Editorial note: Certain information has been redacted from this judgment in compliance with the law.

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER: 2613/2022

In the matter between:

PIETER HENDRIK STRYDOM N. O	**FIRST PLAINTIFF**
HAROON ABDOOL SATAT MOOSA N. O	**SECOND PLAINTIFF**
DEON MARIUS BOTHA N. O	**THIRD PLAINTIFF**

And

CECLILIA JACOBA LE ROUX	**DEFENDANT**

(Identity Number: […])

REASONS

KUSEVITSKY J

Introduction

[1] On 9 June 2023 on the unopposed motion roll, an application for default judgment served before me in which the Plaintiffs, in their representative capacities as joint liquidators of Free Agape Enterprises (Pty) Ltd (In liquidation) ("Free Agape"), sought the repayment of monies from the Defendant in the amount of R 1 044 500.00 in terms of section 26(1) of the Insolvency Act, 24 of 1936, *alternatively* the amount of R 240 000.00 in terms of section 29 of the Insolvency Act.

[2] It is common cause that summons was issued and the matter postponed during October 2022 for the Defendant to obtain legal representation. On the day of the hearing in June 2023, the Defendant had not filed a notice to defend nor a plea. The Defendant did however appear in person and advised the following:

3.1 she had paid monies to Free Agape as an investment ("*belegging*") and had no knowledge that it was illegal for her to have done so;

3.2 she had already repaid some money.

[3] I granted judgment in favour of the Plaintiffs on the alternative claim in the amount of R 240 000.00 in terms of section 29(1), having been of the view that the Plaintiffs did not make out a case for relief sought in terms of section 26(1). The Plaintiffs have requested reasons as to why their claim under section 26(1) did not succeed. Here follows the reasons.

The summons

[4] The particulars of claim aver that on 12 June 2018, Free Agape was placed in final liquidation. In terms of s 348 of the Companies Act, 61 of 1973, the deemed

date of commencement of the liquidation of Free Agape is 22 March 2018, which is the date when it is alleged that the application for winding up was presented to court.

[5] On 13 August 2019 under case number 11938/2019, an order was granted declaring that the investment scheme conducted under the name and style of Free Agape and various under trading names to be illegal, unlawful and void; and that all investment and related agreements entered into between Free Agape and third parties as investors, to be null and void.[1]

[6] The averments furthermore state that Free Agape did no business other than taking deposits from clients/investors, which was utilised to repay deposits received from other clients and/or to pay out money, described as dividends to other clients; the liabilities of Free Agape exceeded its assets; and Free Agape was unable to pay its debts as contemplated in s 339, read with s 340 of the 1973 Companies Act.[2]

Plaintiffs' claim in terms of s 26(1) of the Insolvency Act

[7] The Plaintiffs aver that during or about the period 21 April 2017 to 14 November 2017, Free Agape effected payments to the Defendant in a total amount of R 1 044 500.00.[3] They state that the aforesaid payments were made by Free Agape to the Defendant less than two years before the effective date of liquidation and as a result, the payments constitute dispositions as contemplated in s 26(1), read with s 2 of the Insolvency Act.

[1] Particulars of claim para 5 and the sub-paragraphs thereof
[2] Particulars of claim paras 6.1 to 6.3
[3] the schedule of payments is reflected in para 7.1

[8] Plaintiffs aver that they are entitled to reclaim for the benefit of the body of creditors all actual payments made to the Defendant by Free Agape in so far as they exceed the payments made by the Defendant to Free Agape. During this period, they aver that the Defendant made no payment to Free Agape thus the Plaintiffs are entitled to reclaim the amount of R 1 044 500.00 being the amount of all payments made to the Defendant by Free Agape that exceed the payments made by the Defendant to Free Agape.

[9] They conclude that the payments in the aforesaid amounts were dispositions not made for value and in the premises, the dispositions are liable to be set aside in terms of s 26 of the Insolvency Act.

Is the transaction impeachable as envisaged in the Insolvency Act?

[10] Section 26 reads as follows:

Section 26 – Disposition without value

> *"(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-*
>
> *(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;*
>
> *(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:*

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

[11] Section 26(1) is aimed at protecting the interests of creditors through powers provided to trustees to approach courts to set aside pre-sequestration transactions that were made without insolvent persons deriving value in return.[4]

[12] A disposition without value is any transfer or disposal of right to property, excluding those mandated by a court order, for no value or for a consideration less than the risk incurred by the insolvent in the relevant transaction. A court has the discretion to set aside a disposition without value if it can be proved that immediately after the disposition, the insolvent's liabilities exceeded its assets. It is trite that whether a disposition is made for no value turns on whether the insolvent company obtained a benefit from making the disposition.

