



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case no: 356/2021

In the matter between:

PIETER HENDRIK STRYDOM N.O.

FIRST APPELLANT

AMELIA STRECKER N.O.

SECOND APPELLANT

and

SNOWBALL WEALTH (PTY) LTD

FIRST RESPONDENT

LEO CHIH HAO CHOU

SECOND RESPONDENT

W ZHANG

THIRD RESPONDENT

JULIAN DAVID RABINOWITZ

FOURTH RESPONDENT

Neutral citation: *Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others* (356/2021) [2022] ZASCA 91 (15 June 2022)

Coram: PONNAN, VAN DER MERWE and HUGHES JJA and MUSI and SMITH AJJA

Heard: 4 May 2022

Delivered: 15 June 2022

Summary: Insolvency – s 26(1) of Insolvency Act 24 of 1936 – disposition not made for value – means for no value at all.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Erasmus J, sitting as court of first instance):

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

JUDGMENT

Van der Merwe JA (Ponnan and Hughes JJA and Musi and Smith AJJA concurring)

[1] The appellants are the joint liquidators of DexGroup (Pty) Ltd (in liquidation) (DexGroup). The first respondent is Snowball Wealth (Pty) Ltd (Snowball). The second, third and fourth respondents are Mr LCH Chou, Ms W Zhang and Mr JD Rabinowitz respectively. I refer to the three of them collectively as the other respondents. Prior to its liquidation, DexGroup sold shares in Trustco Group Holdings Limited (the Trustco shares) to each of the respondents. The appellants sued the respondents in the Western Cape Division of the High Court, Cape Town (the high court) for the return of the Trustco shares, alternatively payment of the value of the shares, on the ground that each sale constituted a disposition without value in terms of s 26(1) of the Insolvency Act 24 of 1936. Snowball and the other respondents separately excepted to the appellants' particulars of claim. The high court (Erasmus J) upheld both exceptions. The appeal is with the leave of this court.

[2] By virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008, Chapter 14 of the repealed Companies Act 61 of 1973 continues to apply to insolvent

companies, until a date to be determined. Sections 339 and 340 form part of Chapter 14. Section 339 makes the provisions of the law relating to insolvency *mutatis mutandis* applicable to the winding-up of a company unable to pay its debts. Section 340(1) provides:

'(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.'

[3] Section 26(1) of the Insolvency Act (s 26(1)), in turn, reads:

'(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 issue in the appeal is the meaning of the phrase 'not made for value' in s 26(1) (the phrase).

Background

[4] The background to the claims against the respondents, as sketched in the particulars of claim, was the following. DexGroup was placed in final liquidation on 26 October 2016, whereafter the appellants were appointed as joint liquidators. Since at least 2007 and at all times thereafter, however, DexGroup was unable to pay its debts and its liabilities exceeded its assets. The particulars of the dispositions of the Trustco shares by DexGroup to the respondents were as follows. On 23 September 2010, it

sold 21 million shares to Snowball at 27 cent per share and on 22 November 2010, it sold a further 6 million shares to Snowball at 48 cent per share. On 22 November 2010, it also sold 4 136 755 shares to Mr Chou, at the same price. On the same date, it sold 300 000 shares to Ms Zhang and 1 million shares to Mr Rabinowitz, all at the same price.

[5] The particulars of claim proceeded to state that the 'reasonable market value' of the shares at the time of each sale was 67 cent per share. Because the respondents paid 27 cent (40 per cent of the market value) and 48 cent (72 per cent of the market value), the value given for the shares was 'illusory or merely nominal'. The dispositions took place more than two years prior to 25 February 2014, being the deemed date of sequestration in terms of s 340(2)(a) of Act 61 of 1973.¹ On the strength of these allegations, the appellants sought orders setting aside each sale under s 26(1)(a).

[6] Snowball's exception departed from the premise that 'illusory or merely nominal' value means no value. It emphasised that the according to the particulars of claim, DexGroup had received payment of R5 670 000 for the 21 million shares and R2 880 000 for the 6 million shares. Therefore, so Snowball said, the value given by it was not illusory or merely nominal. On this basis it contended that the appellants' allegations were not capable of sustaining claims based on dispositions not made for value as contemplated in s 26(1).

