IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 149/17

Reportable	**Yes**

In the matter between:

DONALD GEORGE DUKE JACKSON **Appellant**

and

JACOBUS MARTHINUS ABRAHAMS LOUW NO **First Respondent**

PUNITHAN QUENTIN NAIDOO NO **Second Respondent**

FULL BENCH APPEAL JUDGMENT

D VAN ZYL DJP:

Introduction

1) This appeal concerns the application of sections 29, 30 and 31 of the Insolvency Act[1] **(the Act).** The three sections are aimed at safeguarding the interests of the creditors in an insolvent estate, and to ensure an equitable distribution of the assets of the insolvent amongst all the creditors in general. To

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[1] Act 24 of 1936.

achieve this they create a mechanism for the impeachment of certain categories of transactions entered into by the insolvent pre-sequestration.[2] Section 32 invests the trustee in insolvency (or the liquidator of a company in liquidation) with the right to institute legal proceedings for the setting aside of impeachable transactions, or for the recovery of compensation equal to the value of the property disposed of, or for the payment of a penalty.[3]

2) Acting in accordance with their authority in terms of section 32 of the Act, the joint trustees of the insolvent estate of an *inter vivos* trust known as the Greenacres Trust **(the Trust)** instituted an action in the Grahamstown High Court **(the trial court)** against Mr DGD Jackson, cited as the sixth defendant, for the setting aside of two agreements entered into between the Trust and Mr Jackson, and for the return of 163 head of livestock and certain movable goods consisting of farming machinery and equipment **(the equipment)**, alternatively the payment of its value, and in addition, the payment of a penalty.

3) The trial Court found that the two agreements were impeachable transactions as envisaged in sections 29 to 31 and set them aside. It further ordered Mr Jackson to return to the joint trustees of the insolvent estate the livestock and the equipment, and in the event that he could not do so, to pay to the Trust the amounts of R660 000,00, being the value of the livestock, and R310 000,00, being the value of the equipment. The amounts represented what the

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[2] Estate *Jager v Whittaker* 1944 AD 246 at 250.

[3] The relevant subsections are (1)(a) and (3). They read as follows: **"(1)(a) Proceedings to recover the value of property or a right in terms of section 25 (4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee"** and **"(3) When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher."**

parties agreed to be the value of the livestock and the equipment. Mr Jackson was further ordered to pay a penalty equal to the amounts representing the value of the livestock and the equipment, and any claim which he may have against the insolvent estate was declared forfeit.[4]

4) Mr Jackson, with the leave of the Supreme Court of Appeal, appealed the judgment. The appeal lies against the whole of the judgment. For the sake of convenience I shall hereafter refer to the parties as the appellant and the respondents respectively.

The factual background

5) The two agreements **(the agreements)** which formed the subject matter of the action were concluded shortly before the Trust was placed in provisional liquidation. On both occasions the Trust was represented by one of its trustees, Mr A H Winfield **(Winfield)**. The first agreement dealt with the livestock in the possession of the Trust at the time, and was concluded with a number of the creditors of the Trust of which the appellant was one. The second agreement was with the appellant alone. It dealt with certain specified farming equipment which the Trust hypothecated in favour of the appellant in terms of a registered notarial bond.

6) The Trust conducted business as a producer of milk and livestock on the farm Dieprivier. In order to conduct its business it entered into a number of

[4] This part of the order was made in terms of section 31 (2). It reads: **"Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate."**

agreements for the lease of dairy cows, consisting at the commencement of the lease of pregnant heifers. The Trust's indebtedness to the appellant arose from a lease agreement which it concluded with him on 28 July 2009. In terms of this agreement **(the lease),** the appellant leased to the Trust 244 head of dairy cows against payment of a monthly rental. The leased animals comprised cows that were previously leased to Winfield, and an additional number that were identified in a schedule to the agreement. The lease was until 30 June 2012 with the option to renew it for a further period of 24 months. Ownership of the cattle, or the **"herd"** as it is referred to in the agreement, at all times remained vested in the appellant. Upon the termination of the lease the Trust had to return the herd to the appellant **"augmented where necessary"**, and to repurchase the herd at a pre-determined and agreed price. In terms of clause 14 of the lease the Trust was obligated to augment the herd when any of the dairy cows either died or had to be sold off for any reason **"by substituting such animal with a pregnant heifer of a similar race."**

7) A further term in the lease which is relevant to the issues raised in this matter is the suspensive condition in clause 3. In addition to Winfield binding himself as a surety for the indebtedness of the Trust, the Trust was obliged to enter into, and register a special notarial bond in favour of the appellant in accordance with clause 13 of the lease. Clause 13 provided as follows: **"As security for the obligations owing by the TRUST to DONALD in terms of this Agreement, the TRUST agrees to register the BOND, securing all obligations owing by the TRUST to**

DONALD in terms of this Agreement, over the movable property reflected in Schedule 2 ("the SECURITY") on the terms and conditions reflected in Schedule 3."

8) The movable property in Schedule 2 was identified as consisting of 3 tractors, a planter, a fertilizer spreader and a trailer. In compliance with Clause 3 of the lease a special notarial bond was registered over the movables on 4 August 2009 in favour of the appellant. In the notarial bond agreement the Trust acknowledged its indebtedness to the appellant in two amounts; it agreed that the security was intended to cover **"existing, future and contingent indebtedness"**; and the equipment was identified as property hypothecated in terms of section 1(1) of the Security by Means of Movable Property Act.[5]

9) Important in the context of the issues raised in this matter is Clause 10 of the bond agreement. It determined the rights of the appellant in the event of the termination of the lease, or the Trust's refusal or neglect to comply with its obligations under the bond agreement. It reads as follows: **"Upon the happening of an event of default referred to in 10 above,[6] the MORTGAGEE shall, without prejudice to any other right which it has in terms hereof or at law, be entitled –**

- **Notwithstanding the terms and conditions of any indebtedness of the MORTGAGOR to the MORTGAGEE arising before, simultaneously with or after the execution of this bond to declare the full amount of the MORTGAGOR's indebtedness to the MORTGAGEE from the DEBT or whatsoever cause arising to be due and payable forthwith and to claim and recover the same from the MORTGAGOR forthwith on demand;**

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[5] Act 57 of 1993.

[6] The reference to clause 10 is incorrect, as the **"rights in terms of this bond"** were listed in clause 9 of the bond agreement.

- **To have the ASSETS excussed and / or attached by legal process;**
- **To execute upon all or any of the ASSETS;**
- **To employ such other remedies and to take such other steps against the MORTGAGOR as are allowed in law."**

10) Clause 11.1 of the bond agreement permitted the appellant to exercise his rights in terms of the bond, **"either separately or jointly or in such order and combination and at such times"** as he may think fit. Clause 11.3 provided that **"If the MORTGAGOR shall refuse to give possession of the ASSETS on demand, to apply to any competent Court for an Order for delivery of such ASSETS."**

The pleadings

11) The essence of the respondents' pleaded case was that in August 2011, and at a time when the liabilities of the Trust exceeded the value of its assets, the appellant and a number of other creditors of the Trust who were defendants in the action, with the knowledge of each other, resolved and colluded with Winfield to jointly take possession of all the cattle in the possession of the Trust, and to divide and distribute it between them as they saw fit. It was alleged that this was not an appropriation and distribution by the creditors of livestock owned by them, **"but included livestock owned by the Trust in that none of the livestock appropriated and distributed was identified, or capable of being identified as the livestock leased by the various Defendants to the Trust."**

12) The respondents further pleaded that when the distribution of the livestock took place, the appellant and the other defendants knew that the Trust was indebted to another creditor, namely the Humansdorp Co-operative **(the co-operative)**; that the Trust was insolvent; that the co-operative held a statutory pledge in terms of the Co-operatives Act[7] (**the Co-operatives Act**) over all of the livestock owned by the Trust, and a special notarial bond over 150 dairy cows owned by the Trust; that the defendants were aware that proceedings for the sequestration of the Trust were imminent; and that the livestock in the possession of the Trust included livestock **"which was the progeny of livestock leased from Defendants and owned by the Trust."** The appropriation and distribution of the livestock were on these facts alleged to have constituted an impeachable disposition as envisaged in sections 29 to 31 of the Act.

