THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 474/97

In the matter between:

COOPER, BRIAN ST CLAIR **First Appellant**
JANSE VAN RENSBURG, JACOBUS HENDRIKUS **Second Appellant**

and

MERCHANT TRADE FINANCE LIMITED **Respondent**

CORAM: OLIVIER, ZULMAN JJA; FARLAM, MADLANGA and MPATI AJJA

DATE OF HEARING: **16 SEPTEMBER 1999**

DATE OF JUDGMENT: **1 DECEMBER 1999**

Liquidation of close corporation - handing over of movables by a debtor to a creditor one day before the filing of an application to liquidate a close corporation in fulfilment of an obligation in terms of a notarial general mortgage bond - intention to prefer one creditor above others and ordinary course of business.

JUDGMENT

ZULMAN JA:

[1] I have had the advantage of reading the judgment of my brother Olivier

JA. I am regrettably unable to agree with his conclusion that this appeal should be upheld.

[2] In my view the respondent has discharged the onus of proof resting upon it of showing that Cat Quip CC (Cat Quip) did not intend to prefer the respondent above its other creditors. The following are my reasons for this view:-

[3] At the outset it may be convenient to set out the following, mostly well-known general principles, applicable to the concept of "an intention to prefer" in section 29(1) of the Insolvency Act, 24 of 1936 ("the Insolvency Act").[1]

[4] It is essential and indeed fundamental to any decision as to whether there has been an intention to prefer to examine and weigh up all of the relevant facts which prevailed at the time that the disposition was made in order to determine what, on a balance of probabilities, was the "dominant, operative or effectual intention in substance and in truth"[2] of the debtor for making the disposition.
[5] In seeking to establish whether the requisite intention was present in the debtor's mind at the time of making the disposition the test is a subjective one. The court is required to determine a question of fact. As Lord Greene, M. R., echoing the well-known language of Bowen LJ in an earlier case, asserted:-

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[1]See for example, E.M. de la Rey, *Mars/The Law of Insolvency* 8th ed (1988) para 12.20 pp 221-227; Catherine Smith *The Law of Insolvency* 3rd ed (1988) pp 132-136; Meskin *Insolvency Law* (para 5.31.6.4 pp 5-109 to 5-112); and *The Law of South Africa* (First Reissue) (Vol 11) para 186 pp 174-177)
[2]*Pretorius' Trustee v Van Blommenstein*, 1949(1) SA 267 (O) at 279. See also *Swanepoel, N.O. v National Bank of South Africa* 1923 OPD 35 at 39; *Pretorius N.O. v Stock Owners Co-Operative Co. Ltd* 1959(4) SA 462 (A) at 476 - *477; Giddy, Giddy & White's Estate v Du Plessis* 1938 EDL 73 at 79 - 80; *Eliasov N.O. v Arenel (Pvt) Ltd* 1979(3) SA 415 (R) at 418 G-H; *Venter v Volkskas Ltd* 1973(3) SA 175(T) and *Van Zyl & Others N.N.O. v Turner & Another NNO* 1998(2) SA 236 (C) at 244 para 30

> "A state of mind is as much a fact as a state of digestion, and the method of ascertaining it is by evidence and inference ....."[3]

[6] The mere fact that the effect of the transaction is to prefer one creditor above another does not necessarily mean that there has been a voidable preference. Obviously in every case where one creditor is paid and others are not there is a preference in favour of the creditor who has been paid. Something additional is required to impeach the transaction. That additional requirement is an intention to prefer on the part of the debtor. The position is different in Australia where, for example, in terms of the relevant legislation the courts of that country are only concerned with the effect of the transaction and not the motive of the debtor.[4] Similarly the American Bankruptcy Code of 1978 requires no proof of intention but embraces an objective theory of preferences.[5] On the other hand the now repealed Section 44 of the *English Bankruptcy Act* of 1914 as also Section 239 of the current *English Insolvency Act* of 1986 require a subjective intention to be established, albeit that it is the trustee or liquidator seeking to set aside a preference, who bears the onus of proof of showing an intention to prefer on the part of the debtor.[6]

[7] It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons

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[3] *In re M. Kushler, Limited.* [1943] Ch. 248 at 252 and *Edgington v Fitzmaurice* (1885) 29 Ch. 459 at 483, per Bowen, L.J (not an insolvency case). See also Ian F. Fletcher *The Law of Insolvency* (Second ed) (1996) 227-229

[4] See for example *Ferrier v Civil Aviation Authority* (1995) 127 ALR 472 (The Full Court of the Federal Court) at 485-487. See also A Boraine & A Keay - *Challenging Pre-bankruptcy Dispositions. An Australian - South African Comparison* (1998) SA Merc LJ 267 at 280 - 285.

[5] See Section 547 of the Bankruptcy Code of 1978 (USA)

[6] As to Section 44 of the 1914 Act see for example *Peat v Gresham Trust Ltd* [1934] AC 252. As to Section 239 of the 1986 Act see Re *M Bacon Ltd* [1990] BLCL324

for the making of the disposition other than an intention to prefer. This is so because the court, in drawing inferences from the proved facts, acts on a preponderance of probability[7]. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the "two cardinal rules of logic" referred to by Watermeyer JA in *R v Blom*[8] is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the court must select the most "plausible" or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof. Viljoen JA put the matter as follows in *AA Onderlinge Assuransie-Assosiasie Beperk v De Beer*[9]:-

> "Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings."

Selke J expressed the matter in *Govan v Skidmore*[10] thus:-

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[7] cf *Elgin Fireclays Limited v Webb* 1947(4) SA 744(A) at 750

[8] 1939 AD 188 at 202

[9] 1982(2) SA 603 (A) at 614 E-H

[10] 1952(1) SA 732(N) at 734 C-E. Approved of, for example, in *South British Insurance Company Limited v Unicorn Shipping Blinds (Pty) Limited* 1976(1) SA 708 (A) at 713 E-G and *Smit v Arthur* 1976(3) SA (A) 378 at 386 B-D

> "..... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, (3rd ed. para 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."

Holmes JA in *Ocean Accident and Guarantee Corporation Limited v Koch*[11] explained that he understood "plausible", in the context of the remarks of Selke J, to mean "acceptable, credible, suitable".

[8] The mere fact that the person who made the disposition does not give evidence does not *ipso facto* mean that one must infer that there was an intention to prefer. So for example in *Gert de Jager (Edms) Bpk v Jones, N.O. en McHardy, N.O.*[12] the debtor did not give evidence. This notwithstanding, Rumpff, JA nevertheless, after remarking that it was the debtor who knew best as to what his intention was in regard to the disposition, still examined the probabilities in order to determine whether the inference of an intention to prefer was justified in the particular circumstances of the case. Indeed as Catherine Smith points out[13] a debtor who has made a disposition to a creditor with the intention of preferring him above his other creditors is hardly likely to testify that he had that intention. In this regard the following observation of De Villiers JP, made as long ago as 1923, in *Swanepoel v National Bank of South Africa*[14] is particularly apposite, even today:-

> "Then, again, it is true that the insolvent in his evidence repeated the formula that when he passed the bond he was still 'hoping to tide over his difficulties'. Well, if I may be permitted to mention a matter of personal experience, during the last 20 years I have not known of a single undue preference case in which the insolvent, on being called as a witness, has failed to repeat that formula or its

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[11] 1963(4) SA 147 (A) at 159 C-D
[12] 1964(3) SA 325(A) at 331 H
[13] *The Law of Insolvency* (supra note 1) p 134
[14] supra note 2 at 37

equivalent in Afrikaans."

[9] Preference predicates an act of free will. As observed by Pennycuick J in *In re F.L.E. Holdings Ltd*.[15]:-

> "It does not follow because there is no pressure or consideration, that the dominant intention is to prefer the other party. Pressure and consideration may be conclusive that there is not a dominant intention, but the converse is not so.
>
> One has to take all the circumstances into account, and consider what is the correct inference to draw."[16]

[10] In order to determine whether the debtor had the requisite intention it is necessary to enquire whether the debtor actually applied his mind to the matter. If there was no application of mind by the debtor to the question of whether in fact he was conferring a preference, it can hardly be said that he had an intention to do so. There is no room for treating as an intention to prefer "a culpable or reckless disregard of the possibility that the disposition might have the effect of preferring one creditor above another." [17] An actual intention is required - not simply the fact that objectively viewed the debtor ought to have realised that a preference would occur if the disposition is made. Due regard being had to he party who bears the onus in English law, the matter is well put by Tomlin LJ in *Peat v Gresham Trust Limited* [18] in these words:-

> "It is contended on the appellant's behalf that once given the

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[15][1967] 1 W.L. R 1409 at 1420

[16]See also *Farrar,* "The Bankruptcy of the Law of Fraudulent Preference" *The Journal of Business Law* (1983) pp 398-399 and *Pretorius' Trustee v Van Blommenstein (supra* note 2 at 279)

[17]See *Michalow, N.O. v Premier Milling Company Ltd* 1960(2) SA 59 (W) at 65 C-D; *Michau's Trustees v De Wet* 1909 EDC 44; *Slater's Trustee v J O Smith and Co* (1885) 5 EDC 9 at 21

[18]Supra note 6 at 262

> withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. My Lords, I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred."