[7] The nub of the exception of the other respondents was the following:
'A disposition of property is "not made for value" within the meaning of s 26 where (i) no benefit at all is received for the property, or (ii) some benefit is received for the property, but it is merely illusory or nominal, so that the benefit amounts to no value at all.

¹ Section 340(2)(a) reads:

'(2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be—

(a) in the case of a winding-up by the Court, the presentation of the application, unless that winding-up has superseded a voluntary winding-up when it shall be the registration in terms of section 200 of the special resolution to wind up the company.'

A disposition of property for an inadequate value (as opposed to for an illusory or nominal value) is not a disposition “not made for value” within the meaning of s 26.’

The exception proceeded to state that since the particulars of claim revealed that the other respondents had paid more than 70 per cent of the alleged reasonable market value of the shares, the sales in question were not dispositions not made for value.

[8] As I have said, the high court upheld both exceptions. The crux of its reasoning appeared from the following:

‘I now turn to the facts of this matter tested against the legal position set out above. It is clear that the disposition was clearly not for “no value” and was also not “illusory” nor “nominal”. The plaintiffs’ own factual allegations are destructive of any claims in terms of section 26 of the Insolvency Act. The proper interpretation, in the context of the act, as set out above does simply not apply to the facts as pleaded. The pleadings excepted must be taken as it stands, the truthfulness thereof is accepted for these purposes. Even if accepted that the value paid was less than the reasonable market value, no basis is laid nor suggested that there was anything remiss therewith. It would be an absurdity to equate the position that, when paying a discounted price, it can be said you gave no value.’

[9] Whilst this passage cannot be faulted, the high court did not directly address the exception of the other respondents. Thus, it refrained from deciding whether the phrase means for no value at all. I have demonstrated that Snowball’s exception was founded on a narrower ground. However, if the exception of the other respondents is good, then it must follow that Snowball’s exception had to succeed on that ground as well.

Case law

[10] I therefore proceed to consider the meaning of the phrase. Although it has been considered in a number of decisions of this court, as I shall show, it has not definitively been decided whether s 26(1) contemplates a claim based on a disposition for inadequate or insufficient value as opposed to no value at all.

[11] *Estate Wege v Strauss* 1932 AD 76 (*Estate Wege*) dealt with the provisions of s 24 of the Insolvency Act 32 of 1916. For present purposes they did not differ from those of s 26(1) in any material respect. The essential issue in that matter was whether the payment of bets on horse races were dispositions not made for value. The appellant contended that in law betting agreements were null and void. For that reason, so it was submitted, the payments that Mr Wege had made to a bookmaker whilst the former was factually insolvent, were dispositions without value. Wessels ACJ rejected the first part of the contention in these terms at 81:

'A bet, therefore, is not illegal by our law, though it is not enforceable in our Courts between the parties to it, and when we speak of a wagering contract being null and void we mean no more than that our Courts will not lend their aid to its enforcement.'

[12] The court proceeded to adopt the finding of the court below that there was no good reason for making value dependent on the existence of a legal sanction. After saying that the word 'value' in the provision in question carried no technical meaning and could therefore only mean value in the ordinary sense of the word, it stated at 84: 'The object of sec. 24 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or contingent advantage in return.' It is apparent that the question whether the phrase meant no value or inadequate value, did not arise in *Estate Wege* and this dictum must be read in that light.

[13] In *Estate Jager v Whittaker & Another* 1944 AD 246 (*Estate Jager*), a trustee, acting under s 26(1), sought to reclaim interest that the insolvent had paid to a creditor in contravention of the Usury Act 27 of 1926. Relying on *Estate Wege*, the creditor contended that the benefit that the insolvent had derived from the money lent to him was a *quid pro quo* for his promise to pay (and the payment of) interest in excess of the rate allowed by law. Watermeyer CJ, writing for the court, disagreed. He said at 251-252:

'But, in my opinion, the Legislature, by making it a criminal offence for a lender to stipulate for, demand, or receive interest at a rate higher than that allowed by the Usury Act, has in

effect said that the use by the borrower of the money lent shall not be regarded as value for the promise or for payment of anything more than the rate of interest permitted by the Usury Act.

