THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1274/2021

In the matter between:

CLOETE MURRAY N O **FIRST APPELLANT**

THOMAS CHRISTOPHER VAN ZYL N O **SECOND APPELLANT**

RAPHAEL GRANT BRINK N O **THIRD APPELLANT**

CARON-ANN SCHROEDER N O **FOURTH APPELLANT**

(In their capacity as joint liquidators of
Cape Concentrate (Pty) Ltd (in liquidation))

and

HUMANSDORP CO-OPERATIVE LIMITED **RESPONDENT**

Neutral citation: *Cloete Murray N O and Others v Humansdorp Co-operative Limited* (1274/2021) [2022] ZASCA 187 (30 December 2022)

Coram: DAMBUZA ADP, NICHOLLS and GORVEN JJA and BASSON and WINDELL AJJA

Heard: 11 November 2022

Delivered: 30 December 2022

Summary: Company law – Insolvency Act 24 of 1936 – disposition – whether payment was made in terms of a bank guarantee or it was a payment by the respondent constituting a disposition in terms of s 2 of the Insolvency Act – if so, whether the payment was 'not made for value' as contemplated in s 26 of the Insolvency Act – payment was bank guarantee.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Stretch J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Nicholls JA (Dambuza ADP, Gorven JA and Basson and Windell AJJA concurring):

[1] This appeal concerns the payment of monies held in the trust account of Pagdens Incorporated Attorneys (Pagdens) of Gqeberha and made to Humansdorp Co-operative Limited (the Co-op), the respondent. The question to be determined is whether the payment was a disposition made not for value as envisaged in s 26[1] of the Insolvency Act 24 of 1936 (the Act). Integral to this issue is whether the payment was made by the appellant, Cape Concentrate (Pty) Ltd (now in liquidation) (Cape Concentrate), or whether it was a payment made by or on behalf of The Standard Bank of South Africa Limited (Standard Bank), of demand guarantees issued in favour of the Co-op for the liabilities of

[1] Section 26(1) of the Act provides:
'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.'

the Tyefu Community Farming Trust (the Trust). Only if the payment was made by Cape Concentrate does the question then arise whether it was a disposition by Cape Concentrate not made for value. If the disposition was not made for value, then the third issue is whether the Co-op is entitled to be indemnified in terms of s 33(1) and (2) of the Act. Neither Standard Bank nor the Trust are parties to this appeal.

[2] The Eastern Cape Division of the High Court, Grahamstown (the high court) dismissed, with costs, the application brought by the liquidators of Cape Concentrate to set aside, as a payment without value, the payment of R22 268 848.85 made to the Co-op on 8 May 2015. The high court found that the payment was of demand guarantees made by Cape Concentrate to the Co-op and was a disposition with value.

[3] Cape Concentrate has appealed the judgment and order of the high court. The Co-op has cross-appealed against the high court's finding that, although the payment was made in terms of demand guarantees, it 'was paid with [Cape Concentrate's] money' rather than a payment by or on behalf of Standard Bank with money ceded and pledged to Standard Bank. Both leave to appeal and to cross-appeal to this Court were granted by the high court.

Background

[4] Cape Concentrate was incorporated in 2006 and built, at large expense, a tomato paste processing plant at Coega in Gqeberqa. A sister company with the same shareholders, Rumibyte (Pty) Ltd (Rumibyte) was established to procure tomatoes for processing by Cape Concentrate. Both experienced financial difficulties, partly because Rumibyte had difficulty in securing a reliable supply of tomatoes, and both were simultaneously placed under business rescue in May 2013. A practising attorney and director of Pagdens, Francois Vienings

(Vienings), was appointed as the business rescue practitioner of the two companies.

[5] At the first business rescue meeting, on 24 May 2013, Vienings expressed the view that the companies were capable of being saved. This was subject to raising funds of approximately US$90 million. The creditors were duly convinced and the proposed business rescue plan was adopted. However, as at November 2013, Cape Concentrate had liabilities exceeding R133 million and had been trading at a loss for several months. Vienings and the directors of Cape Concentrate approached Africa Agriculture and Trade Investment Fund (AATIF), a non-profit fund advocating the enhancement of agricultural production and food security in Africa, for a loan to finance the operations of Cape Concentrate during the business rescue process.

[6] Pursuant thereto, a term facility was concluded, on 18 August 2014, between AATIF and Cape Concentrate, represented by Vienings, in terms of which AATIF would loan Cape Concentrate amounts for the financing of its tomato farming and processing operations. The Co-op was defined as the investment partner. As to the purpose of the agreement, it was recorded that Cape Concentrate would apply all amounts borrowed, firstly, to the payment of existing lease and supplier indebtedness. Secondly, Cape Concentrate would apply it to pay existing income tax indebtedness, acquisition of new farming equipment to support the operation and for the financing of Cape Concentrate's working capital requirements.

