THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 289/2017

In the matter between:

JOHANNES VAN DEN HEEVER **APPELLANT**

and

LOUIS MARIUS TALJAARD NO **FIRST RESPONDENT**
CHEBO CHAZA **SECOND RESPONDENT**
THE REGISTRAR OF DEEDS **THIRD RESPONDENT**
NEDBANK LIMITED **FOURTH RESPONDENT**

Neutral citation: *Van den Heever v Taljaard* (289/2017) [2018] ZASCA 22 (20 March 2018)

Coram: Navsa, Leach and Mocumie JJA and Makgoka and Schippers AJJA

Heard: 19 February 2018

Delivered: 20 March 2018

Summary: Company law : sale of property when close corporation deemed to be under winding-up under previous Companies Act 61 of 1973 : whether sale a void disposition under s 341 of that Act : whether transfer of property in compliance with a court order as envisaged by s 2 of Insolvency Act 24 of 1936 : sale held to be void.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Basson J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Navsa, Mocumie JJA and Makgoka, Schippers AJJA concurring)

[1] The appellant, Mr Johannes van den Heever, is the registered owner of the immovable property more fully described as Farm Kareebos 618, Portion 43, Molemole Local Municipality, Registration Division LS, Limpopo (the property) which he bought from Sunset Point Properties 212 CC (Sunset Point) in August 2010. In controversial circumstances more fully set out below, he proceeded to take transfer of the property on 11 February 2011. Sunset Point was subsequently placed under winding-up and the first and second respondents were duly appointed as its liquidators (I shall refer to them simply as the liquidators). They applied to the Gauteng Division of the High Court, Pretoria, for an order declaring the transfer of the property to the appellant to be void, as well as certain ancillary relief designed to ensure that the property be returned. The appellant opposed this relief and, in turn, brought a counter-application for

an order under s 341(2) of the Companies Act 61 of 1973 (the previous Companies Act) validating his purchase of the property.

[2] The liquidators' claim succeeded. Although no specific order was made in regard to the appellant's counter-application, the effect of the court a quo's order was to dismiss it. With leave of the court a quo, the appellant now appeals to this Court against both the order granted in the main application and the dismissal of his counter-application. The third respondent, the Registrar of Deeds, has played no part in the proceedings whilst the fourth respondent, Nedbank Limited, which holds a mortgage bond over the property, abides the decision of this Court.

[3] I turn to the relevant background facts. Trading under the name of Leapfrog Properties, Sunset Point, whose sole member was Mrs A Kruger, formerly conducted an estate agency business in Polokwane. In May 2008, Mr Gordon Anthony Jones paid Sunset Point the sum of R650 000 as a deposit on the purchase price of two townhouses. It was agreed that this sum would be held in trust in an interest bearing account pending transfer. Not only did the sale of the townhouses not go through but Mr Jones died on 23 March 2009, before his deposit was repaid to him. Mr Nicky Bosman, a Polokwane attorney, was appointed as executor of Mr Jones's estate (the estate).

[4] Even before his death, Mr Jones had been having trouble getting his money back from Sunset Point. As early as 21 January 2009, he had demanded return of his deposit. This gave rise to some fancy footwork on the part of an attorney representing Sunset Point, Mrs Elmarie Bierman, who in response to his demand confirmed that the sum of R650 000 had been paid to Mr Danie Kruger (an employee of Sunset Point and the husband of its sole member) in respect of the purchase of two units; and that out of those funds he had

mistakenly paid R450 000 to another attorney. She requested Mr Jones to hold things over so that she could clear up the matter and then either return the deposit or provide the signed deed of sale for the units. However, almost inevitably, the deposit was not repaid, and Mrs Bierman later refused to repay the deposit, stating that Mr Jones's children had purchased the units and they had not cancelled their transactions.