No obligation of any sort to pay a higher rate of interest than that permitted by the Act can arise from a promise to pay a higher rate, and therefore it follows that such a promise is a mere nullity, and any payment of such a higher rate in pursuance of such promise is in effect a donation, or disposition not made for value, and is consequently liable to be set aside under sec. 26 of the Insolvency Act. This view is not in conflict with the decision of this Court in the case of *Estate Wege v Strauss* because there are passages in the judgment in that case which indicate clearly that when the question arises whether payments made in pursuance of such contracts can be set aside under sec. 26 of the Insolvency Act, a distinction must be drawn between a contract which, though lawful, gives rise only to moral obligations unenforceable in a court of law and an illegal contract which gives rise to no obligations at all.'

[14] Importantly, this court stated at 250-251:

'The words "disposition not made for value" mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*. The most obvious example of such a disposition is a donation and . . . it would appear *prima facie* that any payment, purporting to be made solely in discharge of an existing obligation, is in effect a donation if no obligation to make such payment in fact exists. If a *lawful* obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment decreases his assets, but at the same time it diminishes his liabilities, and in transactions which are entered into in the ordinary course of business such a discharge from a liability would be value for the payment made. For the purposes of this case, it is unnecessary to consider what the legal position would be if the obligation which is discharged arises from a promise to donate or a promise made in return for an inadequate consideration.'

Therefore, the question whether s 26(1) could apply to dispositions for inadequate value not only did not arise on the facts of *Estate Jager*, but was expressly left open.

[15] The question also did not arise in *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (A) (*Langeberg Koöperasie*). There a creditor appealed against an order setting aside a suretyship and mortgage

bond as dispositions not made for value under s 26(1). Two points arose for decision. The first was whether the suretyship agreement in question constituted a disposition of property within the meaning of the Insolvency Act. If so, the second point was whether there was a disposition not made for value under s 26(1).

[16] The suretyship agreement was entered into by a farming company to secure an overdue debt owed by its insolvent parent company to the creditor. The suretyship agreement entailed an obligation to pay (as surety and co-principal debtor), as well as an obligation to pass a mortgage bond over the unencumbered property of the farming company. The mortgage bond was registered accordingly. This court endorsed the finding of the court below that in the circumstances the suretyship agreement clearly constituted a transaction falling within the definition of 'disposition' in the Insolvency Act.

[17] The argument on the second point was that the disposition was for value as the farming company derived a benefit from a moratorium that had been granted by the creditor to the parent company as a result of the execution of the suretyship agreement. Whilst acknowledging that such a benefit could in principle constitute value under s 26(1), Beyers JA, for the majority,² held that on the facts the farming company had derived no direct or indirect benefit from the moratorium.

[18] *Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) (*Swanee's Boerdery*) concerned a similar case to *Langeberg Koöperasie*. There a company that formed part of a group of companies undertook a suretyship obligation to guarantee the debt of another company in the group. The former company was liquidated and the question arose whether the suretyship was a disposition not made for value. Galgut AJA referred extensively to *Langeberg Koöperasie* in considering an argument that the suretyship gave financial stability to

² Williamson JA dissenting, only on the question whether a contract of suretyship could be a disposition.

the whole group of companies and therefore amounted to a disposition for value. He held, however, that this had not been established on the facts.

[19] In the course of the judgment, the following was stated at 860E-F:

'We were referred to *Bloom's Trustee v Fourie* 1921 TPD 599 at 601 where DE WAAL J when discussing s 24 of Act 32 of 1916 says:

"It seems to me that the word "value" means adequate value or "just and valuable consideration"."

It is clear from what is said in that judgment that the learned Judge came to that conclusion because he adopted the words "just and valuable consideration" which appeared in s 83 of Ord 6 of 1843 (C) and also the dictionary meaning of value. Be that as it may, the *dictum* is no longer applicable since this Court has now defined value in the *Estate Wege* case and the *Estate Jager* case, both cited above.'

