IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 10287/2019

In the matter between:

PIETER HENDRIK STRYDOM N.O.	First Plaintiff (First Respondent in the exception)
AMELIA STRECKER N.O.	Second Plaintiff (Second Respondent in the exception)

And

SNOWBALL WEALTH (PTY) LIMITED	First Defendant (First excipient)
LEO CHIH HAO CHOU	Second Defendant (Second excipient)
W ZHANG	Third Defendant (Third excipient)
JULIAN DAVID RABINOWITZ	Fourth Defendant (Fourth Excipient)

Coram: **N C Erasmus, J**
Dates of Hearing: **21 May 2020**
Date of Judgment: **11 September 2020**

JUDGMENT

(HANDED DOWN ELECTRONICALLY)

ERASMUS, J

Introduction

[1] The excipients who are the defendants in an action instituted by the plaintiffs, as joint liquidators of DexGroup (Pty) Ltd (in liquidation), excepts to the particulars of claim, as amended, on the basis that the particulars of claim lacks averments necessary to sustain an action, or that they are legally unsustainable. The outcome of these proceedings revolve around the meaning of the word "value" as and its usage in section 26(1) of the Insolvency Act, 24 of 1936 ("the Insolvency Act"). For convenience, I shall refer to the parties as cited in the action.

Background

[2] The plaintiffs are the joint liquidators of DexGroup (Pty) Ltd (in liquidation) ("the Company "). The Company was finally liquidated on 26 October 2016, and the plaintiffs were appointed on 9 November 2016. However, in terms of section 348 of the Companies Act, 61 of 1973 it is pleaded that the effective date of the liquidation is 25 February 2014. The initial particulars of claim dated 21 June 2017, was amended during 2019.

[3] Plaintiff's claim against the first defendant is founded upon two transactions that took place on 23 September 2010 and 22 November 2010, respectively. It is alleged that on these dates, being more than two years before the date of its final liquidation, DexGroup sold shares that it held in Trustco Group Holdings Ltd ("Trustco") to the first defendant at a price that was below the reasonable market price. The plaintiffs aver that during the time of the disposition, the reasonable market value per share was 67c per share, whilst at the same time shares were sold at 27c and 48c per share, respectively. Twentyone million (21,000,000) shares at 27c per share and six million (6,000,000) at 48c per share were sold to the first defendant. As against the second, third and fourth defendants, plaintiffs claim on the same basis as against the first defendant save that the second, third and fourth defendants bought 4,136,755, 300,000 and 1,000,000 shares at 48c per share, respectively.

[4] On the basis of the reasonable market value and the price per share paid by the defendant, the plaintiffs aver that the dispositions fall to be set aside as it was not sold at reasonable market value, was illusory, or merely nominal. It, therefore, should be set aside in terms of section 26 of the Insolvency Act.

[5] Plaintiffs thus claim the return of the Trustco shares to the trustees, or in default thereof, that the dispositions be set aside and they be compensated at the

current value calculated at R4.20 per share. In summary the plaintiffs claim against the first defendant the return of 27 million Trustco shares, alternatively, payment of R113,400,000 (R113,4m). The claims against the second, third and fourth defendants is for the return of the number of shares as indicated above, alternatively, the payment of R17,374,371,00 (second defendant), R1,260,000,00 (third defendant) and R4,200,000,00 (fourth defendant), respectively.

[6] The defendants excepted to the particulars of claim on the basis that they lack the averments necessary to sustain the plaintiffs' action against the defendants. Further, that the allegations contained in the particulars of claim are not capable of sustaining a claim based on a disposition "not made for value" as contemplated by section 26 of the Act. They argue that the plaintiffs brought its claim in terms of section 26 of the Insolvency Act and, on the facts alone, it is clear that value was given and it was not merely nominal nor illusory.

The legal position insofar as it relates to exceptions.

[7] Rule 23(1) of the Uniform Rules of Court reads:

1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an

> exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

[8] The first to fourth defendants seek the same relief in the notices of exception, seeking to strike the plaintiffs' particulars of claim by upholding the exceptions. The relief they seek is identical in that the plaintiffs' claim is to be struck out with costs. In argument, though, the first defendant argued that insofar as it may be relevant, that plaintiffs be granted an opportunity to rectify the situation.

[9] The main purpose of an exception taken, on the basis that the particulars lack averments to sustain a cause of action, is to avoid the leading of unnecessary evidence.

[10] In *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) the following is stated:

> "... the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A). Save for exceptional cases, such as those where a defendant admits the plaintiff's allegation but pleads that

as a matter of law the plaintiff is not entitled to the relief claimed by him (cf *Welgemoed en Andere v Sauer* 1974 (4) SA 1 (A), an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of "unnecessary "evidence.", and also ".....It seems clear, however, that the evidence which must be rendered unnecessary by the upholding of an exception to a defence is evidence pertaining to that defence, and not some other defence against which the exception is not directed." This, in my view, also applies to a claim instead of a defence "

[11] Earlier on in the same judgment the court pronounced:

"It seems clear that the function of a well-founded exception that a plea, or part thereof, does not disclose a defence to the plaintiff's cause of action is to dispose of the case in whole or in part. It is for this reason that exception cannot be taken to part of a plea unless it is self-contained, amounts to a separate defence, and can therefore be struck out without affecting the remainder of the plea..."

