mr Barlow's suretyship and the present action against Mr Barlow is withdrawn'.

[54] None of recognised grounds for the joinder of Barlow exists and the defence accordingly is clearly misconceived.

The merits

Section 67 of the Ordinance

[55] In a nutshell, and as I have alluded to in the judgment on absolution, at the heart of the plaintiffs' case is their

reliance on the illegality and voidness of the pre-proclamation contracts, which were specifically prohibited in terms of s 67 of the Ordinance, for the conclusion of recklessness to which the defendant was knowingly a party.

[56] It is as well, at this juncture already, to dispose of an argument advanced by counsel for the defendant concerning the applicability of s 67 to the pre-proc sale contracts we are here concerned with.

[57] Section 67 provides:

‘Prohibition of certain contracts and options

- 1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70-
 - a) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;
 - b) grant an option to purchase or otherwise acquire an erf in the township.

until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.

- 2) Any contract entered into in conflict with the provisions of subsection
 - (1) shall be of no force and effect.
 - 3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.
 - 4) For the purposes of subsection (1)-
 - (a) “steps” includes steps preceding an application in terms of section 69 (1) or 96 (1);
 - (b) “any contract” includes a contract which is subject to any condition, including a suspensive condition.’

[58] Counsel for the defendant submitted that the ordinance, in limiting the common law right of an owner to deal with his or her own property, must be strictly construed with the result that, unless steps to establish a township within the meaning of s ss

- (1) have occurred, the pre-proc sales, falling under the right of an owner to deal with his or her own asset, are not hit by the prohibition. The argument, in my view, is based on an artificial interpretation of the section and further a misconception as to the true intention of the legislator.

- [59] It is abundantly clear from the section that the 'steps' referred to must be given a wide meaning, including those steps taken before the s 69 formal application is lodged. Counsel sought to derive some support for the contention advanced in the plaintiffs' reluctance, if not failure in the pleadings and request for further particulars in regard thereto, and an absence of evidence led to specify exactly what steps had been taken to establish a township. I am unable to agree.
- [60] Whether s 67 applies to the pre-proc sales must be decided on all the facts. The appropriate point of departure is to consider the initial negotiations between the parties, the content of the Bembridge memorandum to the defendant and the subsequent HOA. The sole purpose underlying the sale of the property was undeniably the proposed development, which, in order to be achieved, included the establishment of the township. The defendant's contention finally flounders when consideration is given to ss 4(a), which widens the scope of 'steps' to include those prior to the formal application for establishment of a township. The intention of the legislature accordingly was not to restrict steps to formal town-planning steps as counsel for the defendant would have it. But, the argument on this score also crumbles as the HOC stipulates (clause 9) that 'Barlow will be entitled from the deposit date, to take such steps as he may require to have the relevant local authority and the surveyor general approve a general plan indicating the proposed sub-divided stands'. The lapsing of the HOA, concerning this aspect, is of no moment: in the first Panamo sale agreement it is recorded 'Barlow is an agent and property developer, and had formed the purchaser to take transfer of the property pursuant to heads of agreement concluded between the seller and Barlow on 26 November 2003' (the HOA). Lastly, a site development plan was drawn and used as part of the marketing material by Barlow.
- [61] Counsel made much of the failure by the plaintiffs to lead evidence, in particular that of Barlow and the City Council or town planners, on whether the contractual provisions I have referred to, were implemented. In my view the contention is premised on a wrong interpretation of s 69, as I have already alluded to, and it accordingly fails.
- [62] For all the above reasons I conclude that the HOA itself, constituted a step in the establishment of a township and that, accordingly, the pre-proc sales are hit by the provisions of s 67 of the Ordinance and therefore illegal and of no force and effect.