In my view this dictum also did not decide the question raised in the present matter. I say so for two reasons. The first is that the facts in *Swanee's Boerdery* did not require the consideration of a distinction between the concepts of inadequate value and no value. Secondly, on the issue of value under s 26(1) this dictum went no further than *Estate Wege* and *Estate Jager* discussed above.

[20] In each of the mentioned authorities the focus of this Court was on the nature of the transaction, whether it be the: (i) wager in *Estate Wege*, which was likened to an insurance and thus not a disposition of property without value; (ii) usurious interest rate in *Estate Jager*, where it was held that no obligation arose from a promise to pay a higher interest rate than that permitted by the Act and that such a promise was a mere nullity; (iii) suretyship in *Langeberg Koöperasie*, where the court held that it was difficult to see what possible value there could be for a company that was forced to pledge its assets for a substantially overdue debt for its hopelessly insolvent parent company; (iv) suretyship in *Swanee's Boerdery* where, whilst emphasising that a company had a personality of its own, it was held that the facts were distinguishable from *Langeberg Koöperasie*, inasmuch as the company would for all practical purposes have ceased to exist. Thus, in each of those matters, the court was not

strictly speaking required to consider the issue that confronts us in this matter. The importance of this is twofold. First, there is no authority of this court directly on point as seems to have been suggested, by which we are bound. Second, unlike the other matters, here it is not the nature of the transaction that occupies our attention. It is a sale at arm's length. There is no suggestion that it lacks validity, is unenforceable or otherwise susceptible to impeachment. The argument is that although a price was fixed in terms of an arm's length transaction, the disposition of the shares at that price was a disposition 'not made for value'.

[21] Before turning to the interpretation of the phrase, it is also necessary to refer to the decision in *Terblanche NO v Baxtrans CC and Another* 1998 (3) SA 912 (C). The facts of that case were similar to the facts of this matter. The liquidator of a company sought, *inter alia*, to have a disposition set aside under s 26(1) on the ground that ownership of assets worth R1 276 000 had been transferred for a consideration of only R383 539. The payment of the latter amount to two banks enabled the transfer of ownership of the assets to the transferee. The latter excepted to this claim on the grounds that according to the authorities any value would suffice to render s 26(1) inapplicable and that the plaintiff had not pleaded any basis upon which the payment of the amount of R383 539 could be regarded as not constituting value.

[22] In his judgment Selikowitz J employed the expressions 'illusory value' and 'nominal value'. The learned judge stated at 917B-C:

'Illusory or nominal value is what those words suggest – no value at all. "Illusory value" is merely an illusion and "nominal value" is value in name only.'

Why this was done is not apparent from the judgment. According to the judgment these expressions were not mentioned in the particulars of claim, the argument or the case law referred to. Before us, lead counsel for the appellants confirmed that this judgment was relied upon for the use of these expressions in the appellants' particulars of claim.

I may mention that in his minority judgment in *Langeberg Koöperasie*, Williamson JA (at 612), after having concluded that ‘the circumstances actually precluded any benefit accruing to . . . or ever being likely to accrue in the future’, added ‘the possible benefit to be gained . . . was really, in the event, illusory’. In my view, the importation of the expressions ‘illusory value’ and ‘nominal value’ does conduce to confusion. However, in the light of the conclusion to which I arrive, the issue need not detain me.

[23] Selikowitz J said that neither the argument that s 26(1) could only apply where there is a total absence of value nor the argument that inadequate value would always be prima facie evidence of no value, could prevail. It proceeded to determine the exception raised in that case on the basis that there was no allegation that the value conceded (R383 539) ‘should be treated as equivalent to no value having been received’. It is thus apparent that this judgment also does not provide a clear answer to the question in the present matter.

Interpretation

[24] It follows that the meaning of the phrase has to be determined on ordinary principles of interpretation. There is no need to cite authority for the proposition that this exercise entails giving meaning to the phrase by a holistic consideration of its text, context and purpose. As I have shown, the other respondents contended that the phrase meant for no value at all. The appellants pleaded that it meant for less than ‘reasonable market value’ and submitted that it referred to a counter performance that did not represent a ‘fair return or equivalent’.