> The position might well be otherwise in a criminal case involving, for example, a contravention of section 135(1) of the Insolvency Act relating to a debtor knowingly giving an undue preference shortly before the rehabilitation of his estate.[19]

[11] Mere proof that the insolvent's liabilities exceeded his assets at the time the disposition was made does not raise a presumption of an intention that the debtor's dominant motive in making the disposition was to prefer. Whilst contemplation of insolvency or inevitable insolvency is generally speaking necessary before an intention to prefer can be inferred it by no means follows axiomatically that the presence of such a state of mind, in itself, proves such an intention since other factors may nevertheless negate such an inference.[20] Even

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[19]cf. *R v Ismail* 1920 AD 316 referred to by Horwitz J in *Pretorius' Trustee v Van Blommenstein (supra* note 2 at 279) which was concerned principally with the equivalent section in the 1916 Insolvency Act (section 139(3)) not Section 27 of that Act, which is equivalent to section 29(1) of the 1936 Insolvency Act)

[20]*Pretorius N.O. v Stock Owners Co-operative Co. Ltd (supra* note 2) at 477 A;

if it can be said that sequestration was substantially inevitable, evidence of a more probable inference to the contrary that shows for example that the debtor's dominant intention in making the disposition was not to prefer the creditor in question but to achieve some other purpose would not entitle the court to draw the inference of an intention to prefer. As Pitman AJP pointed out in *Giddys'* case[21]:-

> "The intention to prefer must reside in the mind of the debtor, and its presence here is ordinarily to be inferred from his conduct. If, when he is contemplating sequestration, he selects for payment out of a number of creditors one, who has no right to such selection, the inference from his conduct seems a fair one, that he intended to prefer such creditor above the rest, to disturb in his favour the proper distribution of his assets in insolvency. Such is the only apparent explanation of his action. Where, however, behind the selection and payment there appears to be some other compelling intention, the intention to prefer is not necessarily to be regarded as the dominant intention. The former intention indeed may so powerfully animate the debtor, that the intention to prefer may be said to have been wholly inactive."

[12] In accordance with general principles if an inference of an innocent motive as opposed to an improper one can be drawn this should be done.[22]

[13] The question which the court has to decide is not whether the debtor should have known that the effect of the disposition made would have been to disturb the proper distribution of his assets but rather as a fact that he intended it to have that effect. As previously stated if the debtor never applied his mind to the

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Du Plooy's Trustee v Plewman 7 SC 332 and *Giddy, Giddy and White's Estate v du Plessis (supra* note 2); *S v Ostilly & Others* (1) 1977 (4) SA 699 (D CLD) 699 at 731 G-H; *Gert de Jager (Edms) Bpk v Jones N.O. en McHardy N.O. (supra* note 12 at 332) A-B

[21]*Supra* note 2 at 79

[22]cf. *Trustees of Payn's Insolvent Estate v Bank of Africa Limited* (1885) NLR 231 at 234; *Trustee Insolvent Estate H.A.P. Lyle v Musson, Denby and Greene 25* NLR 315; *R v Sircoulomb* 1954(4) SA 237 (SWA) at 240 G

matter it again can hardly be said that he had the requisite intention.

[14] Any relationship between the insolvent and the creditor in addition to that of debtor and creditor, for example where the creditor is a close family member or relative, is relevant to the existence or non-existence of an intention to prefer.[23]

[15] An intention to prefer involves the requirement that the debtor must, at the time of the disposition, have been in a position to exercise a free choice. It accordingly follows that where the insolvent's primary or dominant motive was for example, to shield himself from a criminal prosecution or to cover up a mis-appropriation of assets then it cannot be said that the disposition was made with the intention to prefer the recipient.[24] In *Sharp (Official Receiver) v Jackson and Others*[25] Lord Macnaghten described the position of the person there making the disposition as "being under an overwhelming sense of imminent peril".

[16] A useful summary of most of the above matters, even although the question of intention in section 30(1) where the onus of proof is upon the trustee, and not section 29(1) of the Insolvency Act was being considered, is contained in the following remarks of Boshoff J in *Venter v Volkskas Ltd*[26]:-

> "Whether a disposition was made with the intention of preferring one creditor above another within the meaning of sec 30(1), is in each case a question of fact which can be established either with direct evidence or by inference from the circumstances in which the disposition was made. Being a question of intention, it involves a subjective assessment of the debtor's action in having

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[23] *Pretorius' Trustee v Van Blommenstein* (*supra* note 2 at 279 - 280) and *Eliasov's case* (*supra* note 2 at 418-419)
[24] *Van Zyl's case (supra* note 2*)* para 30
[25] 1899 AC 419 at 427
[26] *Supra* note 2 at 180 E to 181 B)

made the disposition. In the absence of direct evidence of an intention to prefer one creditor above another, it must generally speaking be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor, to whom the disposition was made, above another; see *Pretorius, NO v Stock Owners' Co-operative Co. Ltd,. supra* at pp 471 to 472 and 476; *Gert de Jager (Edms) Bpk v Jones, NO, en McHardy, NO*, 1964(3) SA 325 (A.D.) at p 331. It is not sufficient that the circumstances show that the debtor should have realised that the effect of the disposition would be to disturb the proper distribution of his assets in the event of the sequestration of his estate. They must show that he as a fact intended it to have that effect. This is so because the onus is on the person who claims to avoid the disposition to establish what the debtor really intended (what the object in his mind was) and that his real intention (or real object in his mind) was to prefer the creditor to whom the disposition was made above the other creditors. It is conceivable that a debtor may also have had other objects in mind when he made the disposition but in that event it is incumbent upon the person upon whom the onus lies to establish that to prefer the creditor in question was the paramount, dominant or substantial object. A preference involves a free selection. Where therefore a debtor pays a creditor 'out of his turn' under great pressure or to avoid a prosecution or for some other reason that negatives the inference that the main object was to prefer the creditor, intention to prefer will not be proved."

[17] I turn now to consider the relevant facts in this case with reference to the principles which I have set out above. The facts appear clearly from the comprehensive judgment of my brother Olivier JA. In summary they are as follows:-

(1) On 4 April 1990 Cat Quip caused a notarial general mortgage bond ("the bond") to be registered over all its movable property in favour of the respondent.

(2) On 18 November 1992 Cat Quip defaulted in meeting certain bills

of exchange which it had drawn in favour of the respondent.

(3) On 20 November 1992 Mr Weichelt, Cat Quip's sole member died.

(4) On 26 January 1993, Mr Rivkind, who was employed by the respondent and who dealt with Cat Quip's account, obtained possession of all Cat Quip's movable assets from Mrs Weichelt (Mr Weichelt's widow) who then managed Cat Quip's affairs and handed him two sets of keys to Cat Quip's premises.

(5) On 27 January 1993 the respondent obtained an order of court purporting to authorise it to perfect its security by taking possession of all of Cat Quip's movable property.

(6) Also on 27 January 1993 Mr Tom Weichelt (Mrs Weichelt's brother-in-law) filed an urgent application in the same court for the provisional liquidation of Cat Quip. The application did not proceed on that day.

(It is not possible to establish from the papers nor was this Court informed whether the order which the respondent obtained on 27 January 1993 to perfect its security was made before or after the filing of Mr Tom Weichelt's application.)

(7) On 2 February 1993 Cat Quip was placed under provisional liquidation at the instance of Mr Tom Weichelt.