[5] What is clear is that Sunset Point was in dire financial straits at the time. This is borne out by it being discovered that the R450 000 Mrs Bierman had mentioned had in fact been misappropriated to pay a debt Sunset Point owed to a hardware store. Moreover, not only did Sunset Point owe Mr Jones R650 000 but there were other unpaid creditors who were pressing for payment. These included a Mr Musolwa, who was owed at least R340 000, and a Mr Van den Berg, who was owed some R90 000 and who had obtained a *nulla bona* return in respect of a costs order he had obtained against Sunset Point. In all these circumstances, when a further demand by the estate for repayment of the deposit fell on deaf ears, it became clear that Sunset Point was unable to repay its debts.

[6] As a result, in an application lodged in the magistrate's court of Polokwane on 7 April 2010, Mr Bosman sought an order winding-up Sunset Point. Surprisingly, given the facts, on 13 July 2010 the magistrate dismissed the application. He did so despite having found that Sunset Point had not paid the estate what it owed and was as a result deemed in law not to be able to pay its debts. The ratio of his decision was that a notice of demand given under s 69(1)*(a)* of the Close Corporation Act 69 of 1984 had not contained a warning to Sunset Point that liquidation proceedings were contemplated and this, so the magistrate concluded, rendered the application fatally defective.

[7] Understandably aggrieved by this, Mr Bosman proceeded to appeal to the High Court. However, on 17 August 2010, whilst the appeal was pending, the appellant offered to purchase the property from Sunset Point for R3.45 million. His offer was accepted and a written agreement of sale drawn up and signed. According to the appellant, at the time he concluded this agreement he knew neither of the liquidation proceedings nor that an appeal against the magistrate's order was pending.

[8] In any event, when the appellant's offer was accepted, the attorney representing Sunset Point in the liquidation proceedings, Mrs Bierman, was engaged to effect transfer of the property to the appellant. Inter alia, this required a mortgage bond in favour of Nedbank Limited to be registered over the property.

[9] At the end of November 2010, after the conclusion of the sale but before the appellant obtained transfer, Mr Bosman learned that the appellant had purchased the property and intended to take transfer. Hearing of this, he and an advocate representing the estate approached the appellant. They told him of the pending appeal against the dismissal of the winding-up and made him aware of the risks involved should he elect to proceed with the transaction. This was confirmed in a letter Mr Bosman wrote to the appellant on 18 January 2011.

[10] As a result, the appellant went to consult his own attorney, Mr J Kampherbeek, about the matter. On 26 January 2011, Mr Kampherbeek addressed a somewhat unusual letter to Mrs Bierman, asking her to explain what was happening in the liquidation application and enquiring as to its prospects of success. He also asked her advice on what the effect of the liquidation would be for his client (the appellant), depending on whether it was granted either before or after transfer was registered. In response to this last

question Mrs Bierman simply replied that the provisions of the Insolvency Act would apply. That of course was correct; but the remainder of her letter was both disingenuous and calculated to mislead. First, she stated that in her opinion there was no liquidation application pending[1] against Sunset Point, although she went on to record that a liquidation application had been dismissed on 13 July 2010 and that an appeal had been lodged against that order. However she immediately stated that a date for the appeal had not been determined, that the appeal would be vigorously opposed (there was on the contrary no opposition when the appeal was heard), that the appellant's claim was opposed (in fact it was not) and that Sunset Point's solvency had been confirmed by the magistrate (he had found the very opposite).

[11] Having consulted with his attorney, and presumably influenced by the comments of Mrs Bierman, the appellant decided to go ahead with the transaction and take transfer. He states that he did so because he was advised he had a valid and binding agreement of sale. That may well be so, but he had been pertinently alerted to the risks he faced due to the pending appeal. In any event, the necessary transfer documents appear to have been lodged with the Registrar of Deeds sometime in January 2011.

