



# **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

Reportable

**CASE NO. 04/2003**

**In the matter between**

**P W M REYNOLDS NO AND OTHERS**

**Appellants**

**and**

**MERCANTILE BANK LTD**

**Respondent**

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CORAM:       HOWIE P, ZULMAN MTHIYANE and CONRADIE  
                  JJA et PONNAN AJA

HEARD:       27 FEBRUARY 2004

DELIVERED:  17 MARCH 2004

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Whether payments made by a company that was subsequently wound-up amounted to dispositions in terms of s 26(1)(b) read with s/2 of the Insolvency Act 24 of 1936

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## JUDGMENT

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ZULMAN JA

[1] This is an appeal (with the leave of the court *a quo*) against a finding that payments of R104 496,68 and R158 466,36 made by a company Duchini (Pty) Limited (in liquidation) (Duchini)) within two years of its being wound-up did not amount to dispositions to the respondent.

[2] The three appellants were the plaintiffs and the respondent the defendant in the court *a quo* and will be referred to herein as such. The plaintiffs are the liquidators of Duchini which was placed in final liquidation on 27 July 1999. The plaintiffs issued summons against the defendant bank claiming payment of the two amounts alleging that they were dispositions without value within the meaning of s 26(1)(b) of the Insolvency Act 24 of 1936, as amended, (the Insolvency Act). The defendant initially contended that the payments were not made by Duchini

and even if they were they were not dispositions to it.

[3] Two issues arose for consideration in the court *a quo*. The first was whether the payments in question were made by Duchini and secondly whether the payments amounted to dispositions to the defendant within the meaning of s 26 (1) (b) read with s 2 of the Insolvency Act. The first issue was resolved in favour of the plaintiffs and is no longer an issue in this court. The second issue was resolved in favour of the defendant and is the only issue before this court.

[4] The following is not in dispute:-

4.1 Payment of the two amounts claimed by the plaintiffs was made by two cheques dated 22 October 1998 (R104 496,68) and 19 January 1999 (R158 466,36) drawn by Duchini on its bank account at First National Bank, Orange Grove branch, in favour of the defendant as the payee.

- 4.2 The cheques were crossed and marked 'not transferable'.
- 4.3 The cheques were signed by Mr J Makrides and Mr G Delyannis both of whom were directors of Duchini at the time. Makrides was its managing director and Delyannis its financial director.
- 4.4 The cheques were deposited by Makrides on 22 October 1998 and 19 January 1999 respectively at the Southdale branch of the Standard Bank of South Africa Limited (the Standard Bank) for the credit of an account that the defendant had at that bank.
- 4.5 On the date of each deposit a copy of the relevant deposit slip was telefaxed by Makrides to the defendant. On the first telefax there was a note to the effect that the deposit was for the account of J Makrides (account number 1101565721).

(Makrides' account.) On the second telefax there was only a reference to the account number.

4.6 Makrides' account was an account held by him with the defendant in respect of a loan granted by the defendant to him.

4.7 On the date of each deposit the amount of each deposit was credited by the defendant to Makrides' account with it. This resulted in his debt to the defendant being reduced accordingly.

4.8 The payment of R104 496,68 reduced the debt of Makrides from R956 465,28 to R851 968,60. The payment of R158 466,36 reduced his debt from R908 531,39 to R750 065,03.

4.9 The defendant had the account with the Standard Bank for the convenience of its clients because it had no branch itself in

Southdale. Similarly it had accounts with other banks in other areas where it had no branches itself.

4.10 Account holders of the defendant who wished to make deposits to their accounts with the defendant in an area such as Southdale would deposit the relevant amount into the defendant's account with the particular bank chosen and notify the defendant of the deposit and of the account with the defendant to be credited with the amount deposited.

Alternatively, if there was a reference on the deposit slip itself and such reference was reflected on the defendant's bank statement such credit would also occur.

4.11 On the date that the two cheques were deposited by Makrides Duchini was not indebted to the defendant.

4.12 The amount of each cheque was debited to the loan account of Makrides in the books of Duchini.

4.13 All of the aforesaid payments and credits took place within two years of the winding-up of Duchini.

[5] The relevant portion of s 26 (1) (b) of the Insolvency Act reads:-

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

(a) ...;

(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 ...’

(My emphasis.)

Section 26 (1) is applicable to liquidations by virtue of s 340 (1) of the Companies Act No 61 of 1973 (as amended). The section reads:

‘Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.’

‘Disposition’ is defined in wide terms in s 2 of the Insolvency Act, inter alia, as ‘any transfer ... and includes ... payment ...’

(My emphasis).