[18] In my opinion if one examines and weighs up the totality of circumstances which gave rise to the disposition, the proper inference to be drawn is that the respondent established, on a balance of probabilities, that Mrs Weichelt's

"dominant or operative or effective intention in substance and in truth" when she handed over the keys to Mr Rivkind, was not to prefer the respondent, within the meaning of that phrase in Section 29(1) of the Insolvency Act, but rather to comply with the clear obligations imposed upon Cat Quip in terms of Clause 7.1.2. of the bond. (The bond, it will be recalled, was executed some three years previously on 4 April 1990.) To my mind the following are the essential facts which render this the most "plausible" inference:-

[19] It was Mrs Weichelt who first raised the question of the existence of the bond in the discussion which she had with Mr Rivkind immediately prior to her handing over the keys. This fact indicates that the existence of the bond was uppermost in her mind. To paraphrase Pitman AJP's phrase in *Giddys'* case, this shows that the existence of the obligation under the bond so powerfully "animated" Mrs Weichelt as to render any intention to prefer "wholly inactive".[27] It is fair to infer from the aforegoing that the more "plausible or acceptable or credible or suitable reason" for her handing over the keys was, I repeat, her intention to comply, on behalf of Cat Quip, with Cat Quip's clear obligations. It was not to seek to prefer the respondent, although the latter was the effect of the disposition.

[20] The fact that neither Mr Rivkind nor Mrs Weichelt ever discussed or even raised what the effect of handing over the keys would be upon Cat Quip's other creditors indicates to me that Mrs Weichelt, as a matter of probability, was not concerned with conferring any preference on the respondent as her dominant motive in making the disposition.

[21] There is no suggestion whatever that the bond registered almost three years previously was not a genuine or open transaction. Nor is there any

[27] See para 3.8 and notes 2 and 21 above

suggestion that at the time the bond was registered and the disposition contained therein made that liquidation of Cat Quip was pending or even contemplated.

[22] The parties represented by Mr Rivkind and Mrs Weichelt conducted themselves at arms length. There was no relationship between them other than of debtor and creditor.

[23] In the particular circumstances of this case the pressure which was present to Mrs Weichelt's mind was that Cat Quip had no defence to the right which the respondent was seeking to exercise to take possession of Cat Quip's movable assets. It would not have been competent in law, for Mrs Weichelt to have told Mr Rivkind, even if she had applied her mind to the matter, that she was not prepared to hand over the keys, because based upon a debt which she in any event considered was not owing to her late husband's brother, a liquidation, was in the offing. The respondent would have been perfectly entitled, had she refused to hand over the keys, to immediately approach a court and seek an appropriate order. Cat Quip's liability was undisputed in that it had not honoured bills which it had given to the respondent for moneys advanced to it by the respondent. The respondent accordingly had every right to act in terms of the bond.[28]

[24] The following exchange between Counsel for the appellants and Mr Rivkind sheds some limited light upon what might well have been Mrs Weichelt's true intention when she handed over the keys:-

> "Isn't it a case sir that you never took possession at all, that Mrs Weichelt's motive in giving you the key had nothing to do with perfecting a pledge, it was simply a case of her employees over the last weekend had been pinching some stock, she was a widow she could not control it and

[28]See for example *Pietersburg Cold Storage, Ltd v Cacaburas* 1925 TPD 295 and *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983(1) SA 79(C) at 84 C-H

> she asked you please won't you on her behalf just take control of it until the liquidation order to preserve everything until the liquidation comes through? — That was not the case."

Presumably Counsel put the question upon the basis of information that the appellants as the liquidators of Cat Quip obtained from Mrs Weichelt.

[25] Whilst it may be true that in all probability Mrs Weichelt must have considered that the liquidation of Cat Quip was inevitable, I believe that a proper evaluation of the totality of circumstances relating to the matter negates an intention on her part to prefer the respondent. Amongst the most important of these circumstances are those that I have enumerated in paragraphs 19 to 24 above.

[26] The mere fact that Mrs Weichelt did not give evidence and state that she had no intention to prefer the respondent above other creditors is not of itself sufficient reason to reject what is, as I have stated above, the most plausible and acceptable reason for the disposition. This reason emerges from the uncontradicted and credible evidence of Mr Rivkind and the factors to which I have drawn attention. I do not believe that anything of consequence would have been added to the matter had Mrs Weichelt stated in so many words that by making the disposition she did not intend to prefer the respondent. Such a statement would have amounted merely to an *ipse dixit*. To paraphrase the words of Rumpff JA in *Gert de Jager Edms Bpk v Jones NO* en *McHardy NO*[29] an inference that only she could have stated what her true intention was loses its force if one has proper regard to Mr Rivkind's evidence and to the circumstances prevailing at the time. To repeat, the more "natural, or

[29] *Supra* note 12 at 331 C ("So 'n afleiding [voorkeur aan een skuldeiser bo 'n ander] verloor sy krag indien daar getuienis is dat 'n vervreemding, gedoen in die omstandighede hierbo genoem, inderdaad nie gepaard gegaan het met die oogmerk om die skuldeiser voorkeur te verleen, nie")

plausible", explanation for the disposition, to use the words of Selke J in *Govan v Skidmore*,[30] was to comply with the obligations of Cat Quip of which Mrs Weichelt was fully aware at the time and not simply to prefer the respondent above other creditors.

[27] Applying the test laid down by Ramsbottom JA in *Pretorius NO v Stock Owners Co-Operative Company Limited*,[31] even if one ignores what I have stated in paragraph 24 above, the correct inference to be drawn from the undisputed evidence of Mr Rivkind is that there was indeed another compelling reason for making the disposition other than an intention on the part of Mrs Weichelt to prefer the respondent. That reason, to repeat yet again what I have previously stated, was to comply with Cat Quip's obligations in terms of the bond which it had executed some years previously.

[28] My brother Olivier JA was only prepared to assume, without deciding the matter, that the respondent had discharged the onus of showing that the disposition was made in "the ordinary course of business" within the meaning of Section 29 (1) of the Insolvency Act. He no doubt made this assumption because of his view that the respondent had not discharged the onus resting upon it of showing that there was no intention to prefer. In my view the undisputed facts reveal that the respondent also discharged the onus resting upon it of showing that the disposition was made in the ordinary course of business.

[29] The phrase "ordinary course of business" although not defined in the Insolvency Act has been interpreted on a number of occasions by our courts[32]

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[30] *Supra* note *10* at 734 C-D
[31] *Supra* note 2 at 476 F-G
[32] See for example *Malherbe's Trustee v Dinner and Others* 1922 OPD 18 at 22, *Hendricks N.O. v Swanepoel v Swanepoel* 1962(4) SA 338 (A) at 345 B-E and

The test, in contra distinction to the test as to whether an intention to prefer exists, is an objective and not subjective one. The matter needs to be determined with reference to all the relevant circumstances in each particular case. The best formulation of the test, in my view, is that of De Villiers JP in *Malherbe's case*[33] where the learned judge put the matter succintly as follows:-

> "..... whether the disposition is in accordance with ordinary business methods and principles obtaining amongst solvent men of business; that is to say a disposition, in order to be in the ordinary course of business, must be one which would not to the ordinary man of business appear anomalous or un-businesslike or surprising."

[30] If one considers all the relevant facts of this matter in the light of this test there was nothing "anomalous or un-businesslike or surprising" when Mrs Weichelt handed over the keys of the business of Cat Quip to Mr Rivkind on 26 January 1993. The contention of the appellant to the effect that a solvent businessman would not, in the ordinary course of business, hand over to a creditor the keys of his business premises giving control of his stock in trade, overlooks the particular circumstances which prevailed at the time that the keys were handed over. Mrs Weichelt had no choice in the matter. Cat Quip was legally obliged in terms of clause 7.1.2 of the bond to comply with Mr Rivkind's request. The position is well illustrated in the following remarks of De Villiers AJA in *Jacobson and Co. Trustees, v Jacobson and Co.*[34]

> "Now before a court would be entitled to say that the disposition was in the ordinary course of business it would have to be satisfied that it is in possession of all the facts, for only then would it be in a position to decide whether the contracts themselves, which form the basis of the transaction are genuine; since a delivery that rests on a contract which itself is open to question cannot be said to be a delivery in the ordinary course of business."