13) The distribution is alleged to have had the effect of preferring the appellant and the other defendants as creditors above other creditors of the Trust; were made with the intention of preferring the defendants above other creditors; and consequent upon collusion between the Trust and the appellant and the remaining defendants, other creditors were prejudiced.

14) In respect of the farming equipment, the respondents' case was that the agreement between the Trust and the appellant constituted an agreement of sale in part settlement of the Trust's indebtedness to the appellant, and was similarly an impeachable transaction as envisaged by sections 29 to 31.

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[7] Section 4 of Part 4 of the First Schedule of the Co-operatives Act 14 of 2005.

15) The appellant's defence on the pleadings with regard to the delivery and division of the livestock was that, in accordance with the terms of the lease, and upon its termination, the Trust was obliged to return the herd to him augmented where necessary. It was alleged that it was an implied term of the lease that in the event of the Trust being unable to augment the herd with pregnant heifers of a similar race, it was obliged to augment the herd with such cattle as it was able to provide.

16) The appellant pleaded that when the lease was cancelled by reason of the Trust's breach, the Trust was unable to return the herd to him, and that the parties thereupon identified 149 cows which were owned by the appellant, and which Winfield, acting on behalf of the Trust, undertook to deliver to the appellant. Accordingly, and in consequence of the termination of the lease and the agreement reached in regard thereto, the appellant received 149 cows of which he was the owner, and in partial augmentation of the shortfall of 95, he received a further 14 cows. It was pertinently denied that the Trust owned any cattle at the time as the respondents alleged in their pleadings, or that the progeny of the herd belonged to the Trust.

17) The appellant's defence to the respondents' claims in respect of the farming equipment belonging to the Trust was that he took possession thereof with the consent of the Trust, and in the exercise of his rights in terms of the bond agreement.

The agreements

18) The agreement dealing with the livestock in the possession of the Trust was with the creditors of the Trust who were the lessors of livestock leased to the Trust to conduct its dairy business. The agreement was entered into against the background of the Trust finding itself in what Winfield described as, a dire financial position. Its business was running at a loss, it was unable to pay its creditors, and the Trust's liabilities exceeded the value of its assets. With the realisation that the business operated by the Trust was no longer a viable one, he took the decision to terminate the diary business, and in its stead to start a business of rearing heifers for other farmers. The location of the farm on which the Trust conducted its business, according to Winfield, was not conducive to dairy farming. Access to the farm was restricted with the result that it limited the production of milk. Winfield's evidence was that the farm lent itself better to the rearing of heifers.

19) As a result Winfield started talking to the lessors of the livestock in July to August 2011 with the view of terminating the dairy business and the leases. To use Winfield's words, he wanted to get rid of all the leased cattle. The Trust was not in a position to comply with its obligation in the various leases to return the leased cattle to the lessors as it possessed a lesser number of cattle than what it received from the individual lessors. The reason for the Trust finding itself in that position appears to be that it at some point in time, due to adverse conditions brought about by a drought, and the consequential additional costs of feeding the

animals, the decision was made, with the consent of the lessors, to reduce the number of the cattle by disposing of cows that were less productive.

20) On 25 August 2011 at a meeting attended by Winfield and some of the lessors it was agreed that the lease agreements be terminated, that the lessors sell all the cows on auction, and that the proceeds be divided amongst the lessors on a *pro rata* basis. The idea of an auction was later abandoned in favour of a division of all the cattle between the various lessors.

21) The agreement dealing with the farm equipment was in turn concluded in writing on 31 August 2011. Winfield and the appellant were the signatories thereto. The document is entitled **"voluntary surrender."** In clause 1 Winfield and the Trust acknowledged their indebtedness to the appellant **"for various amounts in respect of, *inter alia,* rental owing in terms of written agreements of lease."** Clause 2 recorded that a notarial bond had been entered into, listing the movable assets that served as security.[8] Clauses 3 and 4 then provided that:

- **"We have fallen in default of payment of the DEBT.**
- **JACKSON, by virtue of the Bond, is entitled to take all or some of the movable assets encumbered by the Notarial Bond into pledge.**
- **JACKSON has agreed that in the event of the DEBT not being repaid by the due date then the value of the items listed above, being agreed on as being R310,000 will be deducted from the CAPITAL value of the herd outstanding.**
- **Ownership of the items will pass to JACKSON".**

The document ended with the words **"NOW THEREFORE:**

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[8] See paragraph [8] above.

We hereby voluntarily deliver to JACKSON the assets to be held in pledge as security for the payment of the DEBT."

Are the agreements impeachable transactions as envisaged in the Insolvency Act?

22) As stated, the respondents sought to set aside the agreements in terms of sections 29, 30 and 31 of the Act. These sections provide for the setting aside of a disposition:

(a) having the effect of preferring one creditor above another (voidable preference);

(b) intended to prefer one creditor above another (undue preference); and

(c) made in collusion with another person and having the effect of prejudicing creditors **(collusive dealing)**.

Section 29

23) Section 29(1) reads as follows: **"Every disposition of his property made by a debtor more than 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."**

24) From a reading of section 29(1) it is clear that in order to succeed with a claim in terms of the section, the trustee in an insolvent estate is required to allege and prove[9] that:

(a) the debtor made a disposition of his property;

(b) the disposition was made not more than six months before the sequestration of the insolvent's estate;

(c) the disposition had the effect of preferring one of the insolvent's creditors above another; and

(d) immediately after the disposition was made, the insolvent's liabilities exceeded the value of his assets.

25) Once the trustee has proved the four requirements in section 29, a disposition is presumed to confer a preference of one creditor above another, unless the person in whose favour the disposition was made can prove that:

(a) the disposition was made in the ordinary cause of business; and

(b) it was not intended to prefer one creditor above another.

The creditor is required to prove both requirements in order to avoid a claim in terms of section 29(1).[10]

Section 30

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[9] *Simon NO & Others v Coetzee* [2007] 2 All SA 110 (T) at 112.

[10] *Paterson NO v Trust Bank of Africa Ltd* 1979 (4) SA 992 (A).

26) In terms of section 30(1) an undue preference is a disposition made by a debtor of his property **"with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition."**

27) A trustee an in insolvent estate who seeks to set aside a disposition as an undue preference must accordingly allege and prove[11]:

(a) that there was a disposition of property;

(b) at a time when the insolvents liabilities exceeded his assets; and

(c) that the disposition was made with the intention of preferring one of his creditors above another.

Section 31

28) Under section 31(1) the court may, after the sequestration of the debtor's estate "**set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another."**

29) What distinguishes a disposition in terms of section 31(1) from voidable and undue preferences is the element of collusion, and that the trustee in the insolvent estate may in addition to setting aside the disposition, recover from any person who was a party to such collusive disposition any loss which the disposition caused to the insolvent estate, and a penalty in an amount determined

[11] *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 177.

by the court.[12] The compensation and penalty may be recovered in the action to set aside the disposition.[13] A creditor who was a party to a collusive transaction is further penalised by forfeiting his claim against the insolvent estate.[14]

30) To succeed with an action under section 31(1), the trustee in the insolvent estate must allege and prove[15] the following:

(a) the insolvent made a disposition of his property;

(b) the disposition was made in collusion with another person; and

(c) the disposition had the effect of prejudicing creditors or preferring one above another.

