FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH JUDGMENT

PARTIES**:** **LESLIE NEIL SACKSTEIN N.O, JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O AND ROMANA BERNADETTE KNUTH N.O. VS JOHANNES TOBIAS BENADE - CASE NUMBER: 1959/2001**

(a) Registrar:

(b) Magistrate:

(c) High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: 11/5/09

DATE DELIVERED: 31/07/09

JUDGE(S): PILLAY J.
LEGAL REPRESENTATIVES –

Appearances:

(a) for the Appellant(s): ADV. VAN DE LINDE
(b) for the Respondent(s): ADV. BEYLEVELD

Instructing attorneys:

(a) Appellant(s): DE VILLIERS INC.
(b) Respondent(s):KAPLAN BLUMBERG

CASE INFORMATION -

(a) *Nature of proceedings* : CIVIL MATTER

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: **1959/2001**

In the matter between:

LESLIE NEIL SACKSTEIN N.O.	First Plaintiff
JACOBUS HENDRIKUS JANSE VANRENSBURG N.O	Second Plaintiff
ROMANA BERNADETTE KNUTH N.O	Third Plaintiff

And

JOHANNES TOBIAS BENADE	Defendant

JUDGEMENT

Pillay J,

This action is based on four courses of action. The first being in terms of section 26 of the Insolvency Act, No 24 of 1936 ("the Act") alternatively in terms of section 30 thereof. The third cause of action is in terms of section 29 of the act and the fourth being a claim based on enrichment. In these proceedings, I was told, the plaintiffs pursue only the claim against the defendant in terms of section 29 of the act. This was also recorded in the

minute of the pre-trial conference held in terms of Rule 37 of the Uniform Rules of court on 16 March 2009.

I was also informed that the First Plaintiff had since the institution of the action resigned as a trustee of the insolvent estate of the Usapho Trust ("the Trust"). An amendment in accordance therewith was effected in due course and I have noted this.

Background

The action flows from the collapse of a 'pyramid scheme'. It entails a process to equally distribute the residue in the insolvent estate of Usapho Trust (by which the pyramid scheme was known).

Some of those involved in operating the aforementioned scheme were convicted of fraud and theft in respect of their participation therein. It is not necessary to deal with all the details of the respective convictions. Where necessary material aspects of the trust operations will be referred to. The trust was finally sequestrated on 14 September 2000.

While the action was being prepared for trial certain factual issues material to the cause of action were disputed.

However, I was informed that with time and for the purposes of this particular hearing only, the following became common cause between the parties.

Common cause

The defendant, as creditor of the trust, received four payments made on behalf of the trust. These were as follows:

(i)	R	20 000-00	-	17 March 2000
(ii)	R	299 500-00	-	17 March 2000
(iii)	R	22 000-00	-	5 June 2000
(iv)	R	28 000-00	-	20 July 2000
TOTAL	R	549 500-00		

It is also common cause between the parties that at all material times hereto, the trust was insolvent and that each of these payments was a 'disposition' as envisaged by section 2 of the act.

The operation of the business of the trust consisted of conducting the business of a bank as envisaged in the Banks Act no 94 of 1990 though the trust was not a registered bank. It was also an operation which contravened section 12(6) A3 of the Harmful Business Practices Act No 71 of 1989. Furthermore it was agreed between the parties that the operations of the trust was in fact a scheme based on common law fraud and on fraudulent misrepresentations made on behalf of the trust by persons entitled to make representations on its behalf to members of the public. Such misrepresentations included, inter alia (a) that invested capital would be lent by the trust to estate agents at a discounted rate and thereby general income for the trust when in truth, such income would be used to pay or assist in

paying amounts due to other depositors or investors instead of benefiting the trust; (b) that deposits together with agreed interest thereon would be paid out of such trust income when in fact it would only be able to do so from capital paid to it by other investors; and (c) the trust was not generating any income or generating insufficient income to service the trust for the purpose of making repayments as promised and that in truth, such payments would be made (and were indeed so made) out of capital investments.

Section 29 (1) of the act.

Section 29(1) reads as follows:

> "29 Voidable Preferences
>
> (1) Every disposition of his property made by a debtor not more than (6) six months before the sequestration of his estate or, if he is deceased and his estate is insolvent before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another".

Despite the agreement as to the insolvency of the trust, the plaintiffs called Mr Wessel Greef of Wessel Greef and Strydom, Chartered accountants (SA) to

testify about his analysis of investor claims against the insolvent trust estate, based on the claim forms, in general and in particular that of the defendant.

