Republic of South Africa

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

Case No: **112/99**

In the matter between

H DABELSTEIN & 12 OTHERS **Appellants**

and

M LANE & E FEY NNO **Respondents**

Coram: ***Hefer*** **ADCJ,** ***Vivier, Nienaber, Harms, Plewman*** **JJA**

Date of hearing: **14 November 2000**

Date of delivery: **28 November 2000**

Summary: Attachment to found or confirm jurisdiction - *prima facie* case - insolvency - setting aside disposition in compliance with court order.

JUDGMENT

HEFER ADCJ

[1] If the trustee of an insolvent estate fails to initiate proceedings to set aside a disposition under secs 26, 29, 30, or 31 of the Insolvency Act 24 of 1936, as amended ("the Act"), then, in terms of s 32(1)(b), any creditor may do so in the name of the trustee upon his indemnifying the latter against all costs of the proceedings.

[2] The present case relates to the insolvent estate of Jårgen Harksen which was sequestrated by order of the Cape Provincial Division of the High Court. The main issue in the appeal is the correctness of Van Zyl J's subsequent order in the same court confirming a rule *nisi* authorising three German creditors ("the applicants") to attach certain South African assets of thirteen other foreign creditors ("the Dabelsteins") *ad fundandam vel confirmandam jurisdictionem* with a view to the institution of an action by the applicants in the name of the provisional trustees for the annulment of two allegedly impeachable dispositions.

[3] A preliminary submission for the respondents is that the court *a quo*'s judgment is not appealable since, in terms of s 150(4), there is no appeal (subject to certain exceptions) against an order made in terms of the Act. The judgment has been reported (*Lane and Another v Dabelstein and Others (Lane and Another NNO Intervening)* 1993(3) SA 150 (C)) and it appears from the report that the court decided several issues but made only two substantive orders: it granted the present

respondents leave in terms of s 18(3) to institute the proposed action (163G-H) and, by confirming the rule *nisi*, ordered the attachment of the Dabelsteins' property. The first order may well be classified as one in terms of the Act but the order for attachment was made under the common law. It is plainly not affected by s 150(4). Moreover, such an order finally disposes of the issue of jurisdiction and is thus appealable. (*Tick v Broude and Another* 1973(1) SA 462 (A) at 465G - 467A.) I will confine my judgment to this order.

[4] The facts need not be restated because, although there are several matters on which the parties do not agree, this judgment will focus on a single decisive issue. Suffice it to say that the dispute is entirely about two payments made by Harksen to the Dabelsteins before the sequestration of his estate which are alleged by the applicants to be impugnable dispositions under secs 26, 29 or 30 of the Act. But both were made in terms of orders of court and the definition of "disposition" in s 2 expressly excludes "a disposition in compliance with an order of the court". It is incumbent upon an applicant for an order of attachment to establish a *prima facie* case in the proposed action and, since the amounts paid cannot be recovered unless there is room for a finding that the payments are not affected by the exclusion, the only question is whether such a finding is justified.

[5] Relying on *Sackstein and Venter NNO v Greyling* 1990(2) SA 323

(O) the applicants' counsel submits that it is indeed justified. In that case the plaintiffs sought to have a disposition set aside under s 29 or 30 despite the fact that it had been made in compliance with an order of court. The order had been granted in terms of a settlement agreement. At 327B-D Van Coller J reasoned that the exclusion in s 2 could not have been intended to afford protection to the receiver of property who fraudulently colluded to procure an order of court with a view to prejudicing other creditors; and that there may be other forms of improper conduct that may justify the refusal of protection. Although the plaintiffs had not alleged collusion or fraud or any other form of improper conduct in the conclusion of the settlement agreement an exception to the particulars of claim was dismissed on the ground that it might emerge at the trial that the parties had acted fraudulently.

In the present case both orders were granted in terms of settlement agreements between Harksen and the Dabelsteins and the submission is that the latter are not protected by the orders because the parties to the agreements were not *bona fide.* (Precisely what the so-called lack of *bona fides* connotes will be discussed later.)

[6] This argument found favour with Van Zyl J in the court *a quo.* As appears from 170C-171F of the reported judgment the learned judge associated himself with Van Coller J's views in *Sackstein and Venter* and proceeded to say in effect that no order granted by agreement will protect the receiver of property against

a claim to set aside an impeachable disposition.

[7] This part of Van Zyl J's judgment calls for the following comment:

It was said in *Simon NO v Air Operations of Europe AB and Others* 1999(1) SA 217 (SCA) at 228C-D that the requirement of a *prima facie* case in an application for attachment to found or confirm jurisdiction is satisfied where there is evidence which, if accepted, will show a cause of action, and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief. The time may come to reconsider these *dicta* for, as observed elsewhere in the passage referred to, an order of attachment *ad fundandam jurisdictionem* is an extraordinary remedy which should be applied with care and caution, and it seems to me that allegations in a respondent's opposing affidavit which the applicant cannot contradict must weigh in the assessment of the evidence. However, accepting the statements at face value, it is plain that an applicant must at the very least make all the allegations in his founding affidavit that will sustain a cause of action. I accept for purposes of the argument that there are cases where dispositions in compliance with orders of court may be set aside. On the view that I take of the matter it is not necessary to decide on precisely what grounds this may be done. I will assume that fraud or collusion or perhaps other kinds of reprehensible conduct on the creditor's part in procuring an order will suffice. Plainly, however, it will not be sufficient merely to bring the disposition within the

ambit of one or more of the relevant provisions of the Act as was done in *Sackstein and Venter*. An alienation of property may eg be set aside under s 26 as a disposition without value but, if it occurred in compliance with an order of court, additional allegations will have to be made in order to nullify the effect of the exclusion in s 2 (cf *Swadif (Pty) Ltd v Dyké NO* 1978(1) SA 928 (A) at 938B-939H). If fraud is relied upon, then fraud must be alleged; and so with collusion and any other conduct relied upon.