The issues in the appeal

31) It is evident that the requirements for the setting aside of a transaction in terms of the three sections overlap, with the result that in practice it may fall into more than one category. In the grounds of appeal the issues for decision raised by the requirements of sections 29 to 30 were narrowed down to the following questions:

(a) whether the agreement in respect of the cattle was a disposition of the property of the Trust **(as envisaged in sections 29(1), 30(1) and 31(1))**;

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12 Section 31(2).
13 Section 31(3).
14 Section 31(2).
15 *Louw NO v DMA Fishing Enterprises (Pty) Ltd and Another* 2002 (2) SA 163 (SECLD) at 165 E-F. The reference in the judgment to section "36" is incorrect, and should read "31". See generally Sharrock *et al* **Hockley's Insolvency Law** 9th ed at page 147.

(b) whether the agreement in respect of the equipment;

(i) had the effect of preferring one creditor above another **(section 29(1))**;

(ii) was a disposition made in the ordinary course of business, and was not intended to prefer one creditor above another **(the proviso to section 29(1)**); and

(iii) was a disposition made with the intention of preferring one creditor above another **(section 30(1))**;

(b) whether the two agreements were collusive dispositions **(section 31(1)).**

A disposition of his property

32) The requirement that the insolvent made a disposition of his property is a requirement common to sections 29, 30 and 31 of the Act. Although section 31(1) refers to a collusive **"transaction"** as opposed to a **"disposition"**, the difference in the use of terminology does not appear to be of any significance, as in the very next subsection, the juristic act contemplated in subsection (1) is referred to as a **"collusive disposition."** What constitutes a disposition is defined in section 2 of the Act: **"Disposition means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include disposition in compliance with an order of the court; and "dispose" has a corresponding meaning."** **"Property"** is in turn defined as to include **"movable or immovable property . . . and**

includes contingent interests in property other than the contingent interests of a *fideicommissary heir* or *legatee.*"

33) The definition of **"disposition"** is very wide[16]. It is wide enough to take the form of a contract that creates rights and obligations. It is certainly wide enough in the present matter to include, in the case of the livestock, its surrender to the lessors to be used for their own benefit, and in the case of the equipment, the delivery thereof to the appellant in terms of the agreement concluded on 31 August 2011. The issue for determination was whether it constituted a disposition of the **"property"** of the Trust within the meaning of section 29(1). That the Trust was the owner of the equipment was not disputed. What was in dispute was the Trust's ownership of the livestock. As stated earlier, the respondents' case was that the livestock appropriated by the appellant included livestock owned by the Trust. The appellant in turn denied that the Trust owned any livestock.

34) The findings of the trial court were that it was more probable than not that the Trust owned a large number of the cattle that were distributed among the lessors on 7 September 2011, and that **"for the most part"** the cattle that the appellant received were the property of the Trust. In arriving at this finding the trial court dealt with two issues that arose in the context of the requirement in Section 29 to 31 that the disposition must be in respect of the property of the insolvent. The first issue was raised by the appellant's defence that the Trust did not own any cattle. It was premised on the contention that the Trust did not

[16] *de Villiers NO v Kaplan* 1960 (4) SA 476 (C) at 479H.

acquire ownership of the progeny of the cattle it had leased from him. The reasoning was that in the absence of a clause in the lease agreement that the Trust was entitled to the progeny of the cattle, ownership of the progeny vested in him by virtue of his ownership of the cows.

35) The trial court quite correctly rejected this reasoning. The general principle of the common law is that the ownership of a young animal is vested in the owner of its mother who is *prima facie* entitled to the *ius fruendi*.[17] There are however exceptions to this general principle. A recognised exception to the general principle is where the mother of the young animal is the object of a lease. In *Morkel v Malan*[18] the court explained it as follows: **"When he leased the cows to plaintiff he intended, and Truter knew that he intended, to make use of the cows in connection with the dairy farms on the portion of Hansrivier which he had hired from Truter. The lease was to be of indefinite duration. It was known that calves would be born during the period of the lease and both parties contemplated that such calves, if not made away with at birth, should remain with their mothers and be reared by them. Moreover plaintiff had to replace cows which died. Ordinarily a mere lessee would not have to do that, but a usufructuary would have to do so (see Justinian's *Institutes*, Sohm's Trans, p. 125. Plaintiff's rights under the lease were not limited or confined to taking the milk of the cows. He had the right to the enjoyment of the benefits accruing to him from these cows whilst he had them on Hansrivier and used them in connection with his dairy farming operations. Just as a sheep farmer derives profits from the increase of the sheep**

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[17] Voet *Commentarius ad Pandectas 41.1.15*; Van der Linden *Koopmans Handboek 1.7.2*; and Grotius *Inleidinge tot de Hollandsche Rechtsgeleerdheid 2.10.1*.

[18] 1933 CPD 370 at 375. Also Badenhorst *et al* **The Law of Property 5th** at page 142, and *Inst* 2.1.36 – 37; Voet *Commentarius ad Pandectas*; Van Leeuwen Koopmans Handboek. See also *Tucker v Farm and General Investment Trust Ltd* [1966] 2 All ER 508 CA at 512 where the court concluded, with reference to the decision of *Morkel and Malan*, that **"the common law and civil law as to the ownership of the progeny of domestic animals are the same."**

with which he farms, so does the dairy farmer benefit and profit from the young born to his cattle. As *Salkowski* (Roman Private Law – Whitfield's Trans., p. 410), says: "The fruits are acquired by the usufructuary and the lessee through perception (taking possession) upon the ground . . . of the privilege in respect of the produce assured to him by the owner."

36) The position is therefore that unless the lease between the Trust and the appellant provided to the contrary, the young born to the cows during the existence of the lease belonged to the Trust. There is accordingly no room for an implied term in the lease that the progeny belonged to the appellant. There is also in my view nothing that may lend support to the existence of a tacit term to that effect.

37) The second issue that arose in the context of the ownership of the cattle was the appellant's contention that Winfield on 6 September 2011 identified and handed 149 cows over to him as his property. The trial court found no merit in the contention, and on the probabilities accepted the evidence of Winfield that what took place on that day was simply a stock count for purposes of the distribution of the cattle the next day. This finding is correct. The reason lies simply in the fact that, except for a few, the dairy cows were not individually identifiable as belonging to any particular lessor. It is evident from Winfield's evidence that over the course of time, and as a result of circumstances, neither he nor the lessors dealt with the dairy cows on the farm as individually identifiable animals owned by any particular lessor, but rather collectively as a single herd. This conclusion,

which will be more fully dealt with later in this judgment, is inconsistent with any need to identify and point out individual animals as belonging to the appellant.

38) Did the respondents prove that the cattle which the appellant received were the property of the Trust? They were clearly not in a position to prove that all the cattle received by the appellant belonged to the Trust. What they set out to prove, and what the trial court found, went no further than that some of the cattle belonged to the Trust, some to the appellant, and same to the other lessors. That finding in itself can similarly not be faulted. The evidence shows that 4 of the cattle pointed out by Winfield on 6 September 2011 could positively be connected to the individual animals identified in the lease with the Trust as forming part of the leased herd, and could as a result never have belonged to the Trust. Further, the lease was in respect of dairy cows, and it is common cause that of the 163 cattle received by the appellant only 92 were cows. The rest consisted of heifers and calves that were progeny, and for the reasons mentioned earlier,[19] were the property of the Trust.

39) The finding that the Trustees have proved that some of the cattle received by the appellant belonged to the Trust, raises the question whether the respondents have discharged the burden of proving a disposition of the property of the Trust as envisaged in sections 29 to 31 of the Act. Put differently, did it entitle the respondents to an order that the appellant must return all the cattle that were received by him? It was submitted on behalf of the appellant that it does

[19] See paragraphs [35] to [36] above.

not, and that the respondents have failed to discharge the burden of proving which of the animals delivered to the appellant actually belonged to the Trust.

