# THE SUPREME COURT OF APPEAL

Case No 141/96 In

the case between:

DOUGLAS GREEN BELLINGHAM Appellant

and

MALCOLM GREEN t/a GREENS BOTTLE

RECYCLERS Respondent

CORAM: MAHOMED, CJ, EKSTEEN, MARAIS, ZULMAN, JJA

et VAN COLLER, AJA

HEARD: 19 AUGUST 1997

DELIVERED: 22 September 1997

J U D G M E N T

VAN COLLER, AJA

On 17 July 1996 the appellant gave notice of an application for an order condoning its late filing of the appeal record. It appears from the application that the record was served and filed approximately one month late. A satisfactory explanation has been given in the supporting affidavit why the relevant rule has not been complied with timeously. Notice of the application for condonation was given without delay and having considered all the circumstances and the factors which usually weigh with this court in considering applications of this nature I have come to the conclusion that condonation should be granted. It is, however, necessary to express disapproval with regard to one aspect. Mr Jefferys, who appeared on behalf of the appellant, was completely unaware of the application. He had not been informed by his instructing attorney about the application and he was not even in possession of a copy of the papers. This made an adjournment

necessary to enable him to obtain and read the application. Not only was valuable time wasted but the court has also been unnecessarily inconvenienced. Such an attitude of indifference on the part of the appellant's attorney is unacceptable and it must again be emphasized that an application for condonation should not be treated as a mere formality.

In the court a quo the appellant claimed an amount of R105 890,00 from the respondent but judgment was only granted in the amount of R51336,03. The appeal, with leave of this court, is directed against the reduction of the claim in the amount of R54553,97. In its particulars of claim the appellant relied upon fraudulent, alternatively, negligent misrepresentation on the part of the respondent. The condicto indebiti was pleaded as a further cause of action. In his plea the respondent denied the

allegations made by the appellant and also pleaded an estoppel.

The facts which gave rise to the appellant's claim are the following.

The appellant carried on business as a bottler and distributor of wines with its principal place of business at "Wellington in the Western Cape. In the course of its business the appellant acquired both new and second-hand bottles. During the period November 1992 to January 1993 one Kotze, an employee of the appellant, was authorised to purchase bottles on the appellant's behalf. Kotze devised and put into operation the following scheme. He contacted the respondent who carried on business as a recycle: and trader in used bottles and informed him that he could acquire a quantity of bottles from a certain source. Kotze requested the respondent to issue a cheque made out in his (Kotze's) favour for the amount of the alleged purchase price of the bottles. The cheque had to be posted to Kotze's home

address. The respondent in turn was required to invoice the appellant for

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the amount of the purchase price plus an administration fee. Kotze,

however, did not purchase any bottles notwithstanding that he received the

purchase price from the respondent. The appellant received invoices from

the respondent which indicated that various quantities of bottles had been

delivered to its warehouse in Wellington. The appellant paid the face value

of the invoices but did not receive any bottles. In February 1993 the

appellant discovered the true state of affairs and claimed the amount paid

to the respondent.

At the trial the respondent testified that he was told by Kotze that there were numerous bottles available in the district of Wellington but they could only be acquired if paid for in cash. He was induced by Kotze to pay amounts in cash to him which he would use to buy bottles for the

appellant. He paid by cheque and eight cheques were in fact sent to Kotze. According to the respondent he had no reason not to trust Kotze and he was not suspicious when he was asked to send payments to him personally. It appears from the evidence that Kotze used the same modus operandi with another firm, Worcester Bottle Exchange. Kotze was eventually sequestrated and the appellant proved a claim amounting to R2 642 960,89 against his estate. It is common cause that the claim was comprised of two categories of debt, namely those incurred through Worcester Bottle Exchange ("the Worcester Bottle Exchange debts") and those incurred through the respondent ("the respondent's debts").

The court a quo found that the appellant had proved that it was induced to pay the amounts in question as a result of false representations made. Levinsohn J, however, was satisfied that the appellant had failed to

prove that the respondent acted fraudulently. He found that the respondent was negligent in submitting the invoices and he was found to be liable to the appellant on the basis of negligent misrepresentation.

The crux of the appellant's case that the amount claimed should not have been reduced is to be found in the evidence of Mr Eiser, the appellant's attorney. His evidence is to the effect that he appropriated the dividend received from the trustee of the insolvent estate to the oldest debts, namely the Worcester Bottle Exchange debts. The total amount of the oldest debts exceeded the dividend received and, if this purported appropriation is legally correct, there could and should have been no reduction of the respondent's debt. It was common cause, both in the court a quo and in this court, that in so far as the appellant's claim was founded upon delict, Kotze and the respondent were joint wrongdoers.

Levinsohn J rejected the alleged appropriation and in this regard his judgment reads as follows:

> "It is evident that Mr. Eiser treats each fraud committed as giving rise to a separate cause of action and debt. He thus took the view that the proceeds of the dividend ought to be appropriated to the so-called oldest debts and if he does this the Defendant's invoices being the more recent ones would not benefit from this exercise. It seems to me, however, that all the frauds were discovered at the same time and the amounts owing were fixed and determined simultaneously and likewise payment became due and owing at one and the same time. Moreover when the claim was lodged in the insolvent estate it was one claim for R2 642 960,89 'for embezzlement of funds' (see A 37) and submitted on 7th May 1993. The dividend paid is one based on the globular claim which in my view has the effect of novating all the original causes of action and in consequence makes it inappropriate and inequitable to purport to appropriate portions of the single dividend received to the so-called 'oldest indebtedness'. This procedure would also, to my mind, operate to the prejudice of persons liable jointly for the same debt."