[13] It is trite that the word 'value' is not confined to a monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. Whether an insolvent has received 'value' for a disposition must be decided by reference to all the circumstances under which the transaction was made. [5]

Evaluation

[14] It is common cause that the remedies available to trustees to recover monies or assets in questionable transactions can be found in sections 26, 29, 30 and 31 of

[4] Estate Jager v Whittaker 1944 (AD) 246 at 250
[5] Goode, Durante & Murray Ltd. v Hewitt & Cornell 1961 (4) SA 286 (N) at 291E-F

the Insolvency Act. It is also accepted that the nature of the transaction is one of the criterion that determines whether or not a transaction is susceptible to be set aside under these sections. The other determination is the time frame in which these transactions are undertaken, which is apparent in sections 26 and 29.

[15] Thus relief sought under section 26 has a time frame of two years where the onus is on the trustee to prove that a disposition not made for value was made and it is further proved that the liabilities of the insolvent exceeded his assets[6]; and within two years where the onus shifts to the recipient of the disposition should they be unable to prove that immediately after the disposition was made, the assets of the insolvent exceeded its liabilities.[7] Similarly, section 29 which deals with voidable preferences stipulate a time frame of six month. Sections 30 and 31 which deals with undue preference to creditors or collusive dealings respectively which have the effect of intentionally preferring one creditor above another or prejudicing its creditors, specify no time frames. Thus whilst the purpose of these provisions clearly is to protect the interests of the general body of creditors, they do not evince an intention to advance the interests of creditors above all other interests.[8]

[16] On the Plaintiff's own pleaded version in reliance of a claim under section 26(1), they contend that during the period 21 April 2017 and 14 November 2017, the amount of R 1 044 500.00 was paid by Free Agape to the Defendant, whilst no payment at all during this period was received by the Defendant. This, the Plaintiffs claim, entitle them to a remedy under section 26(1) averring that the dispositions were made without value. The phrase '*during this period*' used in the pleadings in my

[6] subsection (a)

[7] subsection (b)

[8] Strydom N.O and Another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022) at para 31

view is instructive. This means that the computation made by the trustees is only for a select period of only six months prior to the deemed date of liquidation of 22 March 2018 in which the dispositions were made. In my view, this approach is untenable. Section 26(1) in my view is a two-part enquiry. On the one hand, it has to be proved that a disposition made was 'for no value' and once this is established, the further onus is placed on the parties within the given time frames as stipulated in terms of subsections (a) and (b). In my view, it is simply not enough to be selective of the time periods. The entire period of two years at the very least, in my view, should be considered.

[17] In *casu*, on Plaintiffs own version, Free Agape was an investment scheme, whose alleged purpose was to take deposits from investors and to repay the dividends to them and other third parties. In this instance, the Plaintiffs failed to state when exactly such payments or deposits were made by the Defendant to have justified repayments of their interest or dividends, given the fact that Plaintiffs could only rely on section 26(1)(a) for the relief sought. Furthermore, it is simply not enough for a trustee or liquidator to make an allegation on the pleadings without more, that immediately after the disposition was made, that the insolvent's liabilities exceeded their assets. I say this because firstly, the onus rests on the trustees and unlike in a situation where a creditor seeks the liquidation or sequestration of an insolvent where the financial situation of the insolvent might not be immediately apparent; in this situation, the trustees are clothed with the duty to administer the insolvent estate and would ordinarily have access to the financial records of the insolvent. I can see no reason, in an instance where trustees are seeking to set aside dispositions to third parties, why the courts should be left to guess as to

whether or not the second leg of the enquiry has been satisfied and the onus discharged.