40) The trial court found that it was not possible to determine who owned which animal; that the appellant was not able to show that he was the owner of all the cattle received by him; and that **"for the most part",** the cattle were the property of the Trust. The difficulty with this finding is twofold: firstly, it does not reflect the fact that the legal burden of proof rested on the respondents to prove that the transaction involving the cattle was a disposition of the property of the Trust, and secondly, it does not account for all the evidence. Winfield's evidence, which the trial court preferred to that of the appellant, was that all the cows belonged to the lessors, but that the heifers were the property of the Trust. He was asked in his evidence-in-chief whether any of the cattle that were taken to a neighbouring farm before they were divided among the lessors belonged to the Trust. His answer was **"yes, the heifers"**. It was thereafter again raised with him. **"Not all the animals belonged to the lessors, did they? – Not of the young heifers, no."** It was also raised with him in cross-examination. Again he confirmed that only the heifers belonged to the Trust. **"Potentially all that was the Trust's property on that day were some heifers. Everything else belonged to one or the other of the herd owners. That's right."** He was referred to the list of the cattle that were divided among the lessors, to which he responded that the bigger and smaller heifers belonged to the Trust. The reason according to him was **"Because they would have been the progeny from the herd that I had leased from Mr Jackson - and others."**

41) Winfield was the respondents' witness. Except for the appellant, whose evidence was rejected, there were no other witnesses who controverted Winfield's evidence. As a general rule a party is bound by the testimony of his own witness.[20] The rule is not without exception. It is open to the party calling the witness to show that his evidence is inherently improbable or is self-contradictory, or is false or mistaken by calling additional witnesses or presenting other competent evidence.[21]

42) Winfield's evidence that the cows were the property of the lessors is, on a reading of his evidence as a whole, not inherently improbable or irreconcilable with the rest of his evidence. He was the only person who was realistically in a position to testify with regard to the ownership of the cattle that were on the farm. The appellant acknowledged in his evidence that Winfield's failure to comply with his contractual obligation to keep proper records made it impossible for him to identify his own cattle. The position of the other lessors would have been no different. Winfield's evidence must be assessed against the background that over time the number of leased cattle were reduced. His evidence was that during the drought, with the consent of the lessors, some of the cows were sold. His failure to keep a record of the animals further meant that he and the lessors were unable to identify any specific animal as belonging either to the appellant or to any of the other individual lessors.

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[20] Ergo, the rule of evidence that a party may not impeach the credibility of his own witness. *R v Wellers* 1918 (TPD) 234 at 237.

[21] See Schwikkard & van der Merwe **Principles of Evidence** at page 365 and 455 to 459 and Zeffertt and Paizes **The South African Law of Evidence** 2nd ed at page 901 and further.

43) In our law a collection of individual objects may for certain legal purposes be regarded as a single unit without losing their separate legal existence. While ownership vests for example in the individual animals that make up a herd of cattle, or a flock of sheep, the aggregate of the animals is recognised as forming a single economic unit that may be sold, leased or be the object of a pledge or a usufruct.[22] Assessed in the context of the prevailing circumstances at the time, Winfield's evidence lends support to the conclusion that the cattle on the farm were regarded a forming part of a single herd, and that the lessors were the owners or the joint owners, proportionally to the number of the cattle leased to the Trust in terms of their respective leases, of the individual cattle that made up the herd.[23] Winfield referred to the cows as having formed part of a **"pool"** of animals. When asked if he was able to identify the individual animals on the farm, he said that **"we would rebuild once the drought was over and we rebuild the herd."** Except for 70 cattle that belonged to a Mr Owen **(Owen)** and was **"brought in to try and freshen up the herd and bring some better producing cows in,"** the remainder of the animals were clearly dealt with by the lessors as a single unit or entity.

44) Other evidence that lends support to such a conclusion is the following: When during the currency of the leases the lessors agreed that some of the cows

[22] Other examples are a swarm of bees, a library and stock in trade. See Badenhorst *et al* Silberberg and Schoeman's **The Law of Property** 5th ed at page 42 to 43; van der Merwe **Sakereg** 2nd ed at page 38, and du Bois Wille's **Principles of South Africa Law** 9th ed at page 420. Badenhorst *et al* in Silberberg and Schoeman's **The Law of Property** 5th ed at page 42 criticise the notion that ownership cannot vest in the collection of similar things as being the result of casuistic historical development, and that there is no reason why a collection of things, recognised as such, should not be regarded as forming an entity in law in all circumstances where it is sought to be dealt with as such. The criticism is not without merit.

[23] *Burger v Rautenbach* 1980 (4) SA 650 (C) at 652F to 653A. Also Van der Merwe **Sakereg** 2nd ed at page 38 and Badenhorst *et al* Silberberg and Schoeman's **The Law of Property** 5th ed at page 42 to 43.

may be sold, there is no evidence that it was done in respect of animals that were identified as being owned by any particular lessor. Further, after the leases were terminated, it was initially agreed that the dairy cows were to be sold by the lessors on auction and that the proceeds will be shared among them. It was later decided to simply divide the animals among the lessors. In both instances, it was without any reference to ownership in respect of any of the individual animals.

45) Winfield was further well aware of his obligation to augment the herd. Although he did not physically mark an animal as replacing a cow of any of the individual lessors, he, on an on-going basis appear to have replaced the cows in the herd consisting of the aggregate of the cows received by the Trust from the individual lessors. His evidence was that as he had leased a certain number of cows, that number had to stay the same. **"Then I reduce my own numbers and I fill those numbers with one of my cows,"** or one of the progeny **"as they became the right age for that."**

46) When asked what happened to the 100 or so cattle that he had before he moved to the farm Diepriver, Winfield answered that **"well some had died, some had been culled out, like I said, and they became part of the leased cows."** Asked in his evidence in chief whether all the animals on Diepriver belonged to the lessors, Winfield answered **"not of the young heifers, no",** and that the **"young heifers"** were not ready to be allocated in replacement of redundant animals because **"they weren't pregnant, they weren't at the stage that I could replace them."**

47) In cross-examination Winfield was asked whether it was correct that the appellant kept on asking him if he had marked his animals as he was obliged to

do in terms of the lease agreement. His answer speaks to the manner in which he dealt with the leased animals. **"I said that they were all part of the herd. It's impossible to keep track of his individual cattle because they come and go in the herd."** According to Winfield, the appellant then went through the herd with him and he was satisfied with what he had found. As stated, the 70 cattle belonging to Owen were brought onto the farm for the purpose of improving the quality of the herd. That could only be achieved by strengthening the herd of dairy cows from the progeny of Owen's cattle. The 70 cattle belonging to Owen appear to have been kept separate from the rest of the herd.

48) There existed no obstacle in law to the Trust having augmented the number of cattle leased to it from its own stock. Augmentation would have meant that Winfield had to transfer ownership of one of his own cows to the lessors. The legal requirements for the transfer of joint ownership to the lessors must not be equated with the contractual obligation of the Trust in terms of the lease agreement to augment the leased herd and to mark the animals by tagging or branding, or to keep a record of the cattle comprising the herd. **"The ownership of movable property does not in our law pass by the making of a contract."**[24] The transfer of ownership required no formalities. All that was required was delivery with the required attention. Ownership of movable property **"passes when delivery of possession is given accompanied by an intention on the part of the transferee to receive it."**[25]

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[24] *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 398.