Plaintiffs' locus standi

- [63] The foundation of the plaintiffs' locus standi in this action based on s 424, consists of the debts of Panamo, arising from the loan agreements I have already referred to. Both in the application for absolution from the instance and in closing argument on the merits, counsel for the defendant challenged the plaintiffs' locus standi on the ground of an absence of proof that the loan amounts were received by Panamo.
- [64] I have fully dealt with this aspect in the judgment on absolution from the instance. It is merely necessary to add that the evidence of both Pillay and Hlongwa is corroborated by the loan agreements. On their version and if regard is had to the loan agreements, it was the

common intention of all involved that the loans were to be made to Panamo. Whatever imperfections there might have been to corroborate their version as to the actual receipt of the loan amounts after payment thereof, I remain of the view and find that, on the evidence as a whole, they have established locus standi.

The defendant's personal involvement

[65] A lengthy relationship having existed between the Hersov family and Bembridge, 'warranting the trust that Hersov reposed in Bembridge', Hersov handing the transaction over to and 'rely entirely' upon Bembridge, who was a partner in 'a firm as solid and reputable as Deneys Reitz' and thereby 'placing himself firmly and squarely in Bembridge's justifiably trusted hands', counsel for the defendant submitted, is dispositive of a finding that Hersov's conduct was reckless or that he knowingly participated in the reckless conduct of Panamo's business.

[66] Hersov, in my view, was neither a distant nor an 'at arm's length' party to the development. He acted on behalf of the Hersov family. He was advised as to the way forward in the Bembridge memorandum. The structure of the agreements right from the outset, at the time of concluding the HOA, was for Hersov, albeit not intending to be identified as a developer, but as security for payment of the purchase price, to remain involved in and control over, not only the development but also the development company, Panamo. It suffices to refer to, by way of telling examples, starting with the HOC, stating the requirement of 'sufficient prospective purchasers to acquire sub-divided stands, to ensure the repayment to the sellers of their anticipated loan account in the Devco, arising from the proceeds of such sales', which if not achieved, would have vested the sellers with an entitlement to 'declare' the agreement of no force and effect, the right afforded to the sellers to 'appoint directors of the company' (Panamo), Barlow required to bind himself as surety and the pledge of 'shares in the company to the sellers as security for the obligations of the company to repay the sellers' loan account' and Barlow's

obligation to report to the sellers and the sellers' attorneys, on a weekly basis, on 'the interest shown in the purchase of sub-divided stands'. The successful sales of the stands, not only was, as correctly referred by counsel for the plaintiffs, the lifeblood of the entire project, but also provided security for payment of the purchase price in respect of the development property.

[67] Of further significance in both the first and second Panamo sale agreements, is firstly, the recordal that 'Barlow is an agent and property developer, and has formed the purchaser (Panamo) to take transfer of the property pursuant to the ...' (the HOC)', and secondly, the suspensive condition in terms of which Panamo was to cause the opening of a township register by a fixed date.

[68] Against this background, Hersov's evidence, simplistically stating 'We were seller and the purchasers developers'

and, further, referring to it as ‘a structure put in place to manage that transfer of land out of the hands of the sellers into the hands of the developers’, is not supported by the facts of this matter and unconvincing.

- [69] Vorster of Deneys Reitz was tasked with capturing details of the pre-proc sales in weekly reports and Bembridge was overseeing the whole process. Hersov admitted in his evidence that he had received the reports but maintained that he had given scant attention thereto. In regard to the legality of the pre-proc sales, Hersov testified that he was advised by Bembridge that the pre-proc sales were ‘not strictly legal’, which he conceded, in any event, meant ‘against the law’. Despite such knowledge, he however, approved the immediate continuation of the sales, to which he added the glaring absurdity, ‘at the sole risk of Barlow’. He agreed to provide substantial assistance to advance the project, inter alia, by the registration of a mortgage bond, to ensure the continuation of sale and development of the Hersov properties. In the first Micawber agreement he assumed liability for a number of Panamo’s creditors (mainly that of Angermaier), all of which had arisen from the development. He conceded that he was in control of the development and readily acknowledged that he could have ‘pulled the plug’ on the project.
- [70] Against this backdrop, this is not a case of a lay client putting his case in the hands of his trusted attorney, simply in an attempt to achieve an ‘attractive price’ in selling the family property. Hersov did not testify as much, and merely stated ‘We (the Hersov family) trusted them’. Although he denied the family having been ‘deeply involved’ in property development, he, as a director of companies, and representing a wealthy family, who already in the late 1990’s had contemplated selling portions of their property, was no stranger to the property market nor to elementary business practices and principles.
- [71] The trust Hersov had placed in the advice received from Deneys Reitz, cannot be elevated and used as a springboard, as counsel for the defendant sought to do, to obscure the true nature of his involvement in and control of the development. I accordingly reject counsel’s contention and hold that the defendant was personally involved in the sale and development of the development properties (cf *Cooper and Others NNO v SA Mutual Assurance Society and Others* [2000] ZASCA 153; 2001 (1) SA 967 (SCA) para [15]).