[12] Shortly thereafter, certain of Sunset Point's creditors got wind of the property being transferred despite the pending appeal. Fearing that transfer was imminent, Mr Musolwa launched an urgent application on 10 February 2011 seeking to interdict either the transfer of the porperty to the appellant or, alternatively, Mrs Bierman, from paying out the proceeds of the sale pending the finalisation of the appeal against the winding-up. Although cited on the papers as a respondent, the appellant alleges that the papers were never served on him. Importantly, neither Mr Bosman nor the estate nor any of Sunset

[1] She used the Afrikaans word, 'hangend'.

Properties other creditors such as Mr Van den Berg were cited as parties. Mr Bosman, however, was aware of the interdict proceedings, and indeed signed a confirmatory affidavit supporting it. He explained that he had done so as he was confident that the interdict would protect the estate's interest as well.

[13] As understandable as Mr Bosman's confidence may have been, it was misplaced. In his absence, when the interdict came before court, Mr Musolwa agreed to allow transfer to proceed. He reached this agreement after negotiating its terms with those who represented Sunset Properties – including of course its attorney Mrs Bierman who had been cited as a respondent. The terms of this agreement also provided that pending the finalisation of an action for payment of his claim to be instituted by Mr Musolwa against Sunset Properties within 30 days, Mrs Bierman would pay R340 000 of the sale price to Mr Musolwa's attorneys to be held by them in trust and to be paid out only in terms of an order of court or in terms of an agreement signed between Mr Musolwa and Sunset Properties. This was, essentially, an agreement between Sunset Point and one of its creditors that sought to advantage the latter over all other creditors. And, importantly, it was an agreement to which the appellant, to whom the property was to be transferred, and Sunset Point's other creditors were not parties.

[14] As a result, without Mr Bosman knowing of it, the property was transferred to the appellant the following day (ie 11 February 2011). On 14 February 2011, after Mr Bosman heard of what had happened and of the agreement that had been concluded with Mr Musolwa and made an order of court, he, too, instituted urgent interdictory proceedings on behalf of the estate. He was too late, as transfer had already been registered. To rub salt into the wound, the procedures envisaged in the court order of 11 February 2011 were not followed. Mrs Bierman paid the agreed amount of R340 000 out of the sale price directly to Mr Musolwa despite the fact that he had not instituted the

action envisaged in the order. This prejudiced the estate and other creditors who were left without any security for their claims against Sunset Properties. As was correctly found by the court quo, the circumstances surrounding the transfer of the property smacked of foul play.

[15] However, all was not lost for the estate. The appeal against the refusal of the liquidation order was duly heard in the Gauteng Division, Pretoria. On 9 February 2012, it was upheld by a Full Bench of that court which set aside the magistrate's order and in its stead issued an order winding-up Sunset Point.

[16] The winding-up of close corporations is regulated by Part IX of the Close Corporations Act 69 of 1984 and in part by Chapter XIV of the previous Companies Act 61 of 1973[2] as read with the provisions of the law relating to insolvency.[3] This position has to date not been altered, notwithstanding the repeal of the previous Companies Act by the Companies Act 71 of 2008. In this regard, item 9(1) of Schedule 5 to the latter Act provides that the previous Companies Act continues to apply with respect to the winding-up and liquidation of companies under the latter Act. Under s 348 of the previous Companies Act, the winding-up of a company 'shall be deemed to commence at the presentation to the Court of the application for the winding-up'.

[17] In the present instance not only had the application for winding-up been presented to court but it had been dismissed by the magistrate well before the appellant purchased the property. The effect of this is that the purchase of the property and the events surrounding its transfer to the appellant took place while Sunset Point was deemed to have been in the process of winding-up.

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[2] See s 66(1) of the Close Corporations Act 69 of 1984 and J J Henning *Close Corporations and Companies Service* Vol 1 (service 49, 2017) para 11.01.
[3] Section 339 of the previous Companies Act.