[25] *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 398; *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922 E-F and *Dreyer and Another*

49) In the context of the present matter, the augmentation of the dairy cows took place in compliance with the Trust's obligation to augment the dairy cows in terms of the lease agreement. It meant that the owner of the movable property, namely the Trust, was in possession of the property, and continued to exercise physical control over it as a lessee in terms of the lease.[26] The requirements for this form of delivery, known as *constitutum possessorium* are the following:[27]

> **"(a) If ownership is transferred, the transferor must be owner and in possession of the relevant thing at the moment of transfer.**
>
> **(b) The transferor must cease to possess in his or her own name and begin to possess for the transferee.**
>
> **(c) The transferee must consent that the transferor retains possession.**
>
> **(d) A distinct *causa detentionis* is essential. There must be a clearly proved contractual relationship under which the transferor becomes the detentor for the purchaser."**

50) The provisions of the Co-operatives Act similarly did not prevent the augmentation of the dairy herd. The relevant section in the context of this matter is section 4(2)(a) and (b) of Part 4 of the first Schedule. Paragraph (a) provides that**: "If a co-operative gives assistance to a farmer or member – (a) the products produced or acquired by the farmer or member are deemed to be pledged to the co-operative as if they were delivered to the co-operative, under the principles applicable in**

NNO v AX25 Industries (Pty) Ltd 2006 (5) SA 548 (SCA) at para [17]. See generally Joubert (ed) **The Law of South Africa** 2nd ed vol 27 at para 209.

[26] *Voet Commentarius ad Pandectas* 41.2.13.

[27] Badenhorst *et al* – Silberberg and Schoeman's **The Law of Property** 5th ed at page 188.

the law of pledge in the Republic". The fact that the cattle or its progeny[28] that belonged to the Trust may, in terms of the Co-operatives Act, be considered to have been **"produce"** that was deemed to have been pledged to the Co-operative, did not affect the capacity of the Trust to transfer ownership. The reason lies in the nature of a pledge. A pledge creates a limited real right in a movable asset of another delivered to the pledgee pursuant to an agreement between the pledgor and the pledgee, or, as in the present case, a statutory provision, as security for the fulfilment of an obligation due by the pledgor to the pledgee. It affords the pledgee the right to the proceeds of the pledged article in a sale of execution, and the pledgee ranks as a secured creditor in respect of the proceeds of such article upon the insolvency of the pledger.[29] Subject to the *nemo plus iuris* rule, the pledge does not prevent the transfer of ownership in the subject matter of the pledge. The pledgee is not the owner thereof, and he only enjoys a *ius in re aliena* in respect thereof.[30] That is also the position in the case of a statutory pledge.[31]

51) Paragraph (b) of section 4 in turn provides that if a Co-operative gives assistance to a farmer "**the farmer or member is prohibited from selling the products referred to in paragraph (a) or using them as security to a third party without the written consent of the co-operative."** Assuming that the augmentation of the herd was a sale

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[28] *Burger v Rautenbach* 1980 (4) SA 650 (C) at 652H to 653B.

[29] Badenhorst *et al* – Silberberg and Schoeman's **The Law of Property** 5th ed at page 393; **Van der Merve Sakereg** 2nd ed at page 650 to 651; Jobert (ed) **Law of South Africa** vol 17 at para 474, and *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) at 611H.

[30] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 242 and *Krapohl v Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) at 863B – C.

[31] *Krapohl v Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) at 863B-C and 865J – 866A.

for purposes of the Co-operatives Act,[32] the prohibition against the sale by a farmer of the produce produced by him, could similarly not prohibit the transfer of ownership of the Trust's cattle in compliance with its obligation in the lease to augment the dairy cows. In *Krapohl v Oranje Koöperasie Bpk*[33] the court dealt with a similar provision in the Act that preceded the Co-operatives Act, and found that at the very most, it prohibits the juristic act whereby the pledgor attempted to dispose of the produce.[34] According to our law, that recognises an abstract system of transfer of ownership, all that is required for the transfer of ownership is the mutual intention of the parties to do so. A valid underlying legal transaction is not required for the passing of ownership. The invalidity of the transaction underlying the transfer of ownership in the cattle that belonged to the Trust could consequently not affect the validity of the transfer of ownership.[35]

"Otherwise stated, the validity of transfer of ownership is not dependent on the validity of the underlying transaction, such as, in this case, the contract of sale."[36]

52) I am accordingly satisfied that there exists no compelling reason, or any obstacle in law, not to accept Winfield's evidence that, except for the heifers and the younger animals, the cattle handed over to the lessors belonged to them. It therefore follows that it is only to the extent that the cattle delivered to the lessors included the heifers and the younger animals, that the agreement in respect of the

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[32] There does not appear to be any compelling reason why the word **"sell"** should not be given its ordinary meaning.

[33] 1990 (3) SA 848 (A).

[34] At 864 D – H. See also *Lesedi v Vaalharts Agricultural Co-op* 1993 (1) SA 695 (NCD).

[35] *See Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 398 – 399; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at para [17]. *Legator McKenna v Shea* 2010 (1) SA 35 (SCA).

[36] Brand JA in *Dreyer and Another NNO v AX25 Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at para [17].

livestock constituted a disposition of the property of the Trust as contemplated in sections 29 to 31 of the Act.

53) Counsel for the respondents in argument invited this court to consider the proposition that the termination of the lease by the Trust constituted a disposition as envisaged in sections 29 to 31. It may very well be that the termination of the lease was an **"abandonment of rights"** as envisaged in the definition of a disposition in the Act. It is certainly wide enough, and must be read with the definition of **"movable property"**, which means every kind of property and every right of interest which is not immovable property.[37] A lease is an asset in the insolvent estate[38], and the cancellation thereof may embrace the abandonment of a right of interest. However, the difficulty facing the respondents is that it was not their pleaded case. It was consequently not considered or dealt with by the trial court, and more importantly, there is no evidence to prove what the value of the lease or of the use of the dairy cows was to the business of the Trust, as opposed to simply the value of the cows.

A disposition that prefers one creditor above another

54) Was the effect of the disposition of the equipment to prefer one creditor above another as envisaged in sections 29(1) and 31(1)? It was submitted on behalf of the appellant that the agreement to surrender the equipment did not, and could not have had the effect of preferring the appellant above other creditors as

[37] Section 2 of the Act.
[38] *Hoosen v Mendelsohn and Others* 19 NLR 40.

required by section 29. This submission was premised on the fact that the appellant was a secured creditor and deemed to be a pledge by virtue of the registration of the bond in terms of Security by Means of Movable Property Act.[39] The bond was in respect of specific corporeal movable property that was described in the bond agreement and it was consequently a special notarial bond. Its registration in terms of the provisions of the Security by Means of Movable Property Act meant that in terms of section 1(1) thereof the equipment was **"deemed to have been pledged as effectually as if they had been pledged and delivered."** Section 1(1) thus creates a fictitious pledge on registration of the bond in the bondholder's favour. It is therefore unnecessary to perfect the bondholder's security by seeking the attachment of the movables. The bondholder is considered to be a pledgee and is treated as a secured creditor.

55) The argument is in essence that the appellant did not acquire more rights than he already had in terms of the special notarial bond; that the value of the pledged equipment could never have exceeded the debt owing to him; and that the other creditors could lay no claim to the proceeds that were to be derived from realizing the equipment. In *Isaacson and Son v Van Druten's Trustee*,[40] a judgment that has consistently been followed,[41] it was held that the meaning to be attributed to the word **"preferring"** should not be confined **"to a preference as to the amount received, since a creditor may well be preferred who receives his debt before the**

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[39] Act 57 of 1993. Section 1(1) thereof reads: **"If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognizable, is registered after the commencement of this Act in accordance with Deeds Registries Act 1937 (Act 47 of 1937), such property shall – (a) subject to any encumbrance resting upon it on the date of registration of the bond; and (b) notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee."**

[40] 1930 GWLD 33 at 36.