He testified that he had acquired a Bachelor of Commerce degree in 1970 and qualified as a Chartered Accountant in 1975. He explained that he has been involved in a number of forensic investigations in a number of cases and has testified in many criminal and civil matters in that regard. His credentials were not challenged.

His investigations and indeed conclusions were based on the liquidation and distribution accounts of the insolvent trust estate.

He testified that the cash residue of the trust was R 5,986m which was far short of what it owed to many creditors. He concluded that creditors would therefore be paid out a percentage of what they were owed by the trust.

He also noticed that the defendant, as a creditor, had been paid in full in respect of the payments in question. He concluded that the effect of such payments to the defendant, was that he was being preferred above the other creditors.

His evidence was not challenged in any detail. In particular, his conclusion that the relevant payments to the defendant had the effect of preferring him above other creditors was not challenged.

It is clear that in the light of the evidence of Mr Greef, the concessions made by the defendant, the agreements between the parties (including those made for the purposes of this hearing only) and that which is common cause, the only issues to be decided are the following:

(c) Whether the four payments as aforementioned were made in the ordinary course of business; and

(d) Whether or not they were made with the intention of preferring the Defendant as against any of the other creditors.

While there are four separate payments of relevance, it seems to me that each of them was paid on the same basis and within the same context and each would therefore be decided in the same manner. In other words all of them were either made in the ordinary course of business and were not intended to prefer the defendant above any other creditor. In principle, they can all be taken as one in considering both questions.

No reasonable alternative to his conclusion was put to Mr Wessels save that it was suggested (as I understood it) that it did not necessarily follow that the payments were made with the intention of preferring the defendant above other creditors. No detail accompanied that proposition. Given the concession in regard thereto, I accept his conclusion as correct and justified in so far as it is necessary to do so. Indeed, Mr Byleveld did not argue that the effect of such payments did not prefer the defendant above other creditors.

‘may’ – Does it create a discretion in section 29(1)

It is necessary, to briefly deal with the import of the word ‘may’ used in the section. Lest it be suggested that it renders the application of the specific provision, discretionary, the contextual perspective thereof needs to be examined.

The context in which the word ‘may’ is used does not afford it a meaning so as to create a wide discretion. While the word ‘may’ is permissive by its very nature, it is sometimes without alternative when it is used to indicate some instructive process.

As was stated in Gunn and Another NNOV Barclays Bank DCO 1962(3) SA 678A @ 685, ‘*it is improbable that the legislature, in providing this remedy for the benefit of creditors in insolvency, intended it to be accompanied, and its employment be hampered, by the uncertainty implicit in so wide a discretion. It would rather seem that the intention was to confer a right of recovery…..’*
See also: Volkskas Bpk No v Barclays Bank (DC & O 1955 (3) SA 104 T.

Therefore in so far as it might be construed that the application of section 29(1) is totally discretionary, it is clearly not. The provisions thereof have to be followed and the obvious consequences must flow therefrom, absent any of the defences provided for therein.

‘Ordinary Course of Business’

The operation of the business in question was illegal. The defendant was paid and benefited from money gathered from a fraudulent activity. Mr Byleveld argued that the payments made by the trust to the defendant was in accordance with their agreement and therefore in the ordinary course of business since he received payment (including interest) as a return for his investment or part thereof as the case may be.

The dispositions in question are contextually required to be made in the ordinary course of business. In dealing with section 29(1), it is necessary to examine what is meant by ‘ in the ordinary course of business’.

The maximum ‘*statutum loquens de aliquo actu vel instrumento vel alia dispostione intelligi debet de valida, non invalida’* comes to mind in regard to this issue.

It means that where the law refers to a transaction, act, written document or another provision it must be construed to be a reference to a lawful or valid and not an unlawful or invalid transaction, act, document or provision.

It is inconceivable that the law would give full recognition to and approve the taking of benefits from an illegal act. Even if business people have become

accustomed to a particular process from which consequences flow and which is ultimately found to be illegal, then it cannot be regarded as having been completed in the ordinary course of business. Such a process would in my view fall outside the scope of 'ordinary business'.

In S v Maphele 1963 (2) SA 651(A) @ 655 D-E, the following was said:

"*It is a recognised canon of construction of statutes that any reference in any law to any action or conduct, is presumed, unless the contrary intention appears from the statute itself, to be a reference to lawful or valid action or conduct*". (Union Government v Silverhout 1925 AD 322 @ 339; Olivier b Botha and Another 1960 (1) SA 678(O) @ 685; Ndhlovu v Mathega 1960 (2) SA 618(A) at 624; De Kock Helderberg Ko-op Wijmakerij Bpk 1962(2)SA 419(A) @ 426).