[25] It follows that the appellants’ interpretation requires significant reading-in into s 26(1). Not so with the interpretation of the other respondents. It will be recalled that in *Estate Wege* this court said that the word ‘value’ in the predecessor of s 26(1) meant value in the ordinary sense of the word. This was taken further in *Estate Jager* when Watermeyer CJ said:

'The words "disposition not made for value" mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*'.³

According to its text, therefore, the phrase means for no value at all. The next question is whether the context and purpose of the phrase indicate that it should nevertheless carry a different meaning.

[26] The most important contextual consideration is that s 26 forms part of a set of remedies available to a trustee or liquidator under the Insolvency Act. The other remedies are contained in s 29 ('Voidable preferences'), s 30 ('Undue preference to creditors') and s 31 ('Collusive dealings before sequestration').

[27] Under s 26(1),⁴ a disposition not made for value may be set aside when the debtor was factually insolvent at the time or when it caused the debtor to become factually insolvent. Subsections 26(1)(a) and (b) only deal with the incidence of the onus in respect of factual insolvency. It follows that the availability of the remedy under s 26(1) is not limited in time. It does not require proof of an intention to prefer one creditor over another or of collusion, nor can a claim under s 26(1) be defeated by showing that the disposition occurred in the ordinary course of business and without the intention to prefer.

[28] Section 29(1)⁵ permits the setting aside of a disposition that had the effect of preferring one creditor over another, where the debtor was factually insolvent when the disposition was made or where it caused the debtor's factual insolvency. The remedy is only available in respect of dispositions made within six months prior to the sequestration or the commencement of winding-up. A claim under s 29 may be

³ See para 14 above.

⁴ Quoted in para 3 above.

⁵ Section 29(1) reads:

'Every disposition of his property made by a debtor not 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.'

defeated by establishing that the disposition was made in the ordinary course of business and that it was not intended to prefer one creditor above another.

[29] Section 30(1)⁶ provides for the setting aside of a disposition by a debtor, who was factually insolvent at the time and whose estate was subsequently sequestrated or placed in liquidation, if the disposition was made with the intention of preferring one creditor above another. In principle this remedy may be employed irrespective of how much time elapsed between the disposition and the sequestration or winding-up. Section 30 also does not provide for any defences to, or exclusions from, the scope of a claim thereunder.

[30] Finally, s 31⁷ permits the setting aside of a transaction entered into by a debtor prior to sequestration or liquidation, whereby the debtor, in collusion with another, disposed of property in a manner which had the effect of prejudicing the debtor's creditors or by preferring one above another. The remedy is also in principle available no matter how much time elapsed since the transaction had been entered into. A person, who was party to the collusion is liable to make good the loss caused to the estate, as well as for payment of a penalty. If the person is a creditor, the claim against the estate is forfeited.

⁶ Section 30(1) reads:

'If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.'

⁷ Section 31 reads:

'(1) After the sequestration of a debtor's estate the court may 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.

(2) 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.

(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

[31] In my view, this contextual setting materially informs the interpretation of the phrase. 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. This is, *inter alia*, illustrated by s 29: a disposition that in fact had the effect of preferring one creditor over another, is immune from a challenge under s 29 if the disposition was made more than six months before the sequestration or winding-up and, when made within the period of six months, if the recipient shows that it was made in the ordinary course of business and without the intention to prefer. This is also indicated by the provisos to s 26(1)⁸ and 26(2).⁹

[32] In my view, these provisions were intended to constitute a comprehensive set of remedies to reverse objectionable transactions that occurred prior to sequestration or winding-up. A comparison of these remedies demonstrates that the more objectionable the transaction, the more extensive the remedy afforded. As I have said, the remedies under s 26, s 30 and s 31 allow retrospective redress that is unlimited in time. But both s 30 and s 31 deal with conduct intended to prejudice the general body of creditors. Section 30 requires proof of the intention to prefer and s 31 requires proof of collusion. However, there is nothing inherently, commercially or morally objectionable to a sale at a discounted price. The same cannot be said of a factually insolvent person squandering or giving away assets for no return. That, I think, is what Wessels ACJ meant when he said 'the object of sec. 24 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his

⁸ See para 3 above.

⁹ Section 26(2) provides:

'A disposition of property not made for value, which was set aside under subsection (1) or which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate: Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which-

(a) was made by way of suretyship, guarantee or indemnity; and

(b) has not been set aside under subsection (1),

the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his liabilities immediately before the making of that disposition.'

assets away without receiving any present or contingent advantage in return'.¹⁰ This indicates that s 26(1) was intended to apply only to gratuitous dispositions.

[33] Importantly, in terms of s 26(2),¹¹ the recipient has no claim in competition with the creditors of the insolvent estate. Section 32(3)¹² provides that should the property have been alienated or consumed in the period between the disposition and the setting aside, the recipient would be liable for the value of the property at the date of the disposition or at the date on which it is set aside, whichever is the higher. On the appellants' construction therefore, should a purchaser, with no knowledge of the seller's financial situation, in the ordinary course of business purchase property at a discounted price (something less than 'reasonable market value' or a 'fair return or equivalent') from a person that is sequestrated years later, the purchaser would have to return the property without the right to reclaim the purchase price. Moreover, should the purchaser *bona fide* have alienated or consumed the property, he or she would be liable for payment of the higher of the value of the property at the time of the sale or at the time of the setting aside of the disposition and forfeit the purchase price. Many examples could be given of the absurd results that the appellants' interpretation would lead to. It suffices to say that they could not have been intended.

[34] As I have said, the appellants' case is that dispositions for less than the 'reasonable market value' or a 'fair return or equivalent' are not made for value. In *Goode, Durrant and Murray Ltd v Hewitt and Cornell*, NNO 1961 (4) SA 286 (N) at 291E-F Fannin J said:

'The word "value" is not, however, 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.'

¹⁰ See para 12 above.

¹¹ See footnote 9 above.

¹² Section 32(3) reads:

'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.'

In *Langeberg Koöperasie* at 604B-C this court quoted this passage with approval. Thus, it is an established principle that 'value' under s 26(1) includes benefits that do not have a reasonable market value and in respect of which a fair return or equivalent could not be evaluated or expressed in monetary terms. This consideration, too, points away from the construction favoured by the appellants.

[35] Finally, there is s 25(4)(c) of the Insolvency Act. In relevant part it provides:

'(4) If a person who is or was insolvent unlawfully disposes of immovable property or a right to immovable property which forms part of his insolvent estate, the trustee may, notwithstanding the provisions of subsection (3), recover the value of the property or right so disposed of-

(a) . . .

(b) . . .

(c) from any person who acquired such property or right from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property or right and any value given in return.'

Subsection 4(c) was introduced by an amendment that took effect on 1 September 1993.¹³ The legislature is presumed to be acquainted with the existing law¹⁴ and a deliberate change of expression indicates a change of intention.¹⁵ In the result, the phrase could not bear the meaning of not for 'sufficient value'.

[36] All the contextual and purposive indicators reinforce the ordinary meaning of the phrase. For these reasons, I conclude that the phrase 'not made for value' in s 26(1) of the Insolvency Act 24 of 1936 means for no value at all.¹⁶ It follows that the appeal must fail.

¹³ In terms of the Insolvency Amendment Act 122 of 1993.

¹⁴ See *Fundstrust (Pty) Ltd (In liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732B.

¹⁵ See *Shalom Investments (Pty) Ltd & Others v Dan River Mills Incorporated* 1971 (1) SA 689 (A) at 701B-C.

¹⁶ Therefore the decision in *De Jongh Ontwikkelings (Pty) Ltd & Another v Kilotech Investments (Pty) Ltd & Others* 2021 (4) SA 492 (GP) para 6.3.7 and 6.3.8 should not be followed.

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

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances:

For appellant: F H Terblanche SC (with P W T Lourens)
Instructed by: Susan Strydom Inc., Pretoria
Symington & De Kok Attorneys, Bloemfontein

For first respondent: C M Eloff SC
Instructed by: Bowman Gilfillan Attorneys, Sandton
McIntyre Van der Post Attorneys, Bloemfontein

For second, third and
fourth respondents: J Muller SC (with K Reynolds)
Instructed by: Edward Nathan Sonnenbergs, Cape Town
Matsepes Inc., Bloemfontein