Section 424: Recklessness

- [72] The crucial issue in this case to which I now turn, is whether Panamo was reckless in carrying on ‘any business’ (the words used in s 424) and whether Hersov was knowingly a party thereto.
- [73] In *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex and Others v Snyman and Others* [1997] ZASCA 92; 1998 (2) SA 138 (SCA), Howie JA held:

'As far as "recklessly" is concerned its meaning, to which the meaning of "recklessness" corresponds, has been the subject of many reported judicial pronouncements. It suffices to refer to the following. In *Shawinigan v Vokins and Co Ltd* [1961] 3 All ER 396 at 403F it was said that "recklessly" means "grossly careless" and that recklessness is –

"gross carelessness – the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as 'reckless'."

That definition seems, with respect, to involve some circuitry of reasoning but the important point it contains is the involvement of a risk, whether or not the doer realises it. That was the point adopted, together with indicia distilled from inter alia earlier judgments of this Court,..'

[74] The test applicable is objective, taking into account the risk the diligens paterfamilias would have foreseen and guarded against (see *S v Van As* 1976 (2) SA 921 (A) 928C).

[75] The plaintiffs' main focus in establishing the element of recklessness, both in the pleadings and at the trial was directed at the illegality of the pre-proc sales. In regard hereto the defendant's armory in defence thereof included the three expert

witnesses who in the summaries of their opinions and reasons in respect thereof, sought to refute the recklessness arising from the illegal pre-proc sales, relied on by the plaintiffs. As I have alluded to, I ruled against the admissibility of both the opinions

expressed as well as the factual content set out in the expert witness notices.

[76] In the judgment on the admissibility of the opinions, I gave full reasons for disallowing such evidence. The same reasoning applies to the factual content set forth in the expert notices: the only relevance thereof was to support the opinions expressed by the experts. The facts relied on by the experts, in any event, are unrelated to the facts of the present matter and therefore

irrelevant. Put differently, this court is enjoined to adjudicate this matter on the facts before it and not on unrelated factual

scenarios which are relied on merely in support of the opinion expressed by the experts, which, in any event, constitute legal

questions this court is required to determine.

[77] To revert to the plaintiffs' reliance on the illegality of the pre-proc sales, I am of the view that the prominence afforded to it seemingly clouded reliance on the totality of the facts in order to identify the real issue in this matter. In short: the illegality of the pre-proc sales, in my view, is a relevant factor in the determination of recklessness but not decisive thereof. These are my

reasons.

[78] The entire project, right from the outset, was a financial disaster never to leave the starting blocks. No likelihood at all existed at any stage until cancellation of the second Panamo sale agreement, of a successful development. The pivotal role player in the financing or obtaining of finances for the project was Barlow. Barlow's failure to either provide or obtain finances would have sealed the fate of the project in its infancy, which is exactly what happened.

