REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 2101/2002

In the matter between :

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O. First Plaintiff
ROMANA BERNADETTE KNUTH N.O. Second Plaintiff

and

JONATHAN BRIAN GRIFFITHS Defendant

Coram : **Brooks A J**

Date heard : **12-13 August 2013**

Date delivered : **25 March 2014**

JUDGMENT

BROOKS A J :

INTRODUCTION

[1] Plaintiffs join in this action as the duly appointed trustees of an insolvent trust established in terms of the Trust Property Control Act[1], known as Usapho Trust. Usapho Trust was sequestrated on 14 September 2000. It had largely been the brainchild of one *Maureen Clifford* and prior to its sequestration its business was illegal. The business can be described in the briefest of terms as an investment scheme of the variety commonly referred to as a pyramid scheme. The illegality gave rise to criminal charges of fraud and theft being brought against *Maureen Clifford*, and others, resulting in a protracted criminal trial before Kroon J.[2] Convictions and appropriate sentences were the further results.

[2] Defendant is an adult male businessman of Port Elizabeth. On two occasions defendant made payment of a substantial amount of capital to Usapho Trust, thereby becoming not only one of its investors but, concomitantly, one of its creditors. Annexed to the particulars of claim marked "A" is a schedule of four payments made by Usapho Trust to defendant, with a total value of R224 000.00. The particulars of claim

[1] Act No. 57 of 1988
[2] S v Maureen Clifford & Others Case No. CC 62/04

seek payment of each of the four amounts reflected in schedule "A", alternatively payment of each of the four amounts reflected in schedule "A" which was paid by or on behalf of Usapho Trust to defendant within the six month period prior to the sequestration of Usapho Trust, together with interest on each of the amounts *a tempore morae* and costs of suit.

LEGAL BASIS FOR THE CLAIMS

[3] Two legal bases for plaintiffs' claims find expression in the particulars of claim. Firstly, reliance is placed upon s26 of the Insolvency Act[3], which reads as follows :

> "***26.*** ***Disposition without value****. – (1) Every disposition of property 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 :*

[3] Act No. 24 of 1936 (as amended)

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

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

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

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

Secondly, and in the alternative, reliance is placed upon s29 of the Insolvency Act[4], which reads as follows :

"*29. **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 made*

[4] Act No. 24 of 1936 (as amended).

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 thirty 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 sub-section (1) of section eleven of the Farmers' Assistance Act, 1935 (Act No. 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."

In respect of the first legal basis for the claims, defendant admitted in his plea that this court may set aside, pursuant to s26 of the Insolvency Act, certain dispositions provided the criteria set out in that section have been complied with. However, in dealing with the all-important allegation made by plaintiffs that the dispositions reflected in schedule "A" were not made for value, defendant pleads :

"*8.* ***Ad Paragraph 11 :***

8.1 The allegations herein contained are denied and the Plaintiffs are put to the proof thereof.

8.2 More particularly the trust, as pleaded above, was immediately upon payment of monies by the

Defendant to the Usapho Trust in terms of a void and illegal agreement, obligated to repay such amounts to the Defendant, and the payments listed in Annexure "A" constitute part payment thereof (part payment in terms of the Usapho Trust's legal obligation to repay such amounts)."

Meeting the second legal basis for plaintiffs' claims, defendant's plea contains the following allegations :

"12. ***Ad Paragraph 15 :***

12.1 The Defendant admits that the payments were received by the Defendant within the period 6 months prior to the sequestration of the Usapho Trust.

12.2 The Defendant denies that such payments had the effect of preferring the Defendant above any other creditor and accordingly the Plaintiffs are put to the proof thereof.

12.3 Further and in any event, the repayments to the Defendant within the six month period were payments made in the ordinary course of business and the Usapho Trust did not intend, by making such payments, to prefer the Defendant above any other creditor.