[18] Thus in my view, it was simply not enough for the Plaintiffs to have been selective with the period within which the dividends or payments were made. In order to rely on a claim under section 26(1), the Plaintiffs were, as is apparent, constrained to limit the time period to that of the scheduled payments. If in fact no monies were received at all from the Defendant to Free Agape during the preceding two-year period, then the Plaintiffs should have said so. They did not. As I have stated, that is not enough. Secondly, the pleaded version of the Plaintiffs in the rest of the particulars of claim is destructive of this claim since what we do know, on Plaintiffs version, is that payments are made in the investment scheme on receipt of a deposit or deposits otherwise known as investments from clients[9]. These deposits are then used to *repay* deposits received from other investors and/or pay out money to other clients. Thus on Plaintiffs own version, the repayment of deposits or dividends only happened after the event of a taking of a deposit for investment purposes. As I have stated before, the nature of the transaction is an important consideration in the evaluation as to whether or not dispositions made are for value or not. As far back at 1932, the Appellate Court in *Estate Wege v Strauss (1032, A.D 76)*, who had to determine whether money paid to a bookmaker was a disposition of property without value, stated that in considering whether or not a disposition is for value within the meaning[10], the court had to look to the time when the promise was made and not to the time when payment in consequence of the promise takes place, otherwise many payments by a person whose liabilities exceeded his assets would be a disposition

[9] Para 6.1 of the Particulars of Claim

[10] of section 24 as it then was

of property not for value, unless enforceability is the test of value, which it is not.[11] This approach was confirmed in *Estate Jager supra* which held that the date of the transaction rather than that of the payment must be regarded.[12]

Does the legality or otherwise of the transaction impact on the evaluation process of considerations under section 26(1) of the Insolvency Act?

[19] The pleadings state that the investment scheme conducted under the name and style of Free Agape were declared to be illegal, unlawful and void[13]; and all investments and related agreements entered into between them and third parties as investors declared to be null and void.[14]

[20] It is trite that the meaning of the phrase 'disposition not for value' means 'for no value at all'.[15] This phrase is intrinsically linked to to the nature of the transactions that insolvent persons conclude before their sequestration or liquidation. It is the nature of those transactions that provide a sense of whether any value was derived or was to be derived.

[21] The court in *Estate Jager supra* defined the words "*disposition not made for value*" as meaning, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*[16]. That court further cited the case of *Estate Wege supra*, which, as stated before, dealt with a transaction of betting on horseraces, which at the time was illegal. In that case, the issue was whether an agreement to pay interest in excess of the rate allowed by law

[11] Estate Wege at 84
[12] Estate Jager v Whittaker and Another *ibid* at 247
[13] Particulars of claim para 5.1.1
[14] para 5.1.2
[15] Strydom *supra* at para 36
[16] at 250

in terms of the Usury Act was considered a disposition made for value, and that court had to evaluate whether or not the transaction created an obligation. The Court in *Wege* held that a bet made with a bookmaker was not an illegal transaction which created a moral obligation binding the loser to pay, and though such obligation could not be enforced in a court of law, it was nevertheless recognized by the law for certain purposes[17]. The Court went on to state that when the question arises whether payments made in pursuance of such contracts can be set aside under section 26 of the Insolvency Act, a distinction must be drawn between a contract which, though lawful, gives rise to only moral obligations unenforceable in a court of law and an illegal contract which gives rise to no obligations at all.[18]

[22] In my view the court in *Estate Jager* drew a distinction between interest which was payable in pursuance of an obligation to pay, and an agreement to pay interest higher than that allowed by the Usury Act. It was the latter agreement which the court held to have been susceptible to being set aside since no obligation to pay a higher rate than that prescribed arose from the promise to pay the higher rate. This is so because the only question that the appeal court had to answer was whether the payments made in that case, *insofar as they exceeded capital plus interest at 12 per cent,* were dispositions which could be set aside under section 26 of the Insolvency Act as being dispositions not made for value.'

[23] Thus on Plaintiffs own version, it cannot be said that the dispositions or payments made to the Defendant constituted dispositions without value within the meaning of section 26(1). The insolvent would have derived value if the creditor that benefitted from the transaction demonstrated benefits derived by the insolvent

[17] at 251
[18] at 252

person that came directly from the transaction. Ultimately, a court exercises a discretion to set aside a disposition without value if it can be proved that immediately after the disposition, the insolvent's liabilities exceeded its assets.[19]

[24] I exercised my discretion based on the above to find that the Plaintiffs did not make out a case in terms of section 26 of the Insolvency Act and accordingly relief under section 29 of the Insolvency Act was granted.

DS KUSEVITSKY

JUDGE OF THE WESTERN CAPE HIGH COURT

FOR PLAINTIFF	**: ADV. CHLOE FRANCIS**
INSTRUCTED BY	**: BARNARD INC.**
FOR DEFENDANT	**: IN PERSON**

[19] Eckhoff N.O and Another v Hartshorne and Another (13640/2020) [2022] ZAWCHC 68 (29 April 2022) at para 29