[79] It must be remembered that Panamo, to the knowledge of all concerned, including the defendant, was a shelf company, of no financial

standing or business reputation at all. But, despite this looming stumbling block it was to be used as the vehicle for a property

development involving millions of Rands. First and foremost, the aspect of financial ability and the viability of the project ought to have been the determining consideration before embarking on any further steps in the development. The events, right from the outset, in my view, reveal a reckless disregard of the huge financial risk, if not the inevitable reality of failure, involved and pursuing the sale and development, when further indications of Barlow's inability to raise finances surfaced and in the absence of any acceptable financial assistance or financial backing. The launching of a township development of this magnitude, in the absence of financial input, backing or security is unheard of and plainly, based on common knowledge and logic, reckless.

[80] The evidence before me reveals that Barlow, except for his marketing skills, was a man of no means. Hersov testified that Barlow, at the initial discussions, offered 'an attractive purchase price' for property and continued:

'What was very clear upfront from his initial proposals of joint ventures and schemes, and I think he actually put forward several proposals on how we could make a salework, was that he was not a man of substance, financial substance but supposedly he, because of his track record in sales you know, believed he could raise the money.'

But the flashing warning lights were ignored: Hersov simply continued. Bembridge testified that Barlow was known to him at the time he was approached by Hersov to look into the proposed transaction, and went on to state:

'I knew Barlow. I used to play sport with him and I knew he was a man without means. He was an estate agent and we immediately put on guard that there is somebody who would not be able to pay the purchase price of that land.'

And once again, the alert was disregarded. It is for this very reason that Bembridge advised Hersov 'if the purchaser came without the means, it is hard to protect the client on the basis that the lands does not move out of their control until such time as the price have (sic) been paid, and normally control means transfer'.

- [81] On this shaky foundation the negotiations proceeded and the HOA was concluded. A purchase price of R18m was agreed on. But no payment would be made nor was any form of security for payment included in the HOA. Indeed, the property would be sold to a then non-existing Devco, the registration of which Barlow would procure, notably at his cost. And Barlow would become entitled, from the deposit date, which, had it been paid, would have been the day of conclusion of the HOA, to actively market the development by inter alia procuring 'irrevocable offers' from prospective purchasers of the stands. The only quid pro quo at that stage was Barlow's obligation to pay the deposit of R700 000-00 that very same day, which was an insignificant amount of money if regard is had to the purchase price and cost of the development.
- [82] The deposit was not paid. Legally the HOA lapsed on the very same day it was concluded: yet another warning light flashing but once again, to no avail. Factually and as for the parties thereto, the agreement continued unabated. Barlow actively marketed the stands and illegal pre-proc sale agreements with unsuspecting third party purchasers were concluded and forwarded to Deneys Reitz, deposits were paid into trust, all of which the defendant was well aware of. Indeed, nothing was done, as the defendant was entitled to, 'to pull the plug'. To the contrary, a further agreement saw the light some 19 months after the lapse of the HOA.
- [83] The first and only proof and recordal of any payment made by Barlow in regard to a project running into millions of Rand, is to be found in the first Panamo sale agreement: Barlow seemingly had come up with and did pay the deposit of R700 000. But, at the same time, the purchase price for the property had increased to R20,4m, which was to be paid 'from the proceeds of the sale and transfer of the sub-divided stands'. In addition, the pre-proc sales were illegal and incapable of enforcement.
- [84] In the second Panamo sale agreement, concluded some 4 months later, a further indulgence was granted to the purchaser: the date for opening of the township register was extended to 1 April 2006. The purchase price for the property had further increased to R20,8m. By now Hersov had become 'sick and tired' of the perceived infighting in regard to Panamo's affairs and he added, it became apparent to him that Panamo was not in a position to honour its obligations, which led to the decision to cancel the second Panamo sale agreement. Cancellation seemingly was a mere formality: a demand was made for payment of transfer costs, amounting to approximately R2m, which was not met and cancellation followed.
- [85] In the first Micawber sale agreement, Micawber assumed liability for payment of some R6,8m, relating to costs of services rendered in the establishment of a township, which Panamo was unable to pay.
- [86] The financial risk of the entire project, right from the outset was extremely high, and never abated. There could not have been a reasonable, or for that matter, any expectation, of Barlow providing or obtaining the necessary funding or financial backing for millions of Rand. Hersov was acutely aware of the lack of finances and financial backing but knowingly increased the risk in allowing Barlow to continue with the pre-proc sales and deciding to

‘give him another chance’ in concluding further sale agreements, once again, on the foundation of sales achieved by Panamo.