Van Zyl & Others N.N.O. v Turner & Another N.N.O. supra note 2 at 245 paras 33-39

[33] *Supra* note 32 at 22

[34] 1920 AD 75 at 79

> In the instant case the contract in question was before the court and as already pointed out there is no suggestion that the contract was not a genuine one not entitling the respondent to act as it did.[35]

[31] In my view the entire matter is correctly summarised in the following passage in the concluding portion of the judgment of the court *a quo*:-

> "This was not a disposition by Cat Quip with the intention of preferring plaintiff above other creditors. Ms Weichelt, on behalf of Cat Quip, merely acquiesced to plaintiff exercising rights which she admitted. Nor does Section 29 find application. There was no motive to give the plaintiff undue preference, although this has, on the facts, resulted. Perfecting a pledge in this manner has in the past been recognised by our courts even in circumstances such as the present. It must therefore be regarded as a transaction which was done in the ordinary course of business. To hold otherwise would practically wipe this legal notion from our law. Were a creditor in plaintiff's position obliged to perfect his pledge when the debtor is still solvent, it would have the effect of putting the debtor out of business and inevitably result in his insolvency. The general notarial bond over moveable assets was devised to avoid exactly that."

[32] In the result I make the following order:-

(1) The appellants' late filing of their power of attorney is condoned subject to the appellants' paying the respondent's costs occasioned by the application for condonation.

(2) The appeal is dismissed with costs.

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[35]See for example *Pietersburg Cold Storage Limited (Supra* note 31*)*

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R H ZULMAN JA

MADLANGA AJA)
MPATI AJA) CONCUR

OLIVIER JA

OLIVIER JA

[1] The Appellants are the joint liquidators of Cat Quip CC (in liquidation) which was provisionally wound up on 2 February 1993. The application for the liquidation of Cat Quip CC was presented to the then Supreme Court of South Africa (Transvaal Provincial Division) on 27 January 1993. In terms of section 348 of the Companies Act the winding up is deemed to have commenced on the latter date.

[2] The Respondent is a finance company. At the date of its liquidation Cat Quip was indebted to the Respondent in the sum of R453 648,07.

[3] It is common cause that the Second and Final Liquidation and Distribution Account of Cat Quip, prepared by the Appellants, reflects total liabilities of R2,4 million, owed to 24 concurrent, preferent and secured creditors.

[4] The crux of the dispute between the Appellants and the Respondent involves the question whether the Respondent is merely a **preferent creditor** of Cat Quip in liquidation (as alleged by the Appellants) or whether it is a **secured creditor** (as alleged by the Respondent).

[5] In the court *a quo* Spoelstra J held that the Respondent is a secured creditor. The Appellants successfully applied to the learned judge for leave to appeal to this Court.

[6] It is common cause that on 4 April 1990 Cat Quip CC ("Cat Quip") caused a notarial general covering bond to be registered over all its movable assets in favour of the Respondent as security for moneys lent and advanced. By virtue of the law as it then stood the Respondent became a preferent, and

not a secured, creditor.

[7] The bond provides that it would be executable against the said movables

if Cat Quip breached any of its terms or committed an act of insolvency. In such an event, the bond provides *inter alia* :

> 7.1 If this bond becomes executable under clause 9, the CREDITOR shall be entitled (but not obliged), without notice to the MORTGAGOR and without first obtaining any order or judgment -
>
> 7.1.1 to claim and recover from the MORTGAGOR forthwith all and any sums for the time being secured by this bond, whether then due for payment or not; and/or
>
> 7.1.2 for the purpose of perfecting its security hereunder to enter upon the premises of the MORTGAGOR or any other place where any of its assets are situated, and to take possession of its assets; and/or
>
> 7.2 The CREDITOR is hereby empowered irrevocably and *in rem suam*, with power of substitution and delegation to exercise all or any of its rights, authorities and powers in

> terms of this bond, and the bond for this purpose shall be deemed to be an irrevocable power of attorney by the MORTGAGOR in favour of the CREDITOR.

[8] It is also common cause that by November 1992 Cat Quip was experiencing cash flow problems. In fact, on 18 November 1992 it defaulted in meeting bills of exchange drawn in favour of the Respondent in the amount of R121 430,38.

[9] At that stage Cat Quip was managed by Mr Weichelt, its sole member, and assisted by his wife, Mrs Sandra Weichelt, who was employed at the business as its bookkeeper/accountant. Mr Rivkind was the account executive employed by the Respondent who dealt with Cat Quip's account.

[10] Mr Weichelt died on 20 November 1992. It is common cause that Mrs Weichelt took over the administration and control of Cat Quip.

[11] The bank account of Cat Quip was frozen. The Respondent's bills were returned unpaid. The full amount owing to it became due and payable, and

the bond became executable. The Respondent became entitled, in terms of clause 7.1.2 of the bond, to take possession of all Cat Quip's movable assets for the purpose of perfecting its security. Nevertheless, the Respondent did not avail itself of these rights as it was entitled to do from 18 November 1992 to 26 January 1993 - a factor to which I will refer again. Nor did Mr or Mrs Weichelt, between 18 November 1992 and 26 January 1993 approach the Respondent to offer or request it to exercise its rights in terms of paragraph 7 of the bond- a significant fact, as I will show shortly.

[12] Rivkind obtained possession of all Cat Quip's movable assets on 26 January 1993 when Mrs Weichelt handed him the two sets of keys of the premises. He physically locked up and, together with Mrs Weichelt, left the premises.

[13] The Respondent's case is that, in taking possession of Cat Quip's movables on 26 January 1993, as it was entitled to do, it became a lawful pledgee and, therefore, a secured creditor. The Appellants, on the other hand, averring that a disposition of its assets by Cat Quip took place on 26 January 1993, aver that such disposition amounts to a voidable preference in

terms of section 29 of the Insolvency Act.

[14] Section 29 (1) of the Insolvency Act provides :

> "**Voidable preferences** - (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 in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."
>
> (My underlining)

[15] In order to have a disposition set aside the Appellants must prove five requirements being :

15.1 a disposition as defined in section in section 2 of the Act of its property by Cat Quip;

15.2 within six months of the liquidation of Cat Quip;

15.3 to the Respondent;

15 4 which has had the effect of preferring one of Cat Quip's

creditors above another; and

15.5 that immediately after the making of the disposition Cat Quip's liabilities exceeded the value of its assets.

Once the Appellants have established these requirements the Court may set aside the disposition unless the Respondent proves that :

(a) the disposition was made in the ordinary course of business; and

(b) it was not intended thereby to prefer one creditor above another.

If the Respondent should fail to prove either of these two requirements it must fail.

[16] A dispute arose between counsel for the respective parties at the hearing

of this appeal in respect of the disposition requirement. Appellants' counsel argued that the physical delivery of the business and all the movable assets by Mrs Weichelt to Rivkind on 26 January 1993 was the relevant disposition under attack. Respondent's counsel submitted that the relevant disposition took place when the material bond was registered on 4 April 1990. If the

Appellants are right, the disposition [on 26 January 1993] falls within the six months' period of section 29 (1); if not, the disposition falls outside that period and cannot be set aside.

[17] Section 2 of the Insolvency Act has this to say of "disposition" :

> "'Disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any other contract therefor, but does not include a disposition in compliance with an order of the court, and 'dispose' has a corresponding meaning."

[18] The statutory definition of 'disposition', is inept in the extreme. 'Disposition' is a core concept in our law of insolvency, and one would have expected clarity and certainty in this respect. What we find, however, is obscurity and confused thinking. The definition lumps together a range of dissimilar juristic facts. Even more, it allows duplication and overlapping of concepts. Take the case of sale. Ordinarily, if one speaks of a sale, it means the contract of sale, creating personal rights to claim performance. But the section also includes 'any other contract therefor'. What can this mean in the context of sale? Does it include an option? A right of first refusal? Even

more, ‘delivery’ is put on the same footing as ‘sale’. Does this mean that the entering into a contract of sale is a disposition, and also the later delivery of the thing sold? And how does one reconcile a ‘sale’, creating mere personal rights with the idea, informing the whole definition, of “any transfer ...of rights to property”? After all, in our law a mere contract of sale does not transfer rights to property - the key requirement is and remains delivery.

[19] The definition of “disposition” in the Insolvency Act has, not surprisingly, troubled the courts before (see ***Estate Jager v Whittaker and Another*** 1944 AD 246 at 250; ***Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) and Another*** 1985 (4) SA 401 (D & C); ***Klerck NO v Kaye*** 1989 (3) SA 656 (C) at 674 C - J).

[20] In the present case the position is that the relevant disposition took place

on 26 January 1993, when Cat Quip delivered its assets to the Respondent in order to perfect its security. It is clear that before that date there had not been “any transfer or abandonment of rights to property” (see the dominant part of section 2 of the Insolvency Act) and that such transfer or abandonment

took place on 26 January 1993 - well within the statutory six months' time limit.

[21] In passing, I would recommend the SA Law Commission to consider amending section 2 of the Insolvency Act in the course of the Commission's present review of the Insolvency Act in the light of the problems alluded to above.

