



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

**Reportable**

Case no: 1280/2021

In the matter between:

**CHAIM COHEN**

**Appellant**

and

**ABSA BANK LIMITED**

**Respondent**

**Neutral citation:** *Cohen v Absa Bank Limited* (Case no 1280/2021) [2024]  
ZASCA 16 (9 February 2024)

**Coram:** MOCUMIE, NICHOLLS and MEYER JJA and CHETTY and  
KEIGHTLEY AJJA

**Heard:** 1 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 9 February 2024.

**Summary:** Insolvency law – Interpretation – s 31(2) read with s 32 of the Insolvency Act 24 of 1936 – whether a surety has *locus standi* to invoke s 31(2) to avoid liability to a creditor after the liquidation of the primary debtor.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Mahalelo J, sitting as court of first instance):

- 1 The application for condonation and reinstatement of the appeal is dismissed with costs, including those of two counsel.
  - 2 The appeal is struck from the roll with costs, including those of two counsel.
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## JUDGMENT

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**Meyer JA (Mocumie and Nicholls JJA and Chetty and Keightley AJJA concurring):**

[1] The appellant, Mr Chaim Cohen (Mr Cohen), seeks to avoid liability under a deed of suretyship executed in favour of the respondent, Absa Bank Limited (Absa), on the basis of s 31(2) of the Insolvency Act 24 of 1936 (the Insolvency Act).<sup>1</sup> As a result of the primary debtor, A Million Up Investments 105 (Pty) Limited (AMU), being unable to meet its obligations under a loan agreement to Absa in full, it was liquidated. Thereafter, Absa sought to hold Mr Cohen liable as surety. In his defence Mr Cohen invoked s 31(2) and alleged that, before its liquidation, AMU colluded with Absa to dispose of property belonging to AMU in a manner which had the effect of prejudicing AMU's creditors or of preferring one of them above the others. The question is whether s 31(2) permits a surety, in these circumstances, to raise this defence. The commercial court of the Gauteng Division of the High Court, Johannesburg (the high court) said no. Consequently, it ordered Mr Cohen to pay to

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<sup>1</sup> Section 31(2) reads:

'Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the Court may adjudge, not exceeding the amount by which he would have benefitted 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.'

Absa 40 million rand plus interest and costs. It is that finding and order which the surety wishes to assail in this appeal. The appeal is with leave of the high court.

[2] Since the appeal record was filed late, the appeal lapsed under rule 8 of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal. Mr Cohen seeks condonation and the reinstatement of the appeal. His application is opposed by the Absa. Evidentially, Mr Cowen's founding affidavit fails to provide a full and reasonable explanation which covers the entire period of the delay. It is trite that 'very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point)'.<sup>2</sup> In this case, as I demonstrate below, it is the absence of any prospects of success that ultimately decide the fate of the application for condonation and reinstatement of the appeal.

[3] The following factual background is common cause. In 2006, AMU purchased a property located on Orange Street, Cape Town (the property). Mr Cohen served as the chief executive officer and chairman of AMU's holding company, Quantum Property Group Limited (QPG). He referred to himself as the 'driving force and controlling mind on the boards of QPG and AMU'.

[4] There were several financing agreements concluded between Absa and AMU. Under these agreements, Absa extended substantial loans to AMU to build a hotel on the property. The hotel, known as 15 on Orange (the hotel), has 129 rooms. There were also plans for 12 penthouses, 2 567 m<sup>2</sup> of retail space, and 169 parking spaces in the basement of the hotel building. July 2006 marked the beginning of construction. The expected completion date was June 2009, with the hotel scheduled to open on 1 September 2009.

[5] In November 2006, a shareholders' agreement was concluded between AMU and Protea Hotel Group (Pty) Limited (Protea). In terms of this agreement, each party was entitled to 50 percent of the shares in Darwo Trading 75 (Pty) Limited (Darwo), the company that was to lease and operate the hotel. Darwo, in turn,

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<sup>2</sup> *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 38.

concluded a management agreement with African Pride (Pty) Limited (AP), a wholly owned subsidiary of Protea, under which AP agreed to manage Darwo's hotel operations for a period of 20 years.

[6] Absa and AMU signed the first loan agreement in 2006. In April 2008, a new loan agreement was concluded, which replaced the initial one (the 2008 loan agreement). It was agreed that Absa would provide AMU with up to R370 600 000 in funding to build the hotel. The loan was due for repayment in May 2009, which was 34 months following the first drawdown in July 2006. The retail areas within the hotel building were to be fully leased when the hotel opened on 1 September 2009. The penthouse apartments were to be sold ahead of time and transferred once they had been built, generating income to reduce the Absa debt.

[7] On 9 January 2008, Mr Cohen signed a deed of suretyship in favour of Absa. Under the suretyship, he bound himself as surety and co-principal debtor, jointly and severally with AMU, in favour of Absa for the repayment on demand of any sum or sums of money which AMU owed or might owe to Absa in the future, from whatever cause arising. He agreed to be bound by all admissions made by or on behalf of AMU. This included, but was not limited to, any acceptance of Absa's claim by a trustee or liquidator in the case of AMU's insolvency or liquidation, and any judgment granted by a competent court against AMU in favour of Absa. Absa's entitlement to recover from Mr Cohen was limited to a minimum amount of R20 million, plus any further amounts for interest and costs that had accrued or would accrue until the date of payment.

[8] The hotel construction was not completed on time or within budget. The hotel did not open until December 2009, and even then, only two floors of finished rooms were ready for usage. The retail space areas remained unleased, while the penthouses were still to be completed. Due to the ongoing construction work, the hotel was unable to reap the anticipated benefits of being a preferred hotel during the 2010 FIFA World Cup.

[9] AMU needed additional funding due to the delay and cost overruns. It requested an extension of the Absa credit facility. In November 2009, in an

addendum, the parties agreed upon the provision of extra funds and an extension of the loan repayment date to 31 March 2010. Due to the loan not being repaid by 31 March 2010, Absa could call up the loan, apply for AMU's liquidation if payment was not made, and call on the sureties, among whom was Mr Cohen, for payment. During that period, Absa was convinced by AMU and the sureties, including Mr Cohen, that AMU could trade itself into a better financial position, allowing it to repay the loan. Absa and the AMU directors engaged in discussions for several months to achieve a mutually acceptable solution that would enable AMU to repay its debt to Absa.

[10] AMU and QPG finally reached an agreement on 16 November 2010 to sign a new 'Commitment Letter' and 'Term Sheet' to restructure the Absa loan (the 2010 Term Sheet). Mr Cohen, the executive chairman of QPG, presided over the QPG board meeting. On 23 November 2010, the 2010 Term Sheet was signed. It outlined the principles that would govern the restructuring of the credit facility and the implementation of the turnaround plan.

[11] The three key components of the financial model that underpinned the 2010 Term Sheet, were the following. First, to lower Absa's risk and the debt, AMU had to raise R50 million in external equity capital, plus interest of about R9 million (the equity injection). The equity injection deadline was 30 November 2011. QPG had suggested that it would raise funds by issuing and selling debentures. This money could then be used to purchase shares in AMU. Second, AMU had to acquire the whole 100 percent benefit of the revenue generated by the operation of the hotel to pay off the Absa debt (the revenue requirement). In August 2010, AMU board recommended to Absa that AMU purchase Protea's 50 percent stake in Darwo, the hotel operating company, to meet the full revenue requirement. At the time, Protea's loan account in Darwo topped R20 million. This meant that in order for AMU to purchase Protea's shares, it would also need to acquire its loan account. Third, the penthouses had to be sold and the money paid to Absa to reduce the loan.

[12] AMU and QPG used the 2010 Term Sheet to inform QPG's shareholders that the loan repayment terms had been extended. Absa and AMU needed to finalize an 'Amended and Restated Loan Agreement' (the ARLA), which included the

restructuring plan they agreed on in November 2010. Since December 2010, all parties concerned have been negotiating the terms of the formal agreement. Mr. Cohen was actively involved in the early discussions and decisions around this agreement, the agreements with Protea, and the draft sale agreement between Protea and AMU. His position as director of AMU and of QPG was subsequently terminated.

[13] The ARLA was ultimately concluded on 31 August 2011. The terms recorded were almost identical to those recorded in the 2010 Term Sheet. Despite the abandonment of the debenture arrangement, the deadline for paying the equity injection requirement was extended to 31 March 2012. To meet the complete revenue requirement, the ARLA included three sets of agreements: The 'Operator Restructure Agreements'; the 'Hotel Lease Agreement'; and the 'New Management Agreement'. These agreements anticipated the sale agreement between Protea and AMU, under which Protea sold and transferred its 50 percent shareholding in Darwo, as well as its loan account to AMU for an amount of R25 million. The sale agreement between Darwo and AMU was concluded on 6 September 2011. AMU settled the acquisition cost by transferring a penthouse to Protea for an estimated value of R11 million. Additionally, cash payments of R11 million and R3 million were made using Absa's loan facility.

[14] As of 31 March 2012, AMU had not paid Absa the mandatory equity injection amount. Following the breach, Absa demanded payment from Absa and from Mr Cohen, *qua* surety. On 4 June 2012, the board of directors of AMU resolved that ARLA voluntarily begin business rescue proceedings and be placed under supervision. Following an application by Absa, the Western Cape high court issued an order on 18 June 2012, setting aside the resolution. On 29 June 2012, AMU was placed under provisional winding-up by order of court, which order was made final on 14 August 2012. The liquidators accepted Absa's claim for R576 991 787.69. Following the sale of the property, the liquidators published the amended second and final liquidation and distribution account that showed a deficiency of R380 million payable to Absa.

[15] On 1 September 2012, Absa initiated action proceedings against Mr Cohen in the high court, claiming the amount of R20 million, interest plus costs, in respect of his liability under the suretyship. The interest that had accrued on the suretyship capital amount of R20 million attained the *in duplum* limit. Thus, Mr Cohen was sued for payment of the amount of R40 million plus costs on the scale as between attorney and own client, which scale of costs was provided for in the suretyship. Before the trial ended, Mr Cohen abandoned all but one of his defences. That defence raises the interpretation of s 31(2) of the Insolvency Act.<sup>3</sup>

[16] Based on the interpretation contended for by Mr Cohen, he argues that he was released *ex lege* from his suretyship obligations due to Absa's forfeiture of its claim against the insolvent estate of AMU in terms of s 31(2) of the Insolvency Act. That is so, he maintains, because AMU entered into a transaction with Absa in terms of which AMU disposed of property belonging to it in a manner which had the effect of prejudicing AMU's creditors through preferring one of its creditors over the other creditors. Absa, therefore, according to Mr Cohen, was a party to a collusive disposition within the meaning of s 31(1) of the Insolvency Act and, as a creditor, it forfeited its claim against AMU's insolvent estate in terms of s 31(2).

[17] In *Gert de Jager (Edms) Bpk v Jones NO & McHardy NO*,<sup>4</sup> Rumpff JA held that if the parties to the collusion know that the debtor is insolvent and also know that the alienation will have the effect of what is mentioned in s 31(1), then it follows that the collusion is fraudulent in respect of the creditors in the sense that its purpose is to short change them.<sup>5</sup>

[18] What constitutes the collusive disposition to which Absa was a party, according to Mr Cohen, is the disposal of AMU's property to Protea, which took place in terms of the sale agreement concluded between Protea and AMU. In concluding the ARLA and the sale agreement, Mr Cohen argues, AMU, in collusion with Absa,

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<sup>3</sup> Op cit fn 1.

<sup>4</sup> *Gert de Jager (Edms) Bpk v Jones NO & McHardy NO* 1964 (3) SA 325 (A) at 330H-331.

<sup>5</sup> Own loose translation of the following passage in which Rumpff JA held that '... as die partye tot die samespanning weet dat die skuldenaar insolvent is en ook weet dat die vervreemding die gevolg sal hê wat in art. 31(1) genoem word, dan volg dit dat die samespanning bedrieglik is ten opsigte van die skuldeisers in die sin dat die oogmerk daarvan is om hulle tekort te doen'.

disposed of R14 million as well as a penthouse in the hotel building worth R11 million.

[19] Absa, in contrast, asserts the following. First, Absa was the only creditor who could have been prejudiced by the penthouse's sale and the R14 million payment to Protea. This is because Absa held a mortgage bond that entitled it to the proceeds of the sale of the penthouse, and the R11 million and R3 million payments were made using the loan facility that Absa provided. Second, the ARLA and the sale agreement had a legitimate purpose, not a fraudulent one, to provide AMU with the best chance of trading out of its debt-laden distressed situation. In extending the additional loan facility to AMU in accordance with the ARLA, Absa facilitated AMU's ability to pay its existing and continuing current creditors. Furthermore, in order to satisfy the debt owed to Absa, the intention of the sale agreement was to secure the full revenue generated from the hotel operations. Absa contends that the absence of evidence refutes a finding of collusion between AMU and Absa, or a finding that the sale agreement, or the ARLA, was concluded or implemented with a fraudulent purpose. I find Absa's assertions to be plausible, taken at face value. Nonetheless, the anterior question is whether Mr Cohen has the *locus standi* to invoke one of the remedies enumerated in s 31(2) of the Insolvency Act.

[20] I shall proceed to an interpretative analysis of s 31(2), using the established triad of language, context, and purpose.<sup>6</sup> Sections 31 and 32 read thus:

'31 *Collusive dealings before sequestration*

- (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 benefitted by such dealing if it had

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<sup>6</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 25; *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* ZASCA 16; 2020 (4) SA 428 (SCA), para 8; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).



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.

### 32 *Proceedings to set aside improper disposition*

(1)(a) Proceedings to set aside any improper disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.

(b) If the trustee fails to take any such proceedings, they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.

(2) . . .

(3) When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition at the date on which the disposition is set, whichever is the higher.'

[21] Section 31 is in a part of the Insolvency Act in which the provisions address the following topics: (a) disposition without value (s 26);<sup>7</sup> (b) antenuptial contracts (s

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<sup>7</sup> Section 26 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.

(2) 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 exceeding his liabilities immediately before the making of that disposition.'

27);<sup>8</sup> (c) voidable preferences (s 29);<sup>9</sup> (d) undue preference to creditors (s 30);<sup>10</sup> (e) collusive dealings before sequestration; and (f) proceedings to set aside an improper disposition (s 32). ‘Disposition’ is defined in s 2 to mean-

‘[A]ny transfer or abandonment of rights to property and including 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 court; and “dispose” has a corresponding meaning;’

[22] Sections 26, 29, 30 and 31 detail the several forms of ‘improper dispositions’ that may be set aside by the court. Additionally, these sections set out the substantive requirements that must be met for the setting aside of each form of disposition. Section 32 governs the procedure for the setting aside of each form of ‘improper disposition’. Each of ss 26, 29, 30 and 31 must be read alongside s 32. Only the trustee or liquidator of the insolvent estate has the *locus standi* to bring any such proceedings. Only if the liquidator fails to bring such proceedings, may a creditor do so in the liquidator’s name, as long as the creditor indemnifies the

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<sup>8</sup> Section 27 reads:

‘(1) No immediate benefit under a duly registered antenuptial contract given in good faith by a man to his wife or any child to be born of the marriage shall be set aside as a disposition without value, unless that man’s estate was sequestrated within two years of the registration of that antenuptial contract.

(2) In subsection (1) the expression “immediate benefit” means a benefit given by a transfer, delivery, payment, cession, pledge, or special mortgage of property completed before the expiration of a period of three months as from the date of the marriage.’

<sup>9</sup> Section 29 reads:

‘(1) 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.

(2) . . .

(3) Every disposition of property made under a power of attorney whether revocable or irrevocable, shall for the purposes of this section and of section 30 be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

(4) For the purposes of this section any period during which the provisions of subsection (1) of section 11 of the Farmers’ Assistance Act, 1935 (Act 48 of 1935), applied in respect of any debtor as an applicant in terms of the said act, shall not be taken into consideration in the calculation of any period of six months.’

<sup>10</sup> Section 30 reads:

‘(1) 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.

(2) For the purposes of this section and of section 29 a surety for the debtor and a person in a position by law analogous to that of a surety shall be deemed to be a creditor of the debtor concerned.’

liquidator for all costs. The compensation and penalty provided for in s 31(2), may in terms of s 31(3), be recovered in any action to set aside the collusive transaction or disposition at issue. The default position is that if the liquidator, or a creditor in the liquidator's name, fails to initiate legal proceedings to set aside such 'improper disposition', the disposition remains valid. This is because the transaction is not void, but voidable.<sup>11</sup>

[23] As to the purpose of the Insolvency Act, this Court recently in *Emontic Investments (Pty) Ltd v Bothomley NO and Others*,<sup>12</sup> reaffirmed that:

'A *concursum creditorum* is established with a trustee or liquidator who is entrusted with the estate's assets, including the property rights and obligations of the insolvent or company. The liquidator is obliged to hold and administer the estate and distribute the proceeds among the competing creditors in the manner and order of preference specified in the Insolvency Act. This procedure is followed after an estate is sequestrated or a company is liquidated. The hand of the law is laid upon the estate and no transaction can thereafter be entered into regarding estate matters by a single creditor to the prejudice of the general body of creditors. The claim of each creditor must be dealt with as it existed at the issue of the order. That is the fundamental purpose of insolvency legislation.' (Footnotes omitted.)

[24] The purpose of ss 26, 29, 30 and 31 of the Insolvency Act is to empower a trustee or liquidator to institute proceedings against the parties (or beneficiaries of the dispositions) listed in those sections, for the setting aside of an 'improper disposition', and to obtain the remedies therein provided for the benefit of the body of creditors. And, the purpose of s 31(2) is to provide the remedies therein specified to a liquidator who has successfully secured an order to set aside a collusive transaction.

[25] Mr Cohen argues that the correct interpretation of s 31(1) and 31(2) reveals that s 31(1) defines the phrase 'collusive disposition' and the word 'such' in the first line of s 31(2) refers to a collusive disposition as it is defined in s 31(1), regardless of whether it has been set aside. The interpretation offered by Mr Cohen is legally unsustainable. Section 31(1) concerns a specific disposition from a specific debtor's estate, which may be set aside by the court. It does not provide a definition of a

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<sup>11</sup> *Galaxie Melodies (Pty) Ltd v Dally NO* 1975 (4) SA 736 (A) at 743.

<sup>12</sup> *Emontic Investments (Pty) Ltd v Bothomley NO and Others* [2024] ZASCA 1 para 17.

collusive disposition. Instead, it provides the substantive requirements that must be satisfied before such a disposition may be set aside.

[26] The subject of the introductory line in s 31(2) is a person who was a party to *such* collusive disposition. In grammatical usage, specifically in formal contexts, the determiner 'such' is employed to refer to the 'type previously mentioned'. The collusive disposition mentioned in the first line of s 31(2) is the one specified in that subsection. That is a collusive disposition in respect of which a trustee (or creditor in the name of the trustee) may commence legal proceedings to set aside the disposition in question and seek to recover compensation and the penalty stipulated in s 31(2).

[27] The ensuing terminology employed in s 31(2), which imposes sanctions on transgressors, affirms the clear meaning that the word 'such' in the first line refers to the specific transaction mentioned in s 31(1). The first consequence imposed on a 'party to such collusive disposition' is the liability 'to make good any loss thereby caused to the insolvent estate in question'. This reinforces the link between the specific transaction being set aside in terms of s 31(1) and the liability consequence imposed. No such liability can be imposed if the transaction is not set aside. Undoubtedly, a third party, such as a surety, could not come along after the winding up and use this provision to seek compensation from a transgressor. The second sanction, the penalty, imposed in s 31(2) is payable 'for the benefit of the estate'. The penalty can only be payable to the same estate in which the collusive disposal is set aside under s 31(1). If the disposal has not been set aside, no penalty is imposed. A third party, such as a surety, cannot use this provision to seek payment of a penalty from a transgressor.

[28] The third consequence, forfeiture, is not separate from the first and second consequences: rather, it follows them, as the conjunctions 'and' and 'also' indicate. The forfeiture sanction necessarily requires that the collusive disposition be set aside and that the remedies of restoring value to the insolvent estate and paying a penalty have been exercised as a first step. If the transgressor is also a creditor of the insolvent estate, the liquidator imposes an additional sanction: the claim against the insolvent estate is forfeited.

[29] In *Louw NO and Another v Sobabini CC and Others*,<sup>13</sup> Plasket J said:

'First, on the setting aside of the dispositions, s 31(2) envisages Jackson having to make good any loss occasioned to the trust by his actions. In this matter, that is simple enough. I shall order him to return the cattle and the equipment that he took or pay their value.

Secondly, s 31(2) makes provision for a penalty to be imposed on the person guilty of collusive dealing. The use of the word 'shall' in this respect, followed close on the heels of the same word used in relation to making good any loss occasioned by the collusion indicate to me that the imposition of a penalty is not discretionary. The quantum of the penalty, however, lies within the discretion of the court but may not exceed the value of the benefit which would have accrued to the person had the disposition not be set aside. . . .

Thirdly, s 31(2) makes provision for the forfeiture of the creditor's claim against the insolvent estate – and that means any claim which the creditor may have against the insolvent estate. This is an automatic consequence of the finding of collusive dealing. The court has no discretion in this regard. [*Gert de Jager (Edms) Bpk v Jones NO & McHardy NO* 1964 (3) SA 325 (A) at 337E-F; *Mohamed's Estate v Khan* 1927 EDL 478 at 488.]'

[30] Section 31(3) strengthens the unity of the subsections of s 31. It allows for the compensation and penalty remedies to be claimed 'in any action to set aside the transaction in question'. Once again, the phrase 'in question' can only be a reference back to the specific transaction being set aside in terms of s 31(1).

[31] An interpretative analysis of s 31(2) leads to the inevitable conclusion that s 31 establishes a unified process in which: (a) a collusive disposition is set aside provided the requirements of s 31(1) have been established; (b) the loss occasioned to the insolvent estate due to the transgressor's actions is made good; (c) a penalty is imposed upon the transgressor; and (d) the *ex lege* forfeiture of the creditor's claim against the insolvent estate if the transgressor is also a creditor of the insolvent estate.

[32] Thus, s 31(2) of the Insolvency Act does not afford a shield to the surety who seeks to escape liability on the basis that the insolvent primary debtor colluded with the creditor prior to its liquidation to dispose of the insolvent's property in a manner which had the effect of prejudicing the insolvent's creditors or of preferring one of

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<sup>13</sup> *Louw NO and Another v Sobabini CC and Others* [2015] ZAECGHC 153 paras 76-78.

them above another. Only the liquidator (or a creditor in the liquidator's name), and not a third party, such as a surety, has *locus standi* to rely on the remedies outlined in s 31. In other words, s 31 serves as a sword for the liquidator in winding up the insolvent estate, rather than a shield for third parties in subsequent litigation. If the liquidator (or a creditor in the liquidator's name) did not take proceedings to set aside a collusive disposition, the disposition remains valid, and neither the liquidator nor anyone else has recourse to the remedies outlined in s 31(2).

[33] The high court correctly held that the interpretation contended for by Mr Cohen is at odds with the text and purpose ss 31 and 32 and is not supported by the relevant authorities, and concluding that-

' . . . section 31 does not stand on its own and does not provide any relief in and in itself. It operates together with section 32 of the Insolvency Act which expressly regulates the proceedings to set aside a disposition of property under sections 26, 29 and 30. Section 32 provides the procedure to be followed by an aggrieved person intending to challenge the disposition in terms of the substantive requirements of each of sections 26, 29, 30 and 31.'

[34] The high court correctly rejected the s 31(2) defence Mr Cohen raised and relied upon and dismissed his counterclaim due to his lack of standing. It thus did not decide whether AMU, prior to its liquidation, entered into a transaction whereby it, in collusion with Absa, disposed of property belonging to AMU which had the effect of prejudicing its creditors or of preferring one over another. The question likewise does not need to be decided by this Court.

[35] Mr Cohen's s 31(2) defence is unmeritorious and does not trump the inadequate explanation for the delay.

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

- 1 The application for condonation and reinstatement of the appeal is dismissed with costs, including those of two counsel.
- 2 The appeal is struck from the roll with costs, including those of two counsel.

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P.A. MEYER

JUDGE OF APPEAL

Appearances

For the appellant:

Instructed by:

A F Arnoldi SC

Ian Levitt Attorneys, Johannesburg

Lovius Block Inc, Bloemfontein

For the respondent:

Instructed by:

D A Turner (with O Motlhasedi)

Webber Wentzel, Johannesburg

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