The qualification in regard to this statement is also to be found in Abbott v Commissioner of Inland Revenue 1963 (4) SA 552K @ 556 E-F where the following was explained:

'*Such presumptions are, however, merely guides and must give way where other considerations, such as those of language context and circumstances indicate a contrary intention on the part of the legislature'.*

There is no indication in the act, and specifically in section 29(1) that a 'disposition made in the ordinary course of business' should be read or construed to mean anything but a lawful or valid disposition.

See also: Du Plooy NO v National Industrial Credit Corporation Ltd 1961(3) 741(W) @ 744.

The payments in question constituted disposition as defined. At best for the defendant, as was subtly suggested, he did not know of that the trust was insolvent at the time of receiving the payments. Making such payments constituted offences. That he may have been unaware that an offence was being committed by the payer is irrelevant to the determination of whether the disposition was made in the ordinary course of business. See: Est van Schalkwyk v Hayman & Lessen 1947(2) SA 1035 (C) @ p1048.

If the employment of this section would fail by virtue of the receiver being unaware of the fraud being committed in presenting payment to him, then the legislature would be giving approval to an illegal transaction. Absent anything to the contrary in the act, the dispositions in question cannot be construed to be transactions in the ordinary course of business. Furthermore, in my view, to qualify as a transaction within the course of ordinary business, it must be that which obtains between people in business transacting in circumstances which give rise to the intended consequences expected by the normal community.

In the circumstances, it cannot be found that the payments made to the defendant were made ‘in the course of ordinary business’ as envisaged in section 29(1) of the act.

Intention of the Payer

It was argued by Mr Byleveld that by the nature of the operation of this scheme, the payment could conceivably have been made to the defendant to entice further investment deposits and perhaps other investors and that this was at least the dominant intention in making the respective payments to the defendants. It follows, so it was argued, that even if that had the effect of preferring one creditor above another, it must be assumed that that was not the intention when making the payments to the defendant and therefore the application of section 29(1) to set aside the dispositions in question must fail.

The person who acted on behalf of the trust in making the payments was by all accounts, Mrs Clifford, one of the convicted fraudsters.

She would have been the best person to say what her intentions were (or were not) when she made the payments in question. She was not called to testify and there was no explanation save that I was informed that the defendant (or his legal adviser) chose not to call her.

I am asked to draw inferences which favour the defendant in regard to the intentions of Mrs Clifford when she made the payments.

Inferences are very rarely relied upon to make important findings such as that which I am asked to make. This is especially so when there is no acceptable

reason for not producing the best evidence available to shed light on precisely what is sought to be inferred.

In addition, the absence of such evidence might itself lead to an inference with which the defendant would be uncomfortable.

In the circumstances, it is not possible to make any inference in that regard.

What is before me is evidence that the effect of the payments in question was to prefer the defendant above the others. Absent any evidence to the contrary, the facts, circumstances and logic dictate that they were made with the intention of preferring the defendant above the other creditors. She must have known the situation at the material time but nonetheless proceeded with the payments in question. It follows therefore that the disposition in question were not made in the ordinary course of business and that they were made with the intention of preferring the defendant above the other creditors.

The defendant has not proved that the payments were made in the ordinary course of business and not with the intention of preferring him above any other creditors.

In the circumstances, the payments are rendered voidable preferences.

Interest

Any monies so received would have accrued interest had it still been in the insolvent estate. This in turn would have been to the benefit of the creditors. I think it would be fair for interest on the amount to be returned to be paid as well. The parties have agreed that should I award interest, it should be calculated in the following terms:

'At the rate of 15,5% per annum on the judgment amount from the 8 August 2001 up to and including 26 April 2002 and from 7th March to date of payment'.

Costs

The costs should follow the result and I have no reason to order anything out of the ordinary in this matter.

I will therefore grant an order:

(a) Setting aside the dispositions as voidable preferences in terms of section 29 of the Insolvency Act;

(b) that the defendant pay to plaintiff the sum of R 549 500-00 and interest thereon at the rate of 15.5% per annum from 8 August 2001 up to and including 26 April 2002 and from 7 March 2008 to date of payment.

(c) that the defendant pays the costs of this action.

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PILLAY J

JUDGE OF THE HIGH COURT