[18] Section 341(2) of the previous Companies Act which, for the reasons set out above, applies to the winding-up of Sunset Point, provides:

'Every disposition of its property . . . by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

It was on this provision that the liquidators relied in instituting proceedings in the court of quo for an order that the sale of the property to the appellant be declared void, as well as relief ancillary thereto.

[19] In opposing such relief, the appellant initially admitted that the sale of the property was void under s 341(2), but sought an order that the court validate it. However, in July 2016, he applied to withdraw that admission, stating he had only just learned of Mr Musolwa's urgent application and the terms of the court order issued by agreement on 10 February 2011when that matter settled. Relying upon the definition of 'disposition' in s 2 of the Insolvency Act 24 of 1936 (the Insolvency Act) – which excludes a disposition 'in compliance with an order of the court' – he contended that the transfer to him had been in compliance with that order and was therefore not a disposition by Sunset Properties of its property as envisaged by s 341(2).

[20] The court a quo granted the appellant leave to withdraw his admission, and, in these circumstances, one of the issues before us is whether the definition of 'disposition' in s 2 of the Insolvency Act applies in regard to a disposition being considered under s 341(2) of the previous Companies Act. As I have already mentioned, companies and close corporations are wound-up under the provisions of the previous Companies Act, read with the relevant rules of insolvency, and it may well be that a disposition under both Acts are to be construed in identical terms. In the light of the view that I take of the matter, it unnecessary to determine this issue. For present purposes I intend to proceed on

the assumption that the appellant's contention is correct and that there is no 'disposition' of property as envisaged by s 341(2) if it takes place 'in compliance with an order of court'.

[21] Assuming the correctness of that proposition, the liquidators argued that the transfer of the property to the appellant had not taken place 'in compliance with an order of court' as envisaged by s 341(2). As a starting point, in advancing their argument they relied on the decision in *Sackstein en Venter NNO v Greyling* 1990 (2) SA 323 (O) at 327. In that case it was held, correctly in my view, that the exclusionary provisions of s 2 of the Insolvency Act were designed to protect a creditor who had successfully enforced its claim against a debtor by way of court proceedings and received assets from the debtor in satisfaction of an order obtained in its favour.

[22] In the present case, however, the appellant had not sought to enforce his claim against Sunset Point by way of court proceedings. Indeed, he states he was not even aware of the proceedings to interdict the transfer. The order granted by the court upon which he now seeks to found his case was therefore not granted in his favour in support of his claim. Nor for that matter was it an order in respect of which any other creditors had knowledge. These facts weigh heavily against a court extending protection to the appellant.

[23] Furthermore, in the light of this Court's judgment in *Dabelstein and others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) at 1228A-B, the parties were agreed that as it could not have been the intention of the legislature to extend protection to a creditor who obtained a court order circumstances of fraud, collusion or other kinds of reprehensible conduct, an order of court obtained in such circumstances to prejudice other creditors is liable to be set

aside and falls not to be taken into account for the purposes of s 2 of the Insolvency Act.

[24] The liquidators argued that the circumstances under which the order of 10 February 2011 was obtained were of such a reprehensible nature that it should be ignored for purposes of s 2. The facts relevant to that issue are also germane to the appellant's counter-application in which he seeks validation of the transfer of the property to him under s 341(2) of the previous Companies Act. The purpose of that section is to ensure that company property is not dissipated before the commencement of a company's winding-up but remains available to meet the claims of creditors who, subject of course to preference, should be treated equally. *Lane NO v Olivier Transport* 1997 (1) SA 383 (C) at 386C-387B, to which both sides referred, lists a number of factors often taken into account by the courts in the exercise of their discretion under the section. Inter alia:

(a) Special regard should be had to the question of good faith and the honest intention of the parties concerned;

(b) An attempt must be made to balance between what is fair between the various affected parties and creditors; in that regard, of particular importance is whether the disposition had the effect of providing a particular creditor in the winding-up with an advantage it ordinarily would not have enjoyed;