12.4 The Usapho Trust, as a reasonable business entity, was at all relevant times obligated to repay to the Defendant all capital amounts received from the Defendant which he had paid to the said Trust in terms of an illegal and void agreement (alternatively agreements) of loan. The payments listed in Schedule A to the Particulars of Claim constitute such obligatory repayments (or part payment thereof).

13. ***Ad Paragraph 16 :***

13.1 It is admitted, provided the criteria as set out in Section 29 of the Insolvency Act have been met, that the above Honourable Court may set aside certain dispositions.

13.2 In the present instance it is denied that Plaintiffs are, by virtue of Section 29 of the Insolvency Act, entitled to set aside any of the dispositions listed in annexure "A" and it is accordingly denied that the Plaintiffs are entitled to repayment of any dispositions made to the Defendant, either as alleged or at all and accordingly the Plaintiffs are put to the proof thereof."

The plea concludes with a denial that plaintiffs are entitled to the orders sought on either of the legal bases set out.

THE INITIAL ONUS OF PROOF

[4] As things stood on the first day of trial, plaintiffs concentrated on the alternative claim based on s29 of the Insolvency Act. Mr *Rorke* and Mr *Ronaasen*, who appeared on behalf of plaintiffs, correctly identified that in order to have a disposition set aside as being a voidable preference in terms of s29, plaintiffs must first prove :

4.1 a disposition, as defined in s2 of the Insolvency Act, of his property by the debtor;

4.2 within 6 months before the sequestration of his estate;

4.3 to the defendant;

4.4 which has had the effect of preferring the defendant above any other creditor of the debtor; and

4.5 that immediately after the making of the disposition, the debtor's liabilities exceed the value of his assets.

[5] Once plaintiffs have established the five factors referred to in the preceding paragraph, the court may set aside the disposition unless the defendant proves :

5.1 that the disposition was made in the ordinary course of business; and

5.2 that it was not intended thereby to prefer one creditor above another.

In this exercise, it is defendant who bears the onus of proof.

[6] The content of the pleadings and the pre-trial agreements combined to identify the following issues as common cause by virtue of admissions made on behalf of defendant :

6.1 the identity and description of the parties;

6.2 that Usapho Trust was sequestrated on 14 September 2000;

6.3 that defendant received from Usapho Trust :

6.3.1 R12 000.00 on or about 27 March 2000;

6.3.2 R100 000.00 on or about 27 March 2000;

6.3.3 R12 000.00 on or about 3 June 2000;

6.3.4 R100 000.00 on or about 3 June 2000;

Total R224 000.00

6.4 that the payments made by Usapho Trust to defendant as referred to in the preceding paragraph, constituted dispositions as defined in s2 of the Insolvency Act;

6.5 that at the time the dispositions were made by Usapho Trust to defendant, the liabilities of Usapho Trust exceeded its assets and Usapho Trust was insolvent;

6.6 that at all material times defendant was a creditor of Usapho Trust;

6.7 that each of the dispositions referred to in sub-paragraph 6.3 (*supra*) was made within 6 months prior to the sequestration of Usapho Trust on 14 September 2000;

6.8 that the business being carried on by Usapho Trust prior to its sequestration was illegal and that the dispositions referred to were made in the course of such illegal business;

6.9 that the business of Usapho Trust contravened the provisions of s11 (1) of the Banks Act[5] in that Usapho Trust accepted deposits, as defined in the Banks Act, from the public without Usapho Trust being a public company or being registered as a bank in terms of the Banks Act;

[5] Act No. 94 of 1990

6.10 that the business of Usapho Trust constituted a harmful business practice as envisaged in paragraph 2 read with paragraph 1.1 of the notice in terms of s12 (6) (iii) of the Consumer Affairs (Unfair Business Practices) Act[6] [7];

6.11 that the business of Usapho Trust consisted of a scheme, amounting to a pyramid scheme, which was premised on representations made by the trustees of Usapho Trust to various depositors, which included defendant, and which representations, to the knowledge of the