[41] *Klerck NO v Kaye* 1989 (3) SA 669 (CPD); and *Simon NO and others v Coetzee* [2007] 2 All SA 110 (T).

other creditors are paid, even though he receives proportionately no greater amount than they do." A creditor has accordingly been preferred if the proper distribution of the assets as envisaged by the Act has been disturbed, either because he has benefited more, or he has been paid earlier than would have been the case if he had been paid after the realization of the assets in accordance with the Act.

56) This interpretation is consistent with the overriding object of the Act dealing with voidable and undue preferences to ensure that property which has left the estate of the debtor in the circumstances described, or its value, will be returned to the estate for a structured and equitable distribution amongst all the creditors by the duly appointed trustee.[42] In Hosking NNO and Other v Coetzee NNO and Others Nugent JA referred to the **"obligation owed by creditors among themselves not to disturb the equitable distribution that they are entitled to anticipate once a debtor is unable to pay all his debts."**[43]

57) It is also consistent with the position in the common law and the provisions of section 83 of the Act that deals with the position of a secured creditor post sequestration. In terms of section 83, every creditor who holds as security for his claim, any movable property belonging to the insolvent estate, must give notice in writing of that fact to the Master. In the case of corporeal movables the appointed trustee is entitled to take the property over at an agreed value, failing which the creditor may realize it subject to the directions of the trustee in the insolvent estate. The creditor must thereafter prove his claim in the ordinary manner. He must also pay over the proceeds to the trustee, and is entitled to be paid

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[42] *Standard Finance Corporation of South Africa Ltd v Greenstein* 1964 (3) SA 573 (A) at 577C – D.
[43] (499/2004) 2 ZASCA 110 (25 November 2005) at para [2].

therefrom, **provided** he has proved his preferent claim, and the trustee is satisfied that the claim was in fact secured by the property so realised.[44]

58) Section 83 gives expression to the aim of maximising the value of the assets and the preservation of the insolvent estate to facilitate the equitable and orderly distribution of the assets to the creditors. In *Venter NO v Aufin (Pty) Ltd*[45] the court explained it as follows: **"At common law a creditor who held movable property as security for his claim could not realise it himself. He had to deliver it to the trustee who had the right to administer it subject to the preference of the creditor in relation to the proceeds derived from its realisation (see *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 250). Section 83, however, permits a creditor who holds movable property as security for his claim, subject to certain limitations, to retain possession of such property and to realise it himself. But once the property is realised he must pay the proceeds to the trustee. The provisions in s 83(10) requiring him to do so are consistent with the general scheme of the Act and, to the extent that the trustee is entitled to receive such proceeds, with the common law. Viewed against this background it could not, I think, have been intended that a creditor by his own non-compliance with the provisions of the Act could notionally place himself in a more favourable position *vis-á-vis* the trustee and avoid his statutory obligation to pay over the proceeds to the trustee."**[46]

A disposition made in the ordinary course of business

[44] Bertelsman et al Mars **The Law of Insolvency in South Africa** 9th ed at page 468 to 471.
[45] 1996 (1) SA 826 (A).
[46] At 833F – 834B.

59) The appellant did not specifically plead that the dispositions of the cattle and the equipment were made in the ordinary course of business. The trial court nonetheless made a decision with regard thereto. It was correct in doing so and counsel for the respondents chose not to argue otherwise. During argument in the trial court application was made for the necessary amendment to the pleadings, and I am satisfied that the issues raised thereby were sufficiently dealt with in the evidence[47]. The trial court found that, viewed holistically, the dispositions were not made in the ordinary course of business, but rather as a consequence of the Trust's financial position at the time. This finding of the trial court cannot in my view be faulted.

60) An objective test is applied in deciding whether a disposition was made in the ordinary course of business.[48] The court must ask itself whether the disposition was one which would normally be entered into between solvent business persons, or put differently, whether the disposition conforms with ordinary business methods adopted by solvent businessmen, or whether it **"would not to the ordinary man of business appear anomalous, un-businesslike or surprising,"**[49] and **"It means that the transaction must fall into place as part of an undistinguished common flow of business done, so that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special situation."**[50]

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[47] See generally with regard to the amendment of pleadings, Erasmus **Superior Court Practice** vol 3 at A2-75 to A2–76.

[48] *Van Zyl and Others NNO v Turner and Another NNO* 1998 (2) SA 236 (C) at para [34]; *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C) at para [9] and *Gazit Properties v Botha and Others* 1922 OPD 18 at 22.

[49] *Malherbe's Trustee v Dinner and Others* 1922 OPD 18 at 22, referred to with approval in *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [29].

[50] *Downs Distributing Co Pty Ltd v Associated Blue Star Stores (Pty) Ltd* [1948] 76 CLR 463 at 477, quoted with approval in *Al-Kharafi & Sons v Pema* 2010 (2) SA 360 (W) at para [27].

Regard must be had to all the circumstances, including the terms of the disposition, the actions of the parties and the circumstances in which the disposition was made.[51] The question of an intention to prefer, and whether the debtor's liabilities exceeded his assets, are irrelevant.[52]

61) As stated earlier, in the appeal the question raised was confined to whether the disposition in respect of the equipment was made in the ordinary course of business, and was not intended to prefer one creditor above another. However, as the two agreements were closely connected in time and circumstances, I intend to deal with this question in the context of both the agreements. The agreement in respect of the livestock arose from the decision of the Trust to terminate the dairy business, and consequently the lease agreements with the respective lessors. In terms of its lease with the appellant, upon its termination the Trust was obliged to return the augmented herd and to repurchase the herd at a predetermined purchase price.[53] The Trust was unable to return the herd as contemplated in the agreement, and it was also not in a financial position to purchase any of the animals from the appellant. The surrender of the livestock to the appellant that did not, and could not form part of the augmented herd, could not constitute a

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[51] *Van Zyl and Others NNO v Turner and Another NNO* 1998 (2) SA 236 (C) at para [34].

[52] *Van Zyl and Others NNO v Turner and Another NNO* 1998 (2) SA 236 (C); *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (C); *Hendriks NO v Swanepoel* 1962 (4) SA 338 (AD) at 342H and *Van der Walt NO v Le Roux NO* [2004] 4 All SA 476 (O) at 485.

[53] Clause 16 of the agreement: **"PURCHASE OF HERD: 16.1 At the termination of the LEASE for whatever reason, the TRUST shall: (a) Return the HERD to DONALD, augmented where necessary in compliance with the provisions of paragraph 12; (b) Re-purchase the HERD from DONALD for a value of R2 074 000 (Two Million and Seventy Four Rands) (excluding Vat). 16.2 Payment of any amount owing by the TRUST to DONALD in terms of this Clause shall be effected subject to the following – (a) All Vat payable in respect of the sale of the HERD shall be paid by the TRUST; (b) Payment of the price plus VAT shall be effected within seven days of termination of the LEASE; 16.3 Delivery of the HERD to the TRUST shall be effected against payment by ALISTAIR of all amounts owing to DONALD in terms of the LEASE and the repurchase of the HERD, and if the TRUST fails to effect payment timeously, DONALD shall be entitled to sell the HERD to any third party, to offset the proceeds against any amount owning to DONALD and to claim any shortfall on the sale price realized as a result of the sale of the HERD, costs or damages incurred in so doing from the TRUST."**

transaction aimed at complying with the terms of the lease, as was contended on behalf of the appellant. It could only have been a transaction outside the terms of the lease, aimed at reducing the indebtedness of the Trust arising from its failure to comply with the terms of the lease agreement.

62) In the absence of a determination of the extent of the Trust's indebtedness to the appellant, and the other lessors, and how its surrender of the livestock to the lessors would serve to either reduce or eliminate its indebtedness, the transaction can hardly be regarded as one in the ordinary course of business entered into between a creditor and debtor. It is **"unusual and anomalous"** for a debtor to simply surrender his property to his creditors to deal therewith as they please.