[12] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465 [3] Harms JA stated:

"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over - technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability'

Dealing with an interpretation issue, he added:

> 'Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts.'"

On my reading of the pleadings, there is no indication that there are either surrounding circumstances, nor any relevant extraneous facts that can be relevant to the interpretation of the stated facts that would debar me from deciding the pleaded issue on exception.

[13] Wallis JA, in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) at 232 par [36], stated the following:

> "... Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test

on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."

[14] The pleadings excepted to is taken as it stands, the truthfulness of the averments it contains is accepted except where the allegations are manifestly false, or divorced from reality, this principle is limited to facts and "does not extend to inferences and conclusions not warranted by allegations of fact".[1]

[15] The plaintiffs are relying on the decisions in *Minerals and Quarries (Pty) Ltd v Henckert En Ander* 1967 (4) SA 77 (SWA) at 84A and *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 278A-C, to advance the argument that the court has the power to defer consideration of the exception to the trial court where the question raised by the exception seems to be interwoven with the evidence which will be led at the trial. This argument pre-supposes that the facts pleaded can be supplemented with potential evidence which to me does not seem to be the case as there is no real foundation in the pleadings, or the obvious facts. I now turn to the question of law raised, by the interpretation of section 26(1) of the Insolvency Act.

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[1] *Natal Fresh Produce Growers Assoc v Agroserve (Pty) Ltd* 1990 (4) SA 749 (NPD), at 755A-B (This passage was accepted and applied by this Court in *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F and *Vogel v Kleynhans* 2003 (2) SA 148 (C) at para [9]).

Disposition "not made for value"

[16] As a starting point, I am guided by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012), where at par [18] it reads:

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The

'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[17] The relevant provisions of the Insolvency Act apply to companies by virtue of section 340 of the Companies Act, 61 of 1973. Section 340 (1) provides:

"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 law relating to insolvency shall *mutatis mutandis* be applied to any such disposition."

[18] The aim of the provisions of the Insolvency Act dealing with voidable dispositions and undue preferences is to ensure that assets that left the estate of the debtor, in the circumstances contemplated, are recovered so that they can be equitably distributed amongst the debtors and creditors. Sections 26 ("disposition without value"), 29 ("voidable preferences"), 30 ("undue preference to creditors") and 31 ("collusive dealings") contemplate various circumstances, with varying threshold requirements, in which a court may set aside a debtor's dispositions. Trustees in an insolvent estate are authorised to bring proceedings to have transactions set aside and where the court sets the transactions aside, it shall entitle the trustees to recover the property so alienated, or its value. Whilst it is

apparent that the trustees have a range of possibilities, in the instant matter they elected to rely exclusively on the provisions of section 26(1) of the Insolvency Act. The defendants (the excipients) argue that, on a proper construction of the allegations by the plaintiffs, their reliance on section 26 cannot be sustained as it is contradictory in itself, and as a legal consequence does not meet the requirements of section 26.

[19] Section 26(1) of the Insolvency Act provides:

> "Every disposition for property not made for value may be set aside by the court if such disposition was made by an insolvent –
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> (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." (my underlining)

[20] The Supreme Court Appeal (Appellate Division, as it then was) considered the wording of section 26(1) in *Estate Wege v Strauss* 1932 AD 76 at 82 where it is stated:

> "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."

[21] In *Estate Jager v Whittaker and another* 1944 AD 246 at 250, the court stated with regard to section 26 of the Act, the phrase under discussion means

> "The words 'disposition not made for value' mean, in the ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*. The most obvious example of such a disposition is a donation..."

[22] The Supreme Court of Appeal in *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (A) at 604 referred with approval to the *dictum* in *Goode, Durrant and Murray Ltd v Hewitt and Cornell NNO* 1961 (4) SA 286 (N) where it is stated:

> "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. Where an insolvent has received 'value' for a disposition must be decided by

reference to all the circumstances under which the transaction was made (*Hurley and Seymour N.O. v W H Muller and Co.*, 1924 NPD 122 at p.133)."

[23] Where a company, in a group of companies, guarantees the obligations of another company in the group, the continued financial stability of the whole group may be sufficient to constitute value for the purposes of section 26(1). Similarly, the grant by a company of a suretyship in respect of another company debts in order to keep alive the *spes* of taking transfer of a valuable property was considered to be in this position for the value for the purposes of section 26(1)[2].

[24] The plaintiffs, relying on *Bloom's Trustee v Fourie* 1921 TPD 599 and Mars[3], argue that 'Value' in relation to a similar context in section 24 of the 1916 Act means 'adequate value'. The court in Bloom's Trustee related 'value' to the price that the item will 'command in the market' and added:

'Otherwise it would seem to me that a disposition to a creditor could not be set aside under section 24(1)(b) if assets of large valuable are so 'sold' for entirely inadequate consideration of for mere trifling consideration".