(c) Regard must be had to whether or not the recipient of the disposition was aware of the likelihood of an application for winding-up or the fact that the company was in financial difficulties;

(d) Little weight is to be attached to the hardship which will be suffered by the recipient if the disposition is not validated, 'the purpose of the

subsection being to minimise hardship to the body of creditors generally'.[4]

[25] The appellant argued that he had been innocent of any reprehensible conduct as he had been unaware of the events surrounding the issue of the court order on 10 February 2011, and that consequently he ought not to be deprived of the protection afforded by s 2 of the Insolvency Act. However, this overlooks that the rules relating to winding-up and insolvency are designed to ensure fair and equal treatment of creditors, and that there can be no doubt that Mrs Bierman knew that there were various other creditors, including the estate, who would be adversely affected by a transfer of the property. Having represented Sunset Point throughout the liquidation proceedings, she must have appreciated that it was in fact in insolvent circumstances. At the very least, she must have known that the magistrate had found that to be the case and had only dismissed the application for winding-up due to what he viewed had been a technical, procedural error.

[26] Furthermore, although the court order stated that the money earmarked for the claim of Mr Musolwa was to be held in his attorney's interest bearing trust account, Mrs Bierman immediately paid that sum to him, thereby affording him a preference over the other creditors. All this was done in order to ensure that the property was transferred and Sunset Point paid the purchase price – which would not have occurred if it had been wound-up.

[27] Bearing in mind that whatever Sunset Point was paid had been dissipated before the appointment of the liquidators, this all indicates that the entire transaction, engineered by Sunset Point's attorney, was designed to

[4] *Lane NO* at 386J.

disadvantage certain of its creditors. The fact that the appellant paid a generous purchase price is really neither here nor there, given that the other creditors have not benefitted from those funds.

[28] In these circumstances the transfer of the property cannot be regarded as a disposition under a court order obtained in good faith. Even if the appellant was unaware of the court order, I can see no reason why he should be allowed to enjoy the benefit extended by s 2 of the Insolvency Act.

[29] Nor is there reason to validate the void disposition, tainted as it was by collusion between a debtor and a single creditor to the prejudice and detriment of the claims of other creditors. The fact that the appellant may suffer some hardship must give way to the general advantage of Sunset Point's creditors. That is all the more so as he went through with the transfer with his eyes wide open to the risks, having been specifically warned by Mr Bosman of the pending appeal and the risks he faced if it succeeded. In the light of the discretion the court has in terms of s 341(2) to validate a disposition which is otherwise void, and weighing up what would be just and fair in the light of the fact that the disposition was made to secure an advantage to the appellant which he would not otherwise have enjoyed, this is clearly a matter in which the court a quo correctly exercise its discretion in not validating the sale and transfer of the property to the appellant.

[30] For the above reasons, the transfer or disposition of the property took place at a time when Sunset Point is deemed to have been under winding-up. It is not to be regarded as having taken place in compliance with the court order of 10 February 2011. It is therefore a void disposition under s 341(2) of the previous Companies Act. The appeal must therefore be dismissed, leaving the appellant, like all other creditors, with a claim against the liquidators.

[31] Before closing I wish to record that the court a quo found Mrs Bierman's conduct worthy of reporting to the relevant law society. It would be inappropriate to comment in any detail on her actions, particularly as she is not a party whom we have heard. Suffice it to say that in the light of what is on record in this appeal, it was appropriate to refer the matter to the law society for investigation.

[32] The appeal is dismissed with costs.

L E Leach
Judge of Appeal

Appearances:

For the Appellant:	J G Bergenthuin SC (heads of argument prepared by B Stoop SC)
Instructed by:	Bernhard van der Hoven Attorneys, Pretoria Rosendorf Reitz Barry Attorneys, Bloemfontein
For the Respondents:	C van Eetveldt (heads of argument prepared by M P van der Merwe SC)
Instructed by:	Bosman Attorneys, Pretoria Stander & Partners, Bloemfontein