63) Another factor is the fact that the agreement in respect of the livestock was concluded in circumstances where the Trust was unable to comply with its contractual obligations, and found itself in a position where it was unable to bargain with the lessors which it would have been if the transaction had been concluded in the ordinary course of business. It clearly had very little option but to agree to the terms which seemed to have been dictated by the lessors. To this extent the evidence suggests that the decision to surrender the livestock to the lessors, and not to wait until a later date as initially agreed, and to sell the livestock on auction, was initiated by the fear of the appellant and the other lessors that the Co-operative may have a claim in respect of the livestock arising from its statutory pledge. Although the transaction in respect of the cattle was set

in motion by the decision of the Trust to cancel the lease agreement, it was not in the ordinary course of the Trust's compliance with the terms of the lease. Rather, the terms of the disposition arose from what Malan J in *Al-Kharafi & Sons v Pema and Others*[54] described as a **"special situation,"** that is, it was dictated by the prevailing circumstances.

64) That brings me to the agreement in respect of the equipment. The trial court concluded that it was a simulated transaction amounting to nothing more than a disguised sale and set-off. While I agree with the result, the reason lies elsewhere. On a reading of the document recording the terms of the surrender of the equipment to Jackson, it is evident that its purpose was twofold, namely to create a pledge as security for the Trust's indebtedness said to arise *inter alia* from its failure to pay the rental in terms of the lease agreement, and in the event of its failure to pay the outstanding debt, to secure ownership of the equipment by deducting the value of the equipment from what is referred to as the capital value of the herd.

65) A notarial bond does not, by operation of law, confer the right to take possession of the assets burdened by it.[55] The right of a creditor to do so is derived from the carrying into effect of a contractual provision in the bond agreement itself, known as a perfection clause. A perfection clause amounts to an agreement to create a pledge in respect of the bonded property and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real

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[54] 2010 (2) SA 360 (W) at para [27].
[55] *Eerste Nasionale Bank van Suid Afrika Bpk v Schulenburg* 1992 (2) SA 827 (T).

right of security.[56] The notarial bond agreement in the present matter entitled the appellant to apply to court for an order for the delivery of the equipment should the Trust refuse to give it possession thereof on demand. While the termination of the lease agreement placed the Trust in default as envisaged in the notarial bond agreement, which in turn authorised the appellant to demand and receive the bonded property to perfect his security, it did not also entitle him to the ownership thereof. To the extent that the agreement in respect of the equipment made provision for the transfer of ownership of the equipment to the appellant, it accordingly fell outside the purview of the bond agreement, and it could consequently not have been an exercise by the appellant of his rights in terms of the bond agreement, thereby constituting an ordinary business transaction, as was contended on his behalf in argument.[57]

66) The existence of a perfection clause in the bond agreement, or the creation of a pledge by the Security by Means of Movable Property Act, did however not prevent the parties, upon the default of the Trust of its obligations in the bond agreement, to conclude an agreement with regard to the bonded property at variance with the bond agreement, which agreement may, judged objectively, be in the ordinary cause of business.[58] Such an agreement may take the form of a pledge agreement and / or, what is effectively a conditional sale, that is, that the pledgee takes over the subject of the pledge at a fair price.[59] The agreement

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[56] *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) at paras [3] to [4].
[57] Compare *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA).
[58] *Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613 (T) at 616D–G and *Bock and Others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA) at para [6] to [9].
[59] *Graf v Buechel* 2003 (4) SA 378 (SCA) para [9] to [11].

would be a fresh agreement, and the exercise of a creditor of his rights in terms thereof would be outside the rights conferred on him by the bond agreement, or the security provided by the Security by Means of Movable Property Act.[60]

67) *Prima facie* the agreement in respect of the equipment embodied an agreement of pledge, as security for the Trust's indebtedness to the appellant, and a conditional sale of the pledged equipment. That a solvent debtor may give a pledge or other form of security to a creditor will ordinarily constitute an ordinary commercial transaction.[61] The same applies in respect of a conditional sale of the pledged property. As stated by Harms JA in *Bock and Others v Duburoro Investments (Pty) Ltd,*[62] **"An agreement whereby a creditor may keep a pledge upon the debtor's default – at a fair price then determined is similar to a conditional sale. Such an agreement is valid and, in relation to the pledging of shares, known since at least 1892. It does not differ much in kind from a *lex commissoria* or forfeiture clause which, typically, permits a creditor to keep what was received from a debtor in the event of the cancellation of an agreement."**

68) The question whether the agreement constituted a transaction in the ordinary course of business must, as in the case of the agreement in relation to the livestock, be determined with reference to the circumstances in which it was concluded, rather than its nature or the terms thereof. The relevant circumstances were the following: Winfield acted under pressure from the appellant who felt threatened by the Co-operative's statutory pledge; Winfield found himself on an unequal footing with the appellant by reason of the precarious financial position

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60 *Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613 (T) at 616E.
61 *Malherbe's Trustee v Dinner & Others* 1922 OPD 18 at 23.
62 [2003] 4 All SA 103 (SCA) at para [9].

of the Trust; the agreement was ineffectual in providing additional security, as it was in respect of an existing debt, and at time when the Trust was already not in a position to meet its financial obligations in terms of the lease and the bond agreement, and found itself in insolvent circumstances;[63] and the surrender of what was farming equipment can ordinarily be expected to have impacted negatively on the business of the Trust.

69) As in the case of the transaction involving the cattle, it was a transaction that arose from the situation in which the Trust found itself rather than what was part of the ordinary flow of business. I am accordingly satisfied on the evidence that the appellant has failed to discharge the burden of proving that the dispositions in respect of the relevant portion of the livestock and the equipment were dispositions made in the ordinary course of business. The dispositions were accordingly voidable preferences as envisaged in section 29(1) of the Act, and the respondents were entitled to an order setting them aside.

70) In the light of this conclusion it is not necessary to also consider whether any of the dispositions had the effect of preferring one creditor above another as envisaged in section 30(1), or whether it was the intention of the Trust to prefer one creditor above another as envisaged in the second leg of the enquiry in terms of section 29(1), or as a requirement in section 30(1) for proving that the agreement in respect of the equipment constituted an undue preference. What remains to be considered is whether the respondents have proved that both the

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[63] *Van der Westhuizen's Trustee v Van der Westhuizen* 1923 CPD 70; *De Klerk's Trustee v Clarke* 1923 EDL 73 at 79 and *Hill NO v Standard Bank* 1929 SWA 62.

agreements in respect of the cattle and the equipment were collusive dispositions as envisaged in section 31(1) of the Act.

Collusive disposition which prejudices creditors or prefers one creditor

71) A collusive disposition in the context of which it is used in section 31(1) means an agreement which had a fraudulent purpose, and not merely an agreement which had the consequence that one creditor is preferred above another. **". . . collusion is a conniving together between two persons – in this case the insolvent and the defendant – to practice a fraud on the creditors. In other words, was it the intention of the insolvent and the defendant in this case, the one to give and the other to obtain an undue preference for the defendant to the prejudice of the other creditors; that is to say in the common parlance, to do the other creditors at of their rights?"**[64]

72) To establish a collusive dealing there must accordingly be proof that two minds were concurring to defraud the creditors.[65] There is no direct evidence that Winfield and the appellant agreed to defraud a creditor. The *onus* was on the respondents to prove on a balance of probabilities that there was collusion.[66] In the absence of direct evidence, the question is whether the inference of collusion is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn from the evidence and the actions of

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64 *Finn's Trustees v Prior* 1919 EDC 133 at 137 quoted with approval in *Gert de Jager (Edms) Bpk v Jones NO en McHardy NO* 1964 (3) SA 325 (A) at 331 and *Meyer NO v Transvaal se Lewendehawe Koöperasie Bpk en Andere* 1982 (4) SA 746 (A) at 771C – E, and *Coetzer v Coetzer* 1975 (3) SA 931 (E) at 936D. See further *Estate van der Westhuizen v van der Westhuizen* 1923 CPD 76, and *Hill NO v Maria Christ* 1927 SWA 50 at 58.