Levinsohn J consequently found that as a portion of the damages was recovered from Kotze in payment of the wrongdoing caused by him and the

respondent as joint wrongdoers, the respondent should be discharged pro tanto. He reduced the appellant's claim by the amount of the dividend received in respect of the respondent's debt. Judgment was therefore granted in the amount of R51 336, 03 and not in the amount of R105 890,00 as claimed by the appellant.

After leave to appeal was granted the parties filed a consent in terms of Rule 5(4)(d)(i) of this court in which it is submitted that the appeal in

this matter turns exclusively on a question of law. The question of law as

formulated in the consent refers firstly to the issue relating to the time when the respondent became indebted to the appellant; secondly to the question of novation and thirdly "(iii) whether in the circumstances the appellant's claim fell to be reduced by the sum of R 54 553, 97."

In this court Mr Wanless, who appeared on behalf of the respondent,

did not rely on the approach to the problem taken by Levinsohn J. Instead he invoked the provisions of section 103(l)(a) of the Insolvency Act 24 of 1936 ("the Act") to refute the alleged appropriation and the contention of Mr Jefferys that the trustee of Kotze's insolvent estate made no declaration as to which debt he wished the payment to be applied to. It was not disputed though that the Worcester Bottle Exchange debts were in fact the oldest debts. It was also not disputed that, in general, where the debtor does not appropriate the payment to any particular debt, the creditor is entitled to do so at the moment he receives the payment.

The provisions of Section 103 (l)(a) of the Act were raised for the first time in the heads of argument submitted by Mr Wanless to this court. The section of the Act was not expressly mentioned in the consent filed by the parties. Even if the point of law as formulated in paragraph (iii) of the

consent is not wide enough to entitle the respondent to rely on the provisions of the section, Mr Wanless in any event dealt fully with the provisions of the section in his heads of argument which were filed on 27 March 1997. It was only when the matter was heard in this court that the appellant objected, and without much conviction, to the point being raised by the respondent. Mr Jefferys conceded that the appellant would not be prejudiced should the respondent be allowed to rely on the section and he had in any event prepared himself to argue this issue. In these cirumstances Mr Wanless was allowed to proceed with this argument and both counsel confined their arguments to the question whether payment by the trustee in terms of section 103(l)(a) of the Act prevented the appellant from apportioning the whole payment received from the trustee to the Worcester Bottle Exchange debts. In view of the conclusion to which I

have come it is not necessary to deal with the findings of Levinsohn J and , with his remarks regarding novation. I may also point out that novation was not pleaded, nor relied upon by Mr Wanless, and was not argued in this court.

Section 103(l)(a) of the Act reads as follows:

"103. Non-preferent claims.-(l) Any balance of the free residue after making provision for the expenditure mentioned in sections ninety-six to one hundred and two inclusive, shall be applied-

(a) in the payment of the unsecured or otherwise non-preferent claims proved against the estate in question in proportion to the amount of each such claim."

The appellant was a concurrent creditor and his claims in respect of the frauds committed by Kotze were unsecured. The trustee therefore had to follow the provisions of the section in applying the balance of the free residue. According to the evidence an amount of 33,93 cents in the Rand ("the dividend") was available. The trustee was accordingly bound in

terms of this section to pay to the appellant a dividend of 33,93 cents in the

Rand in respect of each one of its claims. Although the appellant submitted

one globular claim in respect of all the amounts owed to it by Kotze, the claim included both the debts of Worcester Bottle Exchange and the respondent's debts. In making payment the trustee in fact paid an amount of 33,93 cent for each Rand owed by Kotze to the appellant in respect of the respondent's debts. Consequently there is no merit in the argument that the trustee made no appropriation and that the appellant was entitled to appropriate the total dividend to the oldest debts. Unlike the ordinary debtor, the trustee had no choice in the matter. He was not entitled to apply the whole dividend to only one of a number of admitted debts making up the total claim of a proved creditor. He had to follow the directions contained in the Act and he was obliged to apply the free

residue pro rata to all the debts and did so in this case. This might be described as a statutory appropriation and in my judgment any further appropriation by the appellant as creditor was not possible.

Mr Jefferys contended that the trustee received one globular claim from the appellant and that the section merely prescribes the manner in which the free residue should be distributed so that the appellant was entitled to appropriate the total dividend received to the oldest debts. I cannot agree. I have already pointed out that the claim was comprised of two categories of debt. Each debt within these two categories was in fact a separate claim which the trustee had to consider and then either had to accept or to reject. In this case all the debts which were encompassed in both categories of debt were admitted and the whole of the globular claim made in respect of them was accepted. It was not merely his duty to

distribute the free residue but in terms of the clear wording of the section he had to apply the balance of the free residue pro rata to each claim. It follows inexorably that each debt which goes to make up each such claim is being paid pro rata when that is done. That this was intended is also clear from the Afrikaans wording of the section which reads that the balance of the free residue "word aangewend - (a) tot betaling van die onversekerde of andersins nie-preferente vorderings wat teen die betrokke boedel bewys is na eweredigheid van die bedrag van elke sodanige vordehng." (My emphasis).

I have, therefore, come to the conclusion that the appellant was by, virtue of the payment by the trustee of the dividend in accordance with the provisions of section 103(l)(a) of the Act, precluded from apportioning the whole dividend received from the trustee to the Worcester Bottle Exchange

debts. Levinsohn J correctly reduced the appellant's claim by the amount of R54 553,97.

The following orders are made:

1. The application for condonation is granted and the Appellant is to pay the costs thereof;

2. The appeal is dismissed with costs.

VAN COLLER, AJA

MAHOMED CJ )
EKSTEEN JA ) CONCURRED
MARAIS JA )
ZULMAN JA )