[7] In the interim, and without it having been included in the business rescue plan, in December 2013 Vienings established the Trust to involve local community farmers in the production of tomatoes for supply to Cape Concentrate. Rumibyte and Cape Concentrate were the founders of the Trust.

The Trust required a substantial amount of money for the production of tomatoes. Discussions, facilitated by Vienings, took place between the Co-op and AATIF for funding, and in April 2014 the Co-op indicated to AATIF that it would provide loans to community farmers on commercially negotiated terms.

[8] Vienings then proceeded to make applications for a production loan to the Co-op on behalf of the Trust, first in his capacity as the business rescue practitioner for Cape Concentrate, and then in his capacity as a director of Pagdens. The Co-op required security if they were to loan and advance monies to the Trust. These included, inter alia, a cession of the proceeds of the tomato crop which would be supplied to Cape Concentrate, a cession of any insurance on the crops and most importantly a bank guarantee for the sum of the loan facility.

[9] Vienings tendered certain security for the loan, including a cession of the proceeds of all tomato produce sold by the Trust to Cape Concentrate in favour of the Co-op. It was contemplated that the crop would be produced and delivered to Cape Concentrate, who would pay the Co-op for the value of the tomatoes in terms of the cession and by so doing the production loan would be repaid and the bank guarantees would not have to be called up.

[10] On 14 August 2014, an Investment Partner Agreement was concluded between AATIF and the Co-op, in terms of which the Co-op agreed that it would ensure that its clients would have the ability to pay their obligations without being over-indebted. On 28 August 2014, Vienings confirmed that Cape Concentrate had deposited R5 million into the trust account of Pagdens, which would serve as security, and asked for confirmation that the Co-op would provide a loan to the Trust. Shortly thereafter, the Co-op agreed to grant loan facilities to the Trust, subject to a bank guarantee in respect of the R5 million. It

also required a resolution from the Trust that it would apply for credit and membership of the Co-op. On 3 September 2014, the Trust executed a deed of cession of the proceeds of all its crop in favour of the Co-op. It also made application to the Co-op for membership (which was approved on 28 November 2014). Thereafter, Vienings sent the required documents to the Co-op, including a Standard Bank Corporate Saver guarantee.

[11] As early as mid-September 2014, the Co-op raised its reservations about the planning and management of the Trust. The Co-op pointed out the risks involved and expressed the view that it would be difficult to find another financial institution prepared to finance such a scheme. Undeterred, Vienings saw to it that a further R4 million and R12 million were deposited into the Pagdens trust account, by Cape Concentrate, on 5 November and 18 November 2014 respectively. Vienings confirmed in an email to the Co-op that Cape Concentrate was not in a position, nor was it ever the intention, to provide security for the Trust's farming operations. The credit facility for a production account was approved by the Co-op on 11 February 2015.

[12] Various payments were made by Cape Concentrate into the Pagdens trust account, over the period 1 September 2014 to 31 January 2015. It was on the strength of those payments that the guarantees were issued by Standard Bank. Between 1 September 2014 and 14 January 2015, Vienings provided the Co-op with six demand bank guarantees in the total sum of R25 million. These were issued by Pagdens utilising the Standard Bank electronic system, Third Party Fund Administration (TPFA), as follows: R5 million on 5 September 2014; R2 million on 7 October 2014; R4 million on 6 November 2014; R3 million on 19 November 2014; R9 million on 19 November 2014; and R2 million on 14 January 2015.

[13] Each guarantee is identical, apart from the transaction number, issue date and the amounts reflected therein. It bears the Standard Bank logo and reads as follows:

'Electronically generated DEMAND GUARANTEE – only presentable and payable by electronic means.

Standard Bank

TRN No. [M567801]

TPFA Guarantees Standard Bank
P O Box 61029
Marshalltown
2107

Beneficiary Name: HUMANSDORP KOOPERASIE

Account Number: 0001940000110

Beneficiary Reference: TYEFU

Beneficiary Address: HUMANSDORP

Issue Date: [05/09/2014]

DEMAND GUARANTEE

We, The Standard Bank of South Africa Limited Registration Number 1962/000738/06 ("the Bank"), undertake to pay HUMANSDORP KOOPERASIE BPK ("the Beneficiary") the sum of 5000000 (FIVE MILLION RAND) ("the Guaranteed Amount") on receipt of a first written demand for payment from the Beneficiary stating that the amount is due and payable by THE TYEFU COMMUNITY FARMING TRUST IN THE EVENT OF IT NOT BEING ABLE TO MAKE PAYMENT OF THE PRODUCTION LOAN FROM THE BENEFICIARY WHEN IT BECOMES DUE AND PAYABLE ("the Principal") in terms of an agreement ("the Agreement") between the Principal and the Beneficiary.