65 *Estate Van der Westhuizen v Van der Westhuizen* 1927 CPD 76 and *Hill NO v Maria Christ* 1927 SWA 50. See also Bertelsman et al Mars **The Law of Insolvency in South Africa** 9th ed at page 274.

66 *Bagus v Estate Moosa* 1941 AD 63.

Winfield, the appellant and the other lessors.[67] The probabilities in the present context are also to be assessed against the consideration that in cases that involves fraud or other serious criminal conduct, the reasonable mind is naturally not so easily convinced, as the probabilities against criminal or immoral conduct are stronger than they are against conduct which is neither criminal nor immoral.[68]

"In accordance with general principles, if an inference of an innocent motive as opposed to an improper one can be drawn, this should be done." [69]

73) I am not convinced that the inference of an intention to collude was justified in the circumstances of the case. The trial court placed emphasis on the fact that Winfield co-operated with the appellant and the other creditors, and that he agreed to deliver the equipment to the appellant at a time when he and the appellant were aware that the Trust was insolvent. The question is whether the respondents succeeded in proving that Winfield connived with the appellant and the other lessors with the intention of performing a transaction that was known by the parties thereto to be unlawful or dishonest. The questions of two minds concurring, and an intention to defraud is a question of fact, and must be decided by the evidence.

74) Being a question of intention, it involves a subjective assessment of Winfield's actions in making the agreements with the appellant and the lessors. It is not sufficient that the circumstances show that he should have realised that the

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[67] *A A Onderlinge Assuransie Associasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614E – H; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C – E; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 519C – D and *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1027E – 1028D.

[68] *Bagus v Estate Moosa* 1941 AD 63; *Baldachin's Trustees v Sloman & Sloman* 1944 SR 55 at 60. Bertelsmann et al Mars **The Law of Insolvency in South Africa** – 9th ed at page 275.

[69] Zulman JA in *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [12].

agreements would have the effect of prejudicing creditors or preferring one above another, or that he was reckless with regard thereto. It must be shown as a fact that he intended to make the agreements with a fraudulent purpose. In *Meyer NO v Transvaalse Leuendehawe Koöperasie Bpk en Andere*[70] the court dealt with a factual circumstance similar to the present matter, and emphasised, with reference to the aforementioned passage in *Finni's Trustees v Prior*[71], that **"collusion"**, in the context in which it is used in section 31 means, " **'n ooreenkoms wat n bedreiglike oogmerk het en nie bloot 'n ooreenkoms wat die gevolg het dat een skuleieser bo 'n ander beoordeel word nie**."

75) The facts which the trial court relied on must be weighed against Winfield's evidence, which is supported by the correspondence and other documentation put up in evidence, that he advised the appellant and the lessors that the Trust was indebted to the Co-operative, and that it was a secured creditor in terms of the relevant legislation. According to Winfield he raised the interests which others, including the Co-operative, may have had in the livestock at his meeting with the creditors on 25 August 2011. Jackson apparently undertook to find out what the legal aspects were regarding the rights of the Co-operative, which he did. He wrote to Winfield and his co-trustee on 31 August 2011 advising them that the applicable legislation, namely the Co-operatives Act, **"pledges any crops, animals etc financed by the Co-operative back to the Co-operative. In our case all the dairy animals under Alistair's management are our property and the Co-operative has no hold over them whatsoever."**

[70] 1982 (4) SA 746 (A) at 771C – E
[71] See paragraph [72] above.

76) Winfield also did not hide the existence of the agreement in respect of the cattle from the Co-operative. His evidence was that he advised the Co-operative that the livestock on the farm was going to be divided by the lessors. That this was so is confirmed by correspondence from the attorneys acting for the Co-operative. In fact, it is evident from the correspondence that it was the very reason why the Co-operative's attorney engaged with the lessor's attorneys before the distribution of the livestock. Winfield's evidence was further to the effect that he realised that the Trust was indebted to the appellant and the other lessors, that he felt indebted to them, and that **"I was just trying to be fair."**

77) Another fact that must not be lost sight of is that at the time Winfield found himself in a very vulnerable position where he had little choice but to go along with what the circumstances strongly suggests, were the dictates of the lessors, and in particular that of the appellant. As was correctly pointed out in *Cooper and Another NNO v Merchangt Trust Finance Ltd*[72], the subjective requirement of an intention **"involves the requirement that the debtor must, at the time of the disposition, have been in a position to exercise a free choice."**

78) In my view, if one examines and weighs up the totality of the circumstances which gave rise to the dispositions, as well as the actions of Winfield, it cannot be said that the most plausible or probable inference is that Winfield was conniving with the appellant with the intention of defrauding any of the other creditors.

[72] 2000 (3) SA 1009 (SCA) at para [15].

Conclusion

79) For these reasons I am satisfied that the two agreements were dispositions which are to be set aside as voidable preferences as envisaged in section 29(1) of the Act. They were contracts in terms of which the Trust abandoned its right of ownership in the heifers and the equipment with the effect of preferring one creditor, namely the appellant, above the other creditors. The Trust was provisionally sequestrated on 29 September 2011 and placed in final sequestration on 27 November 2017. The agreements were accordingly entered into and given effect to less than six months before the sequestration of the Trust. It was further not in dispute that when the Trust and the appellant entered into the agreements the Trust was indebted to the appellant and the other lessors by reason of its inability to comply with its obligations in terms of the lease agreements. It can further be accepted on the evidence that the Trust was insolvent by reasons of its inability to pay its creditors, and that its liabilities exceeded the value of its assets before and after the agreements were given effect to.

80) As to the costs, the appellant has been substantially successful, and is entitled to the costs of the appeal.

81) In the result the appeal is upheld with costs, the order of the trial court is set aside and is substituted with an order in the following terms:

"(a) The disposition by the Greenacres Trust to the sixth defendant of 25 large heifers, 28 small heifers and 18 yard heifers on 7 September 2011 is set aside in terms of section 29 of the Insolvency Act 24 of 1936.

(b) The disposition by the Greenacres Trust to the sixth defendant of a Holland 5630 4x4 tractor, a Ford 6610 4x4 tractor, a Duncan 15-row planter, an Aguirre twin disc fertiliser spreader and a blue tip trailer with drop sides on 31 August 2011 is set aside in terms of section 29 of the Insolvency Act.

(c) The sixth defendant is directed to return to the plaintiffs the livestock described in paragraph (a) and the equipment described in paragraph (b) and, in the event that he cannot do so or does not do so within ten days of the date of this order, he is directed to pay to the plaintiffs the amounts of R148 700-00 (one hundred and forty eight thousand seven hundred rand), being the value of the livestock described in paragraph (a), and R310,000, being the value of the equipment described in paragraph (b), together with interest on these amounts calculated at the legal rate from date of judgment to date of payment.

(d) The sixth defendant is directed to pay the plaintiffs' costs of suit."

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D VAN ZYL

DEPUTY JUDGE PRESIDENT

I agree.

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J E SMITH

JUDGE OF THE HIGH COURT

I agree.

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G H BLOEM

JUDGE OF THE HIGH COURT

Counsel for the Appellant;	Adv. A Beyleveld SC
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Instructed by:	Messrs De Jager & Lordan Inc. 2 Allen Street **GRAHAMSTOWN**
Date Heard:	10 September 2018
Judgment Delivered:	13 December 2018