They further argue that in the instant matter the difference between the realistic market value and the e price that was paid would be "no value" for purposes of section 26(1).

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[2] Swanee's Boerdery (Edms) Bpk (in liq) v Trust Bank 1986 (2) 850 (AD) at 860H to 861D

[3] The Law of Insolvency in South Africa.

[25] Their reliance on both these authorities, in my view, is misplaced. It seems the passage in *Mars* was copied from previous editions without being updated in line with the latest decisions. *Blooms Trustee* is no longer good law as was clearly stated in *Swanee's Boerdery (supra)*.

[26] This court, per Selikowitz J, had the occasion to consider the meaning of the phrase under discussion as used in section 26 of the Act in *Terblanche NO v Baxtrans CC and another* 1998 (3) SA 912 (CPD). Certain assets belonging to the company in liquidation had been disposed of to the second defendant for a consideration of 383,539 instead of as alleged by the plaintiff at a value of 1,276,000. Counsel for the liquidator (plaintiff) submitted that whenever a disposition is made for less than the true value of the asset, it is *prima facie* without value. Dealing with these submissions the court remarked as follows:

> "The arguments presented by counsel failed to distinguish between the concepts of 'no value' and 'inadequate value' and failed to recognise the relationship between these concepts to one another in the context of s 26 of the Insolvency Act."

The court indicated that in interpreting section 26, it must be remembered that it is but one of a number of provisions relating to impeachable transactions which "like the proverbial cat can be screened in many different ways "

It went further to state the following:

"In my view, the rejection in *Swanee's Boerdery* of the dictum in *Bloom's Trustee* relates to the refining of 'value' in relation to adequacy as also in relation to the concept of 'just and valuable consideration'."

The question of adequacy should, however, not be equated with the concept of illusionary or a nominal value. illusionary or nominal value is what those words suggest, no one value at all. "Illusory value" is an illusion and "nominal value" is value in name only. Adequacy, on the other hand, in relation to value controllers are far more extensive idea. "Illusory value" and "nominal value"

> "Will always be inadequate. However, a price for the benefit maybe inadequate in relation to the value of the item but they nevertheless not amount to illusory or nominal value."

[27] The court went on to express the view that cases of inadequate value (as opposed to cases where the supposed value is "illusionary" or "nominal" and therefore, in truth no value at all) and more appropriately dealt with via other unimpeachable disposition provisions of the Insolvency Act.[4] It is not insignificant to note that the approach adopted in Terblanche had not been departed from in

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[4] See Endumeni *supra*

the past 22 years, and as quoted authoritatively by Meskin in Insolvency Law and followed in the unreported decisions of *Haywood NO v Fortune* 2006 JDR 0972 (T) at para [7] and *Pro-Med Construction CC (in liquidation) v Botha* [2012] ZAGPJHC 145 (24 August 2012) at para [2].

[28] I now turn to the facts of this matter tested against the legal position set out above. It is clear that the disposition was clearly not for "no value" and was also not "illusionary" nor "nominal". The plaintiffs' own factual allegations are destructive of any claims in terms of section 26 of the Insolvency Act. The proper interpretation, in the context of the act, as set out above does simply not apply to the facts as pleaded. The pleadings excepted must be taken as it stands, the truthfulness thereof is accepted for these purposes. Even if accepted that the value paid was less than the reasonable market value, no basis is laid nor suggested that there was anything remiss therewith. It would be an absurdity to equate the position that, when paying a discounted price, it can be said you gave no value.

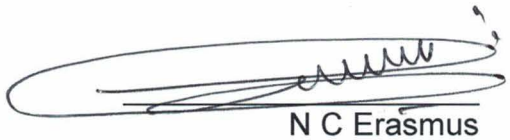
[29] Accordingly, I am of the view that the particulars of claim does not sustain a claim in terms of section 26(1) of the Insolvency Act. Therefore, the following order is made:

1. **The exceptions of the first to the fourth defendants are upheld.**

2. The plaintiffs' claim is set aside.

3. The plaintiffs are granted leave, if so advised, to amend the particulars of claim within twentyone (21) days of this Order.

4. The defendants are entitled to the cost of the exceptions including the cost of two counsel where so employed.



N C Erasmus
Judge of the High Court

Counsel for Plaintiffs/Respondents in exception:	Adv F H Terblanche SC
Attorneys for Plaintiffs/Respondents in exception:	Roestoff Attorneys, Pretoria
Counsel for 1st Defendant/Excipient:	Adv Chris Eloff SC
Attorneys for 1st Defendant/Excipient:	Bowman Gilfillan Inc, Sandton
Counsel for 2nd, 3rd & 4th Defendants/Excipients	Adv Jeremy Muller SC Adv Kate Reynolds
Attorneys for 2nd, 3rd and 4th Defendants / Excipients	Edward Nathan Sonnenbergs Inc, Cape Town