The Bank's liability under this guarantee is principal in nature and is not subject to any agreement. The Bank's liability shall not be reduced, or in any way be affected by any alteration of the terms of the Agreement, or any other arrangements made between the Principal and the Beneficiary.

The Bank will pay on demand and will not determine the validity of the demand or the correctness of the amount demanded, or become party to any claim or dispute of any nature which any party may allege.

Escape clause The Bank reserves the right to withdraw from this guarantee at its entire discretion by giving the Beneficiary 3 (three) months' written notice of its intention to do so. The Beneficiary may, however, claim under this guarantee during the mentioned notice period from the date that such notice is given. The Bank's liability shall cease on expiry of the notice period and no further claims will be considered.

The cancellation of, or any change to the terms and/or conditions of this guarantee, must first be agreed to in writing by the Beneficiary, the Principal and the Bank.

This Guarantee is neither negotiable, transferable nor payable upon presentation at a Branch of Standard Bank and must be returned to us either against payment of the abovementioned sum or in the event of our withdrawal from the undertaking in terms of the preceding paragraph.'

[14] It was not long before the Trust was unable to make payment towards the loan facility provided to it by the Co-op. The Co-op's attorneys directed a letter to Pagdens, on 7 May 2015, stating that the Trust was indebted to their clients in the sum of R22 268 848.85 and demanding immediate payment of the guarantees to the said value. The demand guarantees were hand-delivered to Pagdens by the Co-op at 18h00 later that day. On 8 May 2015, Pagdens loaded the release of the amount of the guarantees from the two TPFA accounts and authorised the transfer of R12 057 148.99 and R11 049 210.88. Payment was then effected to the Co-op by Pagdens transferring these amounts into their Nedbank trust account and from there to the Co-op's account.

[15] The following day, Rob Parker (Parker) directed a letter to his fellow director, Vienings, confirming that the Co-op had made demand on 7 May 2015 and that Pagdens had made payment of R22 268 848.85, which left R839 180.08 remaining in the trust account of Cape Concentrate.

[16] AATIF immediately dispatched a letter to Vienings asking how it was legally possible that R25 million of the AATIF loan to Cape Concentrate was

put in a guarantee account in the name of the Trust when AATIF was not a lender to the Trust. Vienings was requested to explain the grounds on which he had opened guarantee accounts in the name of the Trust with funds provided by AATIF under a facility agreement with Cape Concentrate. The accounts were, in fact, not in the name of the Trust but in that of Cape Concentrate. The letter went on to ask how it was possible that a colleague from the same firm instructed Vienings to make this payment.

[17] Approximately a month later, in June 2015, Vienings resigned as business rescue practitioner of Cape Concentrate and was replaced by Daniel Terblanche. On 15 December 2015, Mr Terblanche applied for the liquidation of Cape Concentrate and the final order of liquidation was granted on 29 March 2016.

Referral to oral evidence

[18] The application launched by the liquidators in the high court to set aside the payment of R22 268 848.85 was brought on the basis that it was a disposition without value made by Cape Concentrate. In response, the Co-op asserted that the monies were paid by Pagdens on behalf of Standard Bank in terms of a demand guarantee issued in respect of the Trust. In reply, the liquidators stated that the Trust only became a member of the Co-op on 28 November 2014, after five of the six guarantees had been issued, and that the credit facility for the Trust was only approved on 11 February 2015, after all the guarantees had been issued.

[19] This prompted the Co-op to file various supplementary affidavits, explaining how the payments were made by Pagdens for or on behalf of Standard Bank, utilising the Standard Bank TPFA. Finally, by agreement, a court order was granted on 15 October 2020 for ‘the hearing of oral evidence in

respect of the facts and circumstances surrounding and involving the issuing, presentation and payment of the six demand guarantees of the Standard Bank Ltd'. The order also provided that certain witnesses from Pagdens and Standard Bank be called to give evidence, including Mr Antonie Pick (Pick), the Standard Bank solutions manager for various products, including TPFA guarantees. The other witnesses named in the order were Mr Brett Weddell (Weddell) and Parker, both of whom were directors at Pagdens, and had provided affidavits.