[87] That loans were to be obtained in respect of the costs of the development was within the contemplation of all parties, including

the defendant. In the HOA it is stipulated that all costs of the development ‘will be funded by way of loans to Devco from

Barlow, which loans will be subordinated to the shareholder loans of the sellers in the company’. The estimated costs of the development are specified in clause 14.2 of the HOA, in respect of which Barlow’s proportionate share amounted to approximately

R3,7m. Hersov, although unaware of the loans made by the plaintiffs to Panamo, should have foreseen that loans were required to be made.

[88] Having considered all the facts and circumstances outlined above I have come to the conclusion that the business of Panamo was carried on recklessly and that the defendant was knowingly a party thereto.

[89] In argument I debated with counsel the propositions in accordance with my reasoning and findings set out above concerning the element of recklessness. Counsel for the defendant contended that the plaintiffs’ particulars of claim and the evidence led at the trial, was solely based on the illegality of the pre-proc sales and that the general financial risk of the entire project, I have referred to, falls outside the scope of the issues raised. I am unable to agree. Counsel for the plaintiffs was at pains during the course of the trial, to emphasize that the conduct of the parties in the development as a whole was at stake. I am alive to fact that, as I have alluded to, the plaintiffs’ sole focus, although perhaps disproportionately, directed at the illegality of the pre-proc sales, does not disentitle this court from deciding the issue concerning recklessness on different grounds arising from the pleadings and the evidence. I am satisfied that, on the evidence placed before this court and the extensive cross-examination that was conducted, my reasoning and findings arise from and fall within the scope of the facts pleaded and the evidence adduced and further that no prejudice exists or has been alleged to exist. In any event, no attempt was made to place any other evidence before me in regard thereto (see *Cooper and Others NNO v Syfrets Trust Ltd* [2000] ZASCA 128; 2001 (1) SA 122 (SCA) para 21).

The court’s discretion as to granting of relief

[90] Section 424 endows the court with a wide discretion concerning the relief to be granted. In the exercise of my discretion I have come to the conclusion that the plaintiffs are entitled to a refund by the defendant of the amounts of the loans, together with interest thereon, at the mora rate, then applicable, of 15,5% per annum (see *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) 300H-301C)), from the date of the defendant’s notice of intention to defend the action, subject to the in duplum rule.

Order

[91] In the result I make the following order:

1. The defendant's special plea and special defences are dismissed.
2. The defendant is declared to be personally liable for the debts of Panamo Properties 105 (Pty) Ltd (in liquidation) (Panamo), in regard to payment of the loan amounts referred to in the first plaintiff's claims 1, 2 and 3 against Panamo and the loan amount referred to in the second plaintiff's claim against Panamo.
3. The defendant is ordered to pay to the first plaintiff:
 - 3.1 The sum of R900 000-00.
 - 3.2 Interest on the amount in 3.1 above, at the mora rate of 15,5% per annum, from 30 March 2009 to date of final payment, subject to the limitation that may be of application under the in duplum rule.
4. The defendant is ordered to pay to the second plaintiff:
 - 4.1 The sum of R800 000-00
 - 4.2 Interest on the amount in 4.1 above at the mora rate of 15,5% per annum, from 30 March 2009 to date of final payment, subject to the limitation that may be of application under the in duplum rule.
5. The defendant shall pay the costs of the action, such costs to include the costs reserved on 6 December 2016 and the costs consequent upon the employment of two counsel.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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ROSE FULBRIGHT SOUTH AFRICA INC

DATES OF HEARING 28,

29 30 NOVEMBER; 1, 2, 5, 6, 7, 9 & 13 DECEMBER 2016

DATE OF JUDGMENT 16

FEBRUARY 2017

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