[6] Given the wide definition of ‘disposition’ in the Insolvency Act it is clear that the payments were ‘dispositions’. It was also not disputed that the payments were dispositions. The only question in issue was whether the ‘dispositions’ were made to the defendant or to Makrides.



[7] The two cheques deposited to the defendant's account at the Standard Bank had the effect of giving the defendant an immediate benefit.

This was a claim which the defendant obtained against its bank (the Standard Bank) to honour the transfer of the amount of cheques deposited

to the account (*S v Kearney* 1964 (2) SA 495 (A) 502 H- 503 A, *S v Kotze*

1965 (1) SA 118 (A) 124 A – 125 C and *Rousseau, NO v Standard Bank of*

*S.A. Ltd* 1976 (4) SA 104 (C) 106 B – G).

[8] Regard being had to the clear provisions of s 26(1)(b) of the Insolvency Act to which I have referred, no question of intention arises.

Indeed a disposition without value which is liable to be set aside is one in

which the person who benefited by the disposition runs the risk of having

such disposition being set aside in certain specified situations. It is

manifest that the defendant benefited from the dispositions. Firstly, as

previously stated, it obtained the benefit of a credit to its account with the

Standard Bank which it could immediately use. Secondly, it was thereafter

able to reduce the debt which was owed to it by Makrides by the amounts of the two deposits making use of the transfer of the credit to its account at the Standard Bank. The Standard Bank was not merely a conduit. It was the defendant's banker with all the usual consequences which flowed from a banker and customer relationship regarding the conduct of a bank account.

[9] It is important to bear in mind that the plaintiffs were seeking to recover under s 26 and not s 29 of the Insolvency Act. The latter was the case in *Ensor NO v Nedbank Ltd* 1978 (3) SA 110 (D) which was referred to by the court *a quo*. The reference to *Malk (Pty) Ltd v Franks and Solomon, NO* 1935 TPD 85 at 90 by the court *a quo* ignores, with respect, the essence of the judgment which was to broaden a trustee's right to recover a disposition rather than, as the court *a quo* has sought to do, restrict it. In any event in *Malk's* case the court was dealing with the effect of s 27 of the Insolvency Act 32 of 1916 which corresponds to s 29 and not s 26 of the later 1936 Insolvency Act.

[10] There is no substance in the submission made by the defendant that the cheques were not intended to be a payment to the defendant but were intended to be payments for the benefit of Makrides in reduction of Makrides' debt to the defendant. As previously pointed out the object or intention with which the two payments were made is irrelevant if proper consideration is given to the provisions of s 26 of the Insolvency Act. The fact that Makrides' loan account in the books of Duchini was debited with the amount of the cheques, that the deposit slips were telefaxed to the defendant for the purpose of having Makrides' account with the defendant credited with the amount of each deposit, and the crediting of Makrides' account by the defendant with the amount of each deposit, as requested by Makrides on the same date that the respective deposits were made, is accordingly equally irrelevant.

[11] I do not agree with the contention advanced by the defendant that the same result could have been achieved had Makrides drawn cash cheques,

obtained the proceeds thereof and thereafter deposited same at a branch of the defendant for the credit to his account. The essential difference between that type of transaction and the transaction in issue is that the cheques in the example were cash cheques drawn on Duchini from which Makrides would have derived the proceeds, whereas the cheques here in issue were cheques which were crossed and marked not transferable and were cheques payable to the defendant, the proceeds of which immediately gave the defendant the benefits previously referred to. To repeat, what the defendant did was to make use of the proceeds of the cheque to reduce the debt which Makrides owed to it thereby benefiting from same. In essence, leaving aside the mechanics employed, Duchini paid Makrides' debt to the defendant.

[12] In the result the appeal must succeed.

[13] As to the question of costs, the appellants seek the costs of two counsel. This is opposed by the defendant who submits that having regard

to the issues involved and the amounts claimed the employment of two counsel is not justified. Although the court *a quo* made mention of the importance of the matter as regards banks generally I do not believe that the matter is of sufficient importance or complexity to warrant the employment of two counsel.

[14.1] The appeal is allowed with costs.

[14.2] The order of the court *a quo* is set aside and replaced by the following order:

“1           It is declared that the payments of R104 496,68  
  
              and R158 466,36 were dispositions by Duchini  
  
              (Pty) Limited (Registration number 97/20920/07)  
  
              to the defendant;

2           The defendant is ordered to pay the costs of the  
  
              hearing on the separated issue;

3           The matter is postponed *sine die* for decision on  
  
the remaining issues.”

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R H ZULMAN  
JUDGE OF APPEAL

HOWIE P	)	
MTHIYANE JA	)	CONCUR
CONRADIE JA	)	
PONNAN AJA	)	