In the present case the applicants' reliance on a lack of *bona fides* is mentioned (at 170B-C) but not pursued in the judgment. Lack of *bona fides* was not the *ratio* for the conclusion that a *prima facie* case had been established. That conclusion, it seems, was based on the view that no judgment by agreement can be regarded as an order for purposes of the exclusion and that a case had been made to set the settlement agreements aside under s 29 or 30. I cannot accept that an order does not qualify as an order for purposes of the exclusion merely because it was made in terms of an agreement. Admittedly, as observed in *Muller and Another NNO v John Thompson Africa (Pty) Ltd and Another* 1982(2) SA 86 (D&CLD) at 92A-C, it may open the door to abuse if a person who is in insolvent circumstances were to make an agreement that would in the ordinary course of events be a voidable disposition and then consent to have the agreement made an order of court. But at 92H Milne J

indicated, rightly in my view, that the same cannot be said of all consent orders.

[8] This brings me to the so-called lack of *bona fides* in the conclusion of the agreements relied upon by the applicants. Their counsel argues that the parties were not *bona fide* in that (1) Harksen knew that he was insolvent at the time whilst the Dabelsteins' attorney who brokered the agreements suspected that to be the case; (2) both parties intended to prefer the Dabelsteins above other creditors and (3) the agreements were converted into orders of court for the very purpose of procuring the exclusion provided for in s 2 of the Act. This is the argument but what does the founding affidavit say? The only pertinent allegations therein are the following:

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I accordingly respectfully say that:

"10.1 The Dabelsteins received the payment of DM 3,5 million on 31 March 1994, at a time when Harksen's liabilities far exceeded his assets;

10.2 The above payment was clearly intended to prefer the recipients thereof above the other creditors of Harksen;

10.3 The above (intention to prefer) is to be inferred, *inter alia*, from the fact that:

(a) at the time of the payment Harksen had already contemplated his own (voluntary) sequestration or surrender of his estate for several months ...;

(b) Harksen himself, clearly as advised by his lawyers, demanded from the trustees ... that the above dispositions be set aside.

10.4 The payment of DM3,5 million to the Dabelsteins accordingly clearly stands to be set aside in terms of section 30 of the Insolvence Act

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In respect of the payment of DM500 000 to the Dabelsteins in August 1995, I respectfully say that such payment:

11.1 occurred within six months of the date of Harksen's final sequestration in October 1995;

11.2 clearly had the effect of preferring of his creditors above others;

11.3 took place at a time when Harksen's liabilities far exceeded his assets;

11.4 was not made in the ordinary course of business ...;

11.5 was also a disposition without value;

11.6 stands to be set aside in terms of section 26 or 29 of 30, or all three such sections, of the Insolvency Act.

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I accordingly respectfully say that the Applicants made out a *prima facie* case for the setting aside of the above dispositions."

[9] From this it will be seen that, apart from Harksen's *de facto* insolvency, none of the other matters is addressed in the affidavit. Nor can they be inferred (as the applicants' counsel invited us to do) from the grains of fact interspersed between a mass of hearsay, bald allegations and inferential reasoning in the founding affidavit. The replying affidavit goes some way towards showing that the Dabelsteins must have suspected that Harksen was in insolvent circumstances, but it is quite clear from all the evidence that the parties were at arms length when the settlements were concluded and that there could not have been collusion. Moreover, even in this affidavit, collusion is not alleged; nor is fraud on the Dabelsteins' part, nor the improper motive on which

respondents' counsel now seeks to rely. It is difficult to avoid the impression that the draftsman of the affidavit was not attuned to nullifying the effect of the exclusion of s 2 and that counsel is seeking to make the best of a bad case.

[10] Because I am of the view that the application for attachment had to founder on the simple ground that a *prima facie* case was not established, it is unnecessary to deal with the other rulings in the court *a quo*'s judgment. The learned judge ruled eg that a creditor who wishes to commence proceedings in the name of a provisional trustee under s 32(1)(b) of the Act does not require the leave of the court in terms of s 18(3); and that it is permissible to bring such proceedings before the second meeting of creditors. The fact that I have not dealt with these matters should not be taken to imply that I necessarily agree with the rulings.

[11] On the ground that portion of the record has become redundant as a result of concessions made in the appellants' heads of argument respondents' counsel requested us to make a special order of costs in the event of the appeal succeeding. However, the relevant part of the record is so small that a special order is not called for.

[12] It is noted that, after judgment in the appeal had been reserved, we received an application by the respondents for leave to adduce further evidence. The proposed new evidence, notwithstanding a submission therein to the contrary, has no

bearing on this judgment.

> The appeal is accordingly upheld with costs including the costs of two counsel and the costs occasioned by the application to adduce further evidence. The order of the court *a quo* is set aside and replaced with an order discharging the rule *nisi* with costs including the costs of two counsel.

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JJF HEFER

Acting Deputy Chief Justice

<u>Concur</u>:

Vivier JA

Nienaber JA

Harms JA

Plewman JA