[20] In the end, the Co-op, who had introduced the affidavit of Pick, elected not to call him as a witness and it was the liquidators who called Pick to testify. Even though Weddell and Parker's version was pertinently put to Pick, after Pick's evidence, the Co-op decided not to call Weddell and Parker as witnesses. Pick was thus the sole witness on some of the issues.

[21] In evaluating Pick's evidence, the high court found that this was not a matter where the application had been referred to trial and where the affidavits stood as pleadings, with evidence to be adduced. The high court favoured the version of Weddell and Parker over the oral evidence of Pick, whose evidence the high court found did not add value to the issue. Instead, the high court found that the affidavits of Parker and Weddell had clarified the position on the issuing of, the presentation of and the payment of the demand guarantees.[2]

[22] In *Lekup Prop Co No 4 (Pty) Ltd v Wright*,[3] this Court pronounced on the status of affidavits in a referral to evidence in the following manner:

'. . . A referral to trial is different to a referral to evidence on limited issues. In the latter case, the affidavits stand as evidence save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'

[2] Paragraph 52 of the high court judgment.
[3] *Lekup Prop Co No 4 (Pty) Ltd v Wright* [2012] ZASCA 211; 2012 (5) SA 246 (SCA); [2012] 4 All SA 136 (SCA) para 32.

[23] The facts in this matter are those which appear from the affidavits of Weddell and Parker, which are either consistent with, or not disputed by, the oral evidence of Pick. Accordingly, the oral evidence of Pick must prevail where there is a dispute.

[24] Pick testified that the TPFA is a fully automated electronic system which is accessed on the business online platform of Standard Bank. It allows managers of those funds to open the accounts, transact on the accounts, close the accounts and to issue guarantees electronically. Pick's evidence was that attorneys could only issue property guarantees using the TPFA system. This was for conveyancing matters and once the guarantee was issued, the funds in the TPFA account were automatically pledged to Standard Bank, and paid to the seller upon registration.

[25] The relationship between Standard Bank and the attorney would be regulated by a written agreement, whereby the attorney acts as agent for the investor principal. The attorney would sign a pledge and cession of all trust monies held in the TPFA trust account, which, according to Pick, was for property matters only. Notwithstanding his insistence that Pagdens was only authorised to issue property guarantees, Pick was unable to dispute the contractual obligations that the guarantee created between Standard Bank and the Co-op, nor the fact that the online options available to Pagdens were not limited to property guarantees and the system's functionality extended to property guarantees, demand guarantees, and lease guarantees.

[26] According to Pick, the pledges placed on the TPFA accounts would remain in place while the guarantees were 'live' on the TPFA system. Three of the guarantees had expired on the system and the other three were cancelled on

7 May 2015, after 16h00. He stated that this meant that none of these could be paid through the TPFA system. If Pagdens were to cancel the guarantees, they would phone or email Standard Bank to arrange for cancellation. He later conceded that the terms of the guarantee required any cancellation or change in terms to be agreed upon in writing between the bank, the beneficiaries and the principal.

[27] The common thread running through Pick's evidence is his emphasis on how the system worked, which frequently conflicted with the terms of the guarantee. He focused on the functioning of the system and methodology of payment, without having sufficient regard to the binding terms of the guarantee itself.

On appeal

[28] The liquidators submit that Pagdens paid the Co-op the amount required to settle the production loan it had granted to the Trust, using the funds of Cape Concentrate. As such, it was a disposition without value within the meaning of s 26 the Act. The Co-op's position is that the payment was pursuant to a demand guarantee and that, with the issuing of guarantees, the funds deposited in the Standard Bank TPFA accounts became the subject of a pledge and cession in favour of Standard Bank and payable on demand.

[29] Both parties agree that if the payment was made in terms of a demand guarantee, then there has been no disposition as defined in s 2[4] of the Act and this is dispositive of the appeal.

[4] A disposition is defined in s 2 of the Act as meaning '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 a disposition in compliance with an order of the court'.

[30] The following facts are common cause. A debt was owed to the Co-op by the Trust. While Cape Concentrate was under business rescue, the business rescue practitioner caused monies of Cape Concentrate to be paid into the trust account of Pagdens. Pagdens paid that money from its trust account to the credit of Standard Bank TPFA accounts, in order for Pagdens to cause guarantees to be issued by its utilisation of the Standard Bank's TPFA system. The guarantees were to secure the debts of the Trust to the Co-op. The Trust was not able to honour its debt to the Co-op, which made demand in terms of the guarantees. When demand was made, the guarantees were not presented to Standard Bank for payment, but to Pagdens. Crucially, it is not disputed that the bank guarantees were binding on Standard Bank.

[31] Once the monies had been credited to the Standard Bank TPFA account, they became subject to a pledge and cession in favour of Standard Bank. In its heading, the pledge and cession document executed by Pagdens and Cape Concentrate specifically stipulated that it was a '[p]ledge and cession of trust funds held in the Third Party Fund Administration ("TPFA") account on behalf of the investor principal, in favour of The Standard Bank of South Africa Limited to cover property guarantees issued on the instruction of the Pledgor from time to time'. It was not in dispute that, in this instance, Cape Concentrate was the pledgor.

[32] Paragraph 1 of the pledge and cession then provided that Pagdens:

'acting in [their] capacities as duly authorised agents of the investor principal ("the Pledgor"), transfers all rights to (cedes), surrenders and pledges to The Standard Bank of South Africa Limited ("the Bank"), or anyone who takes transfer of the Bank's rights under this pledge and cession, trust funds held in the TPFA account, from time to time, on behalf of the investor principal ("Trust Funds") upon the terms and conditions set out in [the] agreement.'

The cession therefore divested Cape Concentrate of its rights to the monies once they were paid into the TPFA system accounts. Those rights became vested in Standard Bank.

[33] The trust funds and interest thereon were 'given and transferred' to Standard Bank as a continuing covering security for property transaction guarantees issued on the pledgor's (Cape Concentrate's) instructions. Cape Concentrate would only have the right to redelivery of the funds on cancellation of the pledge and cession by Standard Bank. The guarantees could only be withdrawn by Standard Bank on three months' notice and could only be cancelled by way of an agreement to do so.

[34] The submission, on behalf of the liquidators, that when Pagdens made the payments on 8 May 2015 the monies had reverted to Cape Concentrate, because the guarantees had already been cancelled, is unsustainable. The guarantees had not been cancelled as provided therein. Instead, the demand for payment was made on the date of their expiry on the TPFA system. In any event, the cession and pledge over the funds, which was intended to secure the guarantees, remained in place until the guarantees were paid.

[35] The fact that the cession was in respect of a property guarantee, as opposed to a demand guarantee, is irrelevant. Once a guarantee is valid on the face of it, the contractual obligation of the bank is to pay the nominated beneficiary once the conditions are met.[5]

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[5] See *Lombard Insurance Company Limited v Landmark Holdings and Others* [2009] ZASCA 71; 2010 (2) SA 86 (SCA); [2009] 4 All SA 322 (SCA) para 20, where this Court stated that disputes which arise are of no moment insofar as the bank's obligation to pay is concerned; See also *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and Another* [2020] ZASCA 146 (SCA); 2021 (2) SA 137 (SCA) paras 7-9; *Raubex Construction (Pty) Ltd v Bryte Insurance Company Ltd* [2019] ZASCA 14; [2019] 2 All SA 322 (SCA) para 6; *State Bank of India and Another v Denel SOC Limited and Others* [2014] ZASCA 212; [2015] 2 All SA 152 (SCA) paras 6-7; *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* [2013] ZASCA 202 (SCA); 2014 (2) SA 382 (SCA) paras 12-13.

[36] The evidence of Pick does not assist. He was constrained to agree that the guarantee was issued by Standard Bank using electronic means; that demand was all that was required to trigger payment; the demand could only be made to Pagdens; and payment could only be made by Pagdens.

Conclusion

[37] In conclusion, the guarantees were presentable and payable by electronic means, by making a demand to Pagdens. When the demand was made by the Co-op for payment under the guarantees, payment of the pledged and ceded monies was made by Pagdens, in line with its obligations under the guarantees. The payment was therefore made by Standard Bank in satisfaction of the demand guarantee.

[38] In light of the above, it is unnecessary to determine the other issues that arose on the pleadings. It is also unnecessary to make an order on appeal in respect of the findings of the high court against which the Co-op cross-appealed. The high court did not make any specific order in relation thereto and once a finding is made that the R22 268 848.85 payment was made in satisfaction of Standard Bank's demand guarantees, any further order would be superfluous.

[39] In the result, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

C HEATON NICHOLLS

JUDGE OF APPEAL

Appearances

For appellants:	J E Smit
Instructed by:	Werksmans Attorneys, Johannesburg
	Symington De Kock, Bloemfontein
For respondent:	D H de la Harpe SC and K L Watt
Instructed by:	De Jager & Lordan Incorporated, Grahamstown
	Phatshoane Henney Attorneys, Bloemfontein