



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

**MEDIA SUMMARY – JUDGMENT DELIVERED
IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal

Date: 20 March 2018

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

JOHANNES VAN DEN HEEVER

V

LOUIS MARIUS TALJAARD NO & OTHERS

The appellant, Mr Van den Heever, purchased a piece of immovable property in Limpopo from a close corporation known as Sunset Point Properties. Sunset Point owed R650 000 to a Mr Jones being the deposit he had paid in respect of the purchase price of two townhouses, the sale of which had fallen through. He attempted to obtain re-payment of that sum, but had not succeeded before he died on 23 March 2009. The executor in his estate, a Polokwane attorney, Mr Bosman, continued the struggle. He applied for an order for winding-up for Sunset Point on the basis that it was unable to pay its debts.

The matter came before a magistrate who, despite finding that Sunset Point was deemed in law not to be able to pay its debts, dismissed the application for winding-up for a technical reason. Mr Bosman proceeded to appeal to the high court.

The appellant purchased the property from Sunset Point on 17 August 2010, when Mr Bosman's appeal was still pending. Sunset Point's attorney, who had acted in the liquidation proceedings, was instructed to effect the transfer to the appellant. When Mr Bosman learned of the sale and the possibility of the property being transferred to the appellant, he went to see him and told him of the pending appeal and the risks which would he run if the appeal succeeded. Despite this, the appellant decided to go ahead to take transfer.

When transfer was imminent, another creditor Sunset Point learned of it and, as a matter of urgency, sought an order to interdict the transfer. Mr Bosman was aware of the interdict and signed a confirmatory affidavit supporting it, as he was of the view that the order would protect the estate of Mr Jones as well. However, when the matter came to court, Sunset Point's attorney concluded an agreement with the other creditor to the effect that the transfer could be affected and the amount he was owed paid into his attorney's trust account to be held by them and paid out only if he was able to establish his claim. On 10 February 2011, an order to this effect was granted by agreement between Sunset Point and its creditor. Pursuant to this, the property was transferred to the appellant the next day. Thereafter, in breach of the agreement, and the terms of the court order, the attorney paid the creditor the full amount of his claim without his having instituted proceedings as envisaged in the order.

Subsequently the high court upheld the appeal that was pending at the time of these events, set aside the magistrate's order and, in its stead, issued an order winding-up Sunset Point. The effect of this was that under s 348 of the previous Companies Act 61 of 1973, which remained of application despite that Act having been repealed by the Companies Act 71 of 2008, the winding-up of Sunset Point was deemed to have commenced when the application for its winding-up was presented to the court. Accordingly, at the time of the sale and transfer of the property to the appellant, Sunset Point was deemed to be under winding-up.

As a result of this, s 341(2) of the previous Companies Act became of application. It provides that any disposition of property by a company being wound-up and unable to pay its debts is void unless the court otherwise orders. Relying upon these provisions, the liquidators of Sunset Point applied to court for an order that the transfer of the property to the appellant was void and that the property be returned.

The matter was heard in the Gauteng Division of the High Court, Pretoria which granted the liquidators the relief they sought. The appellant, Mr Van den Heever, then appealed to this Court. Relying upon the definition of 'disposition' in s 2 of the Insolvency Act 24 of 1936, which excludes a disposition 'in compliance with an order of court' he contended that the transfer to him had been in compliance with the order of 10 February 2011 and had therefore not been a disposition as envisaged by s 341(2).

The Supreme Court of Appeal held that the provisions of s 2 of the Insolvency Act were designed to protect a creditor who has successfully enforced its claim against the debtor by way of court proceedings and received assets from the debtor in satisfaction of an order obtained in its favour, which was not so in the present case. Furthermore in the light of certain authorities it found that it could not have been the intention of the legislature to extend protection to a creditor who obtained a court order under circumstances of fraud, collusion or other kinds of reprehensible conduct. The circumstances under which the order of 10 February 2011 was obtained were of such a nature and should therefore be ignored.

The Court went on to hold that the rules relating to winding-up insolvency were designed to ensure fairly good treatment of creditors, and that the entire transaction leading up to the court order of 10 February 2011 had been engineered by Sunset Point's attorney in order to disadvantage certain of its creditors. In these circumstances, the fact that the appellant might suffer some hardship had to give way to the general advantage of creditors, particularly as Mr Van den Heever had gone through with the transfer with his eyes wide open to the risks after having been warned by Mr Bosman of the pending appeal and the risks he faced.

The appeal was therefore dismissed with costs.