[22] In connection with the requirement of "disposition" in the present matter, a further issue must be addressed. It is this : Both parties are agreed that possession of the movable assets of Cat Quip was given to the Respondent on 26 January 1993 when the keys of the business were handed over by Mrs Weichelt to Mr Rivkind. However, on 20 January 1993, at a meeting of the Board of Directors of the Respondent, a resolution was passed to approach the Supreme Court on an urgent basis for an order authorising the Respondent (through the Sheriff or his deputy) to perfect its security in terms of the notarial bond, by taking and then retaining possession by way of pledge all the movable assets of Cat Quip. The necessary papers were prepared and the application was enrolled for hearing on 26 January 1993. Prior to the hearing of the matter, Mrs Weichelt requested a postponement in order to

endeavour to raise money. The Respondent agreed to the postponement, but on 26 January it took possession of the assets as mentioned above because it then became clear that a liquidation application was being prepared. Nevertheless, the Respondent considered that it was prudent to obtain the order of court sought in the aforesaid application and, without disclosing the fact that it had already obtained possession of the assets and thereby having perfected its security, the matter was enrolled for hearing on 27 January 1993. The order was granted on that day. It is relevant to note that notice of the application was not given to any other creditor of Cat Quip. On the same day, 27 January 1993, a provisional liquidation order was granted by the Supreme Court.

[23] The issue that arises relates to the effect of the order of court dated 27 January 1993 allowing the Respondent to perfect its security by taking possession of the movables of Cat Quip. This question becomes relevant, because section 2 of the Insolvency Act excludes from the definition of "disposition", " ... a disposition in compliance with an order of the court." On behalf of the Respondent it was argued that the disposition now under discussion does not fall to be set aside because it was a disposition in

compliance with an order of the court.

[24] The Respondent's argument on this point cannot be upheld. The possession was not obtained in compliance with an order of court. It was correctly stated by Flemming J in ***SAPDC (Trading) Ltd v Immelman*** 1989 (3) SA 506 (W) at 509 G - H that delivery which precedes the Court order cannot be a disposition "in compliance with an order of the Court".

[25] All the other requirements in respect of which the Appellants bear the *onus* of proof, have been fulfilled :

25.1 the liquidation application was presented on 27 January 1993, *i.e.* one day after the disposition and the disposition was thus within 6 months of the liquidation of Cat Quip;

25.2 the disposition was to the Respondent;

25.3 the disposition had the effect of preferring one of Cat Quip's creditors (the Respondent) above another;

25.4 immediately after the making of the disposition Cat Quip's liabilities exceeded the value of its assets.

The Appellants have accordingly satisfied the aforesaid five requirements set out above and what remains are the two issues, defined

above, which the Respondent is required to prove on a balance of probabilities.

[26] For the purpose of this judgment I will assume in favour of the Respondent, without deciding, that the disposition in question was made in the ordinary course of business. The vital question is whether the Respondent has proved on a balance of probabilities that when the disposition - the handing over of the assets of Cat Quip on 26 January 1993 - was made, it was not intended by Cat Quip to prefer one creditor above another.

[27] The question whether Cat Quip, in making the disposition now under discussion, intended to prefer the Respondent above other creditors, is a factual one. But that question must be approached against an existing cultural and legal background. Only because there seems to be a difference between the approach of the majority judgment in this case and my own, I summarise my view of the law as follows:

[28] Section 29 (1) of the Insolvency Act reflects a particular economic and legal morality, which may well differ from that of other countries, and

which was expressed in unmistakable terms in ***R v Ismail*** 1920 AD 316. That case dealt with an appeal against a conviction of a contravention of the provisions of section 139 (3) of the Insolvency Act of 1916, which provided that every person shall be guilty of an offence "who knowingly gives an undue preference." Section 28 defined an "undue preference" as being "any disposition of his property made by an insolvent at a time when his liabilities exceeded his assets with the intention of preferring one creditor above another." It can be seen that these principles of have been retained in the present Insolvency Act.

[29] In ***R v Ismail****, supra,* the basic principle was laid down that once a person has made up his mind to surrender his estate (or if at the time he contemplated the sequestration of his estate) " ... his duty was not to make any payments to one or more of his creditors, but to preserve his assets for the purpose of their being equally distributed amongst all his creditors." (per Solomon JA at 319, 323). It was also laid down that a creditor with a bill in his favour is in no better position on the eve of insolvency than any other creditor (see Solomon JA at 324). Finally it was stated that in the absence of an explanation proving that such a payment was in the ordinary course of

business and with no intention to prefer, " ... the natural inference to draw from such a payment is that it was made with intent to prefer." (see Solomon JA at 324).

[30] In giving effect to the decision of this Court in ***R v Ismail**, supra,* there has developed a clearly defined point of departure in cases such as the present one: When once it is proved that the debtor made a payment to one creditor at a time when he knew that sequestration was substantially inevitable, there arises a presumption, rebuttable by proof on a balance of probabilities, that the debtor

did intend to prefer that creditor above another or all the others. (See section 29 (1) of the Insolvency Act; ***Gert de Jager Edms) Bpk v Jones NO and McHardy NO*** 1964 (3) SA 325 (A) at 331 C; ***Pretorius NO v Stock Owners' Co-operative Co Ltd*** 1959 (4) SA 462 (A) per Ramsbottom JA at 476 F - G; ***Pretorius's Trustee v Van Blommenstein*** 1949 (1) SA 267 (0) at 278; ***Eliasov v Arenel (Pvt) Ltd*** 1979 (3) SA 415 (R) at 418). In the light of these cases our law and insolvency practice have developed a clear and consistent approach : unless duress or other extraordinary factors compelled the debtor to pay one creditor in preference to others within six months of

liquidation or sequestration and at a time the debtor is aware of impending and unavoidable insolvency proceedings, a disposition made in these circumstances is liable to be set aside in terms of section 29 (1) of the Insolvency Act. There simply is no authority for the proposition, which seems to me irreconcilable with section 29 (1) of the Act, that the mere obligation to pay a creditor, is a justification for escaping the sanction of section 29 (1). Any endeavour to distinguish ***R v Ismail****, supra*, or to argue that the decision in that case is not applicable to the present appeal is, in my view, doomed to failure. ***Ismail*** lays down a basic approach to all instances where the question of intention to prefer became relevant. And ***Ismail*** does not stand alone. Its approach and principle are embodied in sec 29 (1) of the Insolvency Act and the decisions referred to above, *inter alia* the decision of this Court in **Pretorius NO v Stock Owner's Co-operative Co Ltd**, *supra*. When I refer to ***R v Ismail*** I incorporate by reference the time-honoured approach to the matter of intention to prefer. What the Respondent has to convince us of in the present case is either that that approach is wrong or should not be followed in the present case. The Respondent has manifestly not succeeded in doing so.

[31] It is trite law that when considering whether a disposition was made with or without the intention to prefer, the state of mind of the debtor, *i.e.* Cat Quip represented by Mrs Weichelt in this case, is relevant and not the intention of the creditor, the Respondent in this case. Furthermore, the test is a subjective one. In this respect - as in all other cases where intention is the subject of enquiry - inferences, deduction and commonsense play a decisive role alongside credibility. In the end, the *onus* of proof may be decisive. At the trial of the present action, the Respondent did not call Mrs Weichelt (now Mrs Fourie) as witness. It is common cause that she was available to testify and did testify at the commission of enquiry held in respect of the affairs of Cat Quip on 27 September 1994. In the absence of the direct evidence of Mrs Weichelt, the Respondent, who bears the relevant *onus*, is faced with a formidable task. There was no agreement between the parties that the evidence led at the commission was admissible. Consequently it cannot be taken into consideration.

[32] At the trial, Respondent only presented the evidence of the aforesaid Rivkind. His evidence amounts to the following :

32.1 During middle January 1993 he had a conversation with attorney Wustrow, an executor in the estate of the late Mr Weichelt. Wustrow said that Mr Weichelt's estate was insolvent, that Mrs Weichelt was running the business but was incapable of doing so, that "... he believed that Cat Quip may be insolvent ... ", that he had recently become aware of the Respondent's involvement in Cat Quip by way of a notarial bond and that the Respondent should protect themselves.

32.2 Mr Rivkind was, however, not alarmed but Mr Wustrow telephoned him a few hours later to say that certain " ... HP creditors ... " had moved onto the premises and had begun to remove equipment. At that stage Rivkind became alarmed.

32.3 It was then decided that the Respondent would perfect its security by way of a court order and attorneys were instructed. On 21 January 1993 Rivkind deposed to an affidavit in support of an application in the Supreme Court, Witwatersrand Local Division, set down for hearing on 26

January 1993.

32.4 The application was not heard on 26 January 1993 because

Mrs Weichelt had contacted the Respondent's attorneys to say that "Timquin" Properties (a separate company over which the Respondent held security) was being sold, the sale should be finalised " ... within a day or two ... " and that the Respondent would be settled out of the proceeds of the sale.

32.5 Whilst the matter was standing down for a day or two Rivkind received a telephone call from an attorney Van Rensburg on 26 January 1993 intimating that there was going to be an application for the liquidation of Cat Quip. Van Rensburg was " ... looking for a requisition from us so he could be appointed as liquidator in the matter if Cat Quip went into liquidation". Van Rensburg said that he believed an urgent application would be launched the following morning on 27 January 1993 and that it would be brought by Mr Tom Weichelt, the brother of the deceased.

32.6 Rivkind then realised that the matter was becoming urgent and that the Respondent needed to take care of its security. He telephoned Mrs Weichelt and told her that he was coming out to Cat Quip's premises immediately and that the purpose of going there was to take possession of the assets for the purposes of perfecting Respondent's security.

32.7 At the premises he discussed the proposed liquidation with Mrs Weichelt. She was aware of it. She was also aware that the application was being brought by the deceased's brother and that he claimed to be owed R11 000.

32.8 Mrs Weichelt :

> " ... actually disputed that the amount was owed [to the deceased's brother] and [said] that he in fact owed Cat Quip money and she did not believe it was a legitimate application."

32.9 A discussion then took place and :

> " ... she went on to say that we hold a notarial bond, in terms of the notarial bond the stock is ours and she was handing over the keys for us to take control, to take possession to perfect our security. After that

> I emphasised to her that it was actually a term of the bond that we were entitled to take possession, physical possession by taking the keys and being in control of the premises."

32.10 Rivkind was given two sets of keys by Mrs Weichelt. He physically locked up and he, together with Mrs Weichelt and others, left the premises.

32.11 Mrs Weichelt was the first to say (in their discussion on 26 January 1993) that the Respondent had a notarial bond, that the stock was the Respondent's and then she " ... virtually spontaneously ... " and without any pressure at all handed over the keys to Rivkind.

(My emphasis)

32.12 The intention with regard to taking possession was to put the Respondent in a better position than they would have been if they had no pledge and it followed that other creditors would be worse off, although no thought was given by the Respondent as to how other creditors would be affected. This was Rivkind's uncontroverted evidence.

32.13 He did not discuss the assets and liabilities of Cat Quip with

Mrs Weichelt, but both knew that there was a liquidation application coming.

32.14 Neither he nor Mrs Weichelt suggested that the liquidation be opposed, that Cat Quip was not insolvent, nor that there was thus no need to liquidate Cat Quip.

32.15 Rivkind's evidence was that he did not suggest that the liquidation be opposed. The following exchange then took place between Mr Rivkind and Counsel for the Appellants :

> "Nor did she. I put it to you, whether it was said in so many words or not, that it was clear in the context of what had happened and what you were discussing with this woman Mrs Weichelt, that both of you realised that Cat QuipCC is about to be liquidated as being unable to pay its debt, correct? ..... Yes."

(It may be interposed that the liquidation application was presented the next day and a winding-up order was subsequently granted.)

[33] Even if no weight is given to what Mrs Weichelt allegedly told Mr Rivkind,

it is clear that she knew very well that Cat Quip was insolvent, that a liquidation application was imminent, that hire-purchase creditors had begun to remove their equipment and that the game was up.

[34] The only witness called by the Respondent, Mr Rivkind, made the important concession that both he and Mrs Weichelt realised that Cat Quip was insolvent because it was unable to pay its debt. The Respondent did not call Mrs Weichelt to rebut what its only witness had said. Having regard to the parlous state of Cat Quip's affairs it was, in my view, correctly submitted that what Rivkind testified in this regard is clearly, on the probabilities, the correct position and Mrs Weichelt could hardly have said otherwise.

[35] That Mrs Weichelt must have appreciated the extent of Cat Quip's financial predicament is demonstrated by her conduct regarding the liquidation application. When the Respondent launched its application to perfect its security, to be heard on 26 January 1993, Mrs Weichelt responded by trying to settle the Respondent's claim by the sale of other assets. Very shortly thereafter it became known, obviously to her too, that a liquidation application was to be brought. Although she is said to have held the view that the claim

was invalid and disputed, she did not resist the liquidation application but her attitude towards the Respondent changed dramatically - instead of offering to pay their claim with proceeds from other assets, she now voluntarily offered possession of the stock. As between her and the Respondent, however, nothing had changed legally. All that had happened, apparently, was the knowledge of the pending liquidation. This demonstrates that although she may have said that her brother-in-law's claim is disputed, the truth of the matter is that she knew that Cat Quip was insolvent. Her intention in offering the key is presumed to be due to an intention to prefer, and, in the absence of her being called by the Respondent, and testifying convincingly to the contrary, that presumption must be accepted as the truth.

[36] Thus if all the evidence introduced by Rivkind on behalf of the Respondent and reflected above, is given credence, it does not avail Respondent. On the contrary, it confirms the assumption that Mrs Weichelt, on behalf of Cat Quip, intended to prefer the Respondent before the other creditors. It was she who drew Rivkind's attention to the notarial bond and that it gave the Respondent the right to take possession of the movable assets. She handed Rivkind the keys voluntarily. In the absence of any

other evidence, the conclusion that she, on behalf of Cat Quip, intended to prefer the Respondent above other creditors seems the only natural and probable one.

[37] On the evidence Mrs Weichelt, raised the matter of Respondent's rights under the notarial bond (one day before the Respondent was put into provisional liquidation) **without any pressure from Rivkind** and freely and from her own initiative handed the keys of the business to Rivkind, may well be the final nail in the Respondent's coffin. It was never explained why she **on that day just before the provisional liquidation** (at least two month's after Cat Quip had defaulted in which time nothing had been done) suddenly decided to hand over possession to the bondholder. She well knew, as appears from the evidence of Rivkind, that the effect of this handover would be that the Respondent would become a secured creditor and thus be preferred above other concurrent creditors. In the absence of evidence offering any other explanation or inference, it must follow that Mrs Weichelt had the intention to prefer the Respondent above other creditors.

[38] Even if it can be said that the existence of the bond was uppermost in

her mind, (which was never proved and is the very fact in contention) it does not follow that it rendered an intention to prefer “wholly inactive”. On the contrary, the said knowledge coupled with the proved realization of the consequences of her act, prove the very opposite, as will appear from the principles discussed in the cases previously mentioned and the natural and plausible inference from her knowledge and her decision to proceed with the disposition.

[39] The fact that Mrs Weichelt and Rivkind never discussed what the effect of

handing over the keys would be upon the other creditors of Cat Quip is not a factor in favour of the Respondent. On the contrary, it appears from the evidence that such a discussion was unnecessary, because both knew full well what the consequences would be. Why else, at this late stage, the handing over of the keys? I have quoted Rivkind’s evidence *verbatim* in paragraph 32.9 above, and have also referred in paragraph 32.1 above to what the attorney Wustrow said to Rivkind. The intention to prefer the Respondent above other creditors is manifest.

[40] It is a fundamental mistake in approach to suggest that the intention on the part of Mrs Weichelt to comply with a contractual obligation, assists the Respondent to any extent. The prohibition of section 29 (1) of the Insolvency Act is aimed precisely at a debtor who, on the eve of sequestration or liquidation, pays its lawful debt to one creditor. The debtor cannot do that, as appears from the judgment in ***R v Ismail***, discussed above. In fact, if compliance by the Respondent of its obligations under the bond was a good excuse, so would be all payments of debts on the eve of liquidation and sequestration, and section 29 (1) of the Insolvency Act would become a dead letter. To say that such a debtor does not have an intention to prefer because he or she was obliged to pay the debt is an obvious *petitio principii* (see ***R v Ismail***, *supra*).

[41] Nobody has ever argued that the bond was not a genuine one or that liquidation of Cat Quip was pending or even contemplated when it was registered in 1990. What is relevant is the intention of the debtor, as represented by Mrs Weichelt, on the moment of the relevant disposition which occurred on the eve of the liquidation. Nor was it ever disputed that Mrs

Weichelt and Rivkind conducted themselves at arms' length. But this factor also does not avail the Respondent. Even in an arm's length transaction, a disposition can still be accompanied by an intention to prefer the debtor. The test is not one of presence or absence of friendship, but of an intention to prefer.

[42] Then it was argued that the "pressure which was present to Mrs Weichelt's mind" was that Cat Quip had no defence to the Respondent's claims under the bond, and that it would not have been competent in law for Mrs Weichelt to have told Rivkind that she was not prepared to hand over the keys.

As indicated earlier, this approach is fundamentally flawed and is irreconcilable with the judgments on this point since ***R v Ismail***. In the latter case it was expressly stated that it does not avail a debtor, in the face of an attack under section 29 (1), to say that it was obliged to honour its obligations under a bill of exchange. There is no difference between that case and the present one as far as the legal principle to be applied is concerned.

[43] Then there is the submission that the Respondent would have been entitled, had Mrs Weichelt refused to hand over the keys, to approach a court and seek an appropriate order. It is not self-evident, however, that such an

application would or could have been successful. Had Cat Quip relied on its duty to all creditors, as stated in ***R v Ismail****, supra,* I cannot envisage any court coming to the assistance of the Respondent. One of the cases cited in this regard - ***Pietersburg Cold Storage Ltd v Cacaburas*** 1925 TPD 295 - does not deal with the situation where such an order is sought on the eve of liquidation, and does not advance the Respondent's case at all. The other case cited in support of the Respondent's case is ***International Shipping Co (Pty) Ltd v Affinity (pty) Ltd and Another*** 1983 (1) SA 79 (C). In that case there was a notarial bond in favour of International Shipping Ltd granted by Affinity Ltd over all its movables, with a clause in similar terms to clause 7 of the bond now under discussion. When Affinity Ltd ran into financial difficulties, International Shipping claimed to take possession of all the movable assets of Affinity in terms of the bond. **Affinity refused to give such possession.** Thereafter International Shipping applied to the Cape Supreme Court for an order authorising it to take possession of the said movables and to exercise its rights in terms of the notarial bond. Anglo African Factors (Pty) Ltd ("Factors"), another creditor of Affinity, intervened in and opposed this application, at the same time making an application for the winding-up of Affinity. On the return day, the court (per Grosskopf J)

dismissed International Shipping's application, because the handing over of the assets would come after the making of a final winding-up order. The judge held as follows:

> "On the papers before me the applicant's conduct prior to the commencement of Affinity's winding-up does not give it any equitable claim to be placed in a better position than other creditors, such as for instance Affinity's employees. The applicant took a business risk which failed and, like other creditors, must now be satisfied with its share of Affinity's assets as determined by law. And, as is also laid down by law, the provisional liquidators should in my view be enabled to administer Affinity's estate. No sound reason has, in my view, been shown to allow the applicant in effect to take it over."

This decision which is in line with ***R v Ismail****, supra*, is clearly correct and puts paid to the Respondent's case. If, in the present case, Mrs Weichelt did what she should have done in terms of ***R v Ismail***, the disposition could only have been effected after the winding-up order. It stands to reason that the Respondent cannot be in any better position if the disposition was effected one day before the commencement of the winding-up.

[44] Reference was also made to a passage in the cross-examination of Rivkind in which it was suggested that there was no final handing over of possession, but only a temporary one, pending the liquidation in order to

preserve the liquidation. Rivkind denied that that was the case. No inference can be drawn from the question - it may well have been a well-thought out piece

of cross-examination. What is important is Rivkind's denial. What remains then, as the only feasible explanation for the handing over of the keys, is an intention of Mrs Weichelt to give possession of the movables to the Respondent on a permanent basis. What other intention could there then have been but to prefer the Respondent above other creditors? And what evidence is there of any other intention?

[45] The most plausible and acceptable reason for the disposition was therefore the intention to protect and safeguard the Respondent, before other creditors could remove the movables or bring an application for winding-up, from which moment Cat Quip could no longer protect the Respondent against the other creditors due to the resultant *concursus creditorum*.

[46] I fail to find in the evidence any other "compelling reason" for the disposition, other than the alleged wish of Mrs Weichelt to comply with the

obligations of Cat Quip. As stated before, and in the light of ***R v Ismail*** and the insolvency cases thereafter, the intention to comply with a valid obligation does not negate an intention to prefer if the disposition occurs on the eve of a liquidation and when the debtor knows that it is insolvent.

[47] Further, one can with justification ask the question why, if Cat Quip (or Mrs Weichelt) considered as "compelling" the giving of possession of the movables in order to comply with the obligations of Cat Quip towards the Respondent, was it not given in the two months preceding 26 January 1993? By the end of November 1992 Cat Quip had defaulted in the payment of the bills in favour of the Respondent; its financial position was then in a parlous state; it knew of the bond and its provisions. Why suddenly, when she became aware of the pending liquidation application, did Mrs Weichelt take the initiative to hand over the assets to the Respondent? The only plausible explanation is that she had the intention to protect the Respondent against other creditors.

[48] There is also the matter of Mrs Weichelt not testifying. She was avilable

as a witness. The *onus* rested on Cat Quip, as represented by her. She

could have told the court with what intention she gave possession of the assets to the Respondent. This she did not do. In these circumstances it is proper to draw the inference that the Respondent, who would have relied on her evidence, feared that her evidence will expose facts unfavourable to him, especially under cross-examination (see ***Elgin Fireclays Limited v Webb***, 1947 (4) SA 744 (A) at 749 *in fine*).

[49] It was further submitted that Mrs Weichelt had at first asked the Respondent not to proceed with its envisaged application to court for an order to be allowed to take possession of the movables, and promised to settle the Respondent's claim from the proceeds of the sale of Timquin Properties, another company over which the Respondent held security. This sale never materialised. After that, Mrs Weichelt gave the possession of the Cat Quip movables to the Respondent. It was said that this proves that Mrs Weichelt merely had the "innocent" intention of complying with Cat Quip's obligations to the Respondent. But the correct inference from these facts is exactly the opposite : when Mrs Weichelt realised that she could not pay the Respondent what was owing to it, and well-knowing that Cat Quip was insolvent (this appears clearly from the accounts filed and Mrs Weichelt was, after all, the

bookkeeper and manager of Cat Quip) she handed over the assets of Cat Quip to the Respondent. She must have realised that she was preferring the Respondent above other creditors. The facts do not point to an "innocent" explanation, but to the opposite. In any event, there was as far as the said intention is concerned, no *onus* on the Appellants. No other intention was proved on behalf of the Respondent except the so-called compelling reason to pay its debt to the Respondent - a reason which, as I have pointed out, is no justification under the circumstances.

[50] And, finally, to say that Mrs Weichelt knew that she had no basis for denying Rivkind what he was there for, *i.e.* to take possession of Cat Quip's stock by virtue of the bond, is, as indicated above, no excuse, in the light of ***R v Ismail****, cum suis*. She knew very well that in giving possession to the Respondent, she was preferring the latter above other creditors and, well-knowing of the impending application for liquidation, proceeded with the disposition. What other intention, but to prefer the Respondent above others, can be inferred?

In my view, the appeal must succeed with costs.

PJJ OLIVIER JA

CONCURRING

FARLAM AJA

MPATI AJA

[1] I have had the advantage of reading the judgments of my brothers Olivier and Zulman JJA. I concur in the judgment of Zulman JA. I merely wish to mention, however, certain facts which weighed with me and perhaps not with him.

[2] Mr Rivkind's undisputed evidence is that when he discovered, through one Van Rensburg on 26 January 1993, that an application for the liquidation of Cat Quip was imminent, he telephoned Mrs Weichelt and informed her that he was going to Cat Quip's premises "immediately and the purpose of going there was to take possession of the assets", i.e. "to perfect our security". Thus, even though, as Zulman JA points out, Mrs Weichelt was the first to raise the question of the existence of the bond during the discussions which she had with Mr Rivkind immediately prior to handing over the keys, she knew that the

purpose of his visit was to take possession of Cat Quip's movable assets as he was entitled to do in terms of the bond.

[3] Coupled with this is the fact that a few days earlier Mrs Weichelt had persuaded the respondent, through its attorney, not to proceed with its application for a court order, which was to be sought on 26 January 1993, authorising respondent to perfect its security. She had undertaken to the respondent's attorney that the respondent's claim would be settled out of the proceeds of the sale of Timquin Properties, another company over which the respondent held security. Whether the sale of Timquin Properties took place or not is not clear from the record. The point is, however, Mrs Weichelt did not oppose the respondent's application for a court order to perfect its security as there existed no grounds on which she could do so. Similarly, she could not have had legitimate grounds to object to the taking of possession of Cat Quip's movable assets by Mr Rivkind on 26 January 1993.

[4] That Mrs Weichelt was the first to mention the existence of the notarial bond during the discussion with Mr Rivkind and that the stock was the respondent's is true, but she was not doing so in ignorance of the reason for his visit. She knew he was there to perfect the respondent's pledge by taking possession of Cat Quip's movable assets.

[5] To my mind, the most plausible inference to be drawn from these facts is that Mrs Weichelt knew that she had no basis for denying Mr Rivkind what he was there for, i.e. to take possession of Cat Quip's stock. She knew that Cat Quip had not met its obligations towards the respondent and that for that reason the respondent was entitled to perfect its security. (As to the respondent's entitlement to perfect its security, cf *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C), especially at 85 F-H.) At best for the appellants Mrs Weichelt acquiesced in the taking, by Mr Rivkind, of Cat Quip's movable assets, but did so because there was no ground for objection. The bond made provision for such taking.

[6] I agree, therefore, with Zulman JA that in the particular circumstances of this case the pressure which was present to Mrs Weichelt's mind was that Cat Quip had no defence to the right which the respondent was seeking to exercise to take possession of Cat Quip's movable assets.

L MPATI AJA

CONCUR:
MADLANGA AJA

MADLANGA AJA:

[1] I am in full agreement with Zulman JA and Mpati AJA's judgments. I have

seen it fit to deal with some of the issues raised by Olivier JA's judgment.

[2] In his judgment Olivier JA strongly relies on *R v Ismail* 1920 AD 316. In *Ismail's* case the transactions sought to be impugned involved Ismail (the debtor) and two other persons. One of them (a juristic person) had been a supplier of goods to Ismail's business which had since been taken over by his brother. The evidence revealed that Ismail **was eager that the supplier should continue supporting his brother.** From this the court concluded that it might very well be that Ismail thought that the supplier "would be more willing to do so if he placed it under an obligation to himself" (at 321). The second person involved in Ismail's transactions was a certain Abdullah Adam, **his friend** (at 322, 324) from whom he had purchased goods for £190. He had given him a bill for that amount. **Without any demand** by these two persons Ismail effected payment to both of them. In testimony Abdullah stated that "he had not pressed [Ismail] for payment" (at 322).

[3] In my view the above brief statement of the facts of the *Ismail* case amply demonstrates that the instant case is distinguishable from *Ismail*. Ismail, without any prompting or demand and with absolutely no pressure of whatever nature, voluntarily paid the supplier, partly made good the bill and, for the balance on it, handed over some goods to Abdullah Adam. In the instant case an application to perfect the security in terms of the notarial general mortgage bond ("the bond") was pending against Cat Quip. It had been before court only the day before the disposition was made but was not proceeded with at Mrs Weichelt's instance - she was hoping to find a way to settle the respondent's debt. On the date of the disposition Mr Rivkind telephoned Mrs Weichelt and, in so many words, told her that he was on his way to Cat Quip's business premises to take possession of its movable goods so as to perfect the respondent's security in terms of the bond (for more detail, see Mpati AJA's

judgment). The statement of law by Solomon JA on which Olivier JA strongly relies should be viewed in the context of the facts of the *Ismail* case. Because of the manifest differences in the facts *Ismail's* case is of no assistance. That statement of the law is to the following effect (at 324):

> "A creditor with a bill in his favour is in no better position on the eve of insolvency than any other creditor. There may no doubt be circumstances which might satisfy a Court that a payment made to such a creditor was one in the ordinary course of business, and with no intention to prefer; but in the absence of explanation the natural inference to draw from such a payment is that it was made with intent to prefer. In the present case we find that without any pressure from Abdullah his debt was discharged in full by part payment of £45, by return of the goods which he had bought in July to the value of £129, and by delivery of further goods to the value of £20."

The legal proposition by Solomon JA plainly states that, depending on the circumstances, a disposition, on the eve of insolvency, made by a debtor who is aware of the looming insolvency may still be found by the court not to have been made with an intention to prefer one creditor above another. On the facts of the instant case as set out by Zulman JA and Mpati AJA the circumstances are such as to satisfy the court that Cat Quip (through Mrs Weichelt) did not intend to prefer the respondent above other creditors.

[4] A thread that runs through Olivier JA's judgment is that, at a time when she was aware of Cat Quip's parlous financial position, Mrs Weichelt "virtually spontaneously and without any pressure at all" gave up control and possession of the goods secured by the bond (paragraph 32.11 of his judgment: also see paragraphs [35], [36], [37] and [47] of his judgment). Olivier JA relies heavily on these factors. I do not agree with his interpretation of the facts. Earlier in his judgment Olivier JA himself accepts that Mr Rivkind "telephoned Mrs Weichelt and told her that he was coming out to Cat Quip's premises immediately and that the purpose of going there was to take possession of the

assets for purposes of perfecting respondent's security" (paragraph 32.6). That being the case, Mrs Weichelt's subsequent conduct can hardly be described as "spontaneous". That she was responding to something initiated by Mr Rivkind is sufficiently demonstrated by Mpati AJA in his judgment. Further, in the face of the pending application for the perfection of the security which had been postponed or stood down only for a few days and Mr Rivkind's avowed intention to personally take possession of the goods it is difficult to understand how it can be said that the disposition was made when there was no "pressure at all". The *ratio decidendi* in *Ismail's* case is, *inter alia*, based on the fact that no pressure whatsoever had been brought to bear on the debtor - he had acted "spontaneously". *In casu* there was pressure and Mrs Weichelt did not act spontaneously. These two factors (which are heavily relied upon by Olivier JA) must thus be disregarded. Once that is done, Olivier JA's approach, in my respectful view, cannot stand.

[5] Another case strongly relied upon by Olivier JA is *International Shipping Co. (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C). He relies on this case to counter Zulman JA's view that Cat Quip had no defence to the respondent's insistence on perfecting the security in terms of the bond. All of this is in the context of the pressure that was brought to bear on Cat Quip. In this regard Olivier JA specifically relies on a passage appearing at 87 C-D of the report. In my view this passage does not support my colleague. There Grosskopf J was concerned with the question whether, once an application for the winding-up of a company has been presented, a creditor who is a mortgagee in terms of a notarial general covering bond would be entitled as of right to perfect its security in terms of the bond and thus become a secured creditor. The passage relied on by Olivier JA is preceded by passages that plainly demonstrate that the situation dealt with by Grosskopf J is completely different from the present one (at 84 *in fine et seq.*) At 85 F-G Grosskopf J has the

following to say:

> "The effect of the filing of the application for liquidation was therefore to change the nature and purpose of the order of Court which the applicant sought (and still seeks). Prior to the filing, the applicant was *prima facie* entitled to insist that Affinity should perform its obligations under the bond. After the filing, Affinity was *prima facie* unable validly to perform its obligations if the application was pursued to finality. In the former event, a Court order would merely have enforced existing rights. In the latter event, a Court order would have created rights and obligations - it would have rendered valid what would or might otherwise have become void. Obviously the approach of the Court in granting or refusing an order would differ completely in the two different sets of circumstances."

In the *International Shipping* case the winding-up application was presented before the application for the perfection of security was heard. In the passage relied upon by Olivier JA Grosskopf J is not addressing the question of the existence of a defence to the application to perfect the security. He is addressing the question of the Court's exercise of a discretion whether or not to come to the rescue of a mortgagee under a notarial general covering bond where an application for the liquidation of the debtor company has already been presented. *In casu* the disposition took place before the application for Cat Quip's liquidation was presented. The Court's approach differs completely in these two sets of circumstances (Grosskopf J at 85 G). By way of conclusion on this point I would say that there is no basis for suggesting that Mrs Weichelt had a defence to the intended perfection of the security in terms of the bond.

[6] In my view even assuming that Cat Quip did have a defence, its compliance with the terms of the bond under the prevailing circumstances would not of necessity translate to an intention to prefer one creditor above another. Despite the existence of such a defence the subjective intention of the debtor may be other than to prefer one creditor. I am in full agreement with Zulman JA that on the facts the plausible inference is that the intention was not

to prefer one creditor above another. I thus disagree with the suggestion made by Olivier JA in paragraph [49] *(in fine).*

[7] I agree that the appeal must be dismissed with costs.

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MADLANGA AJA

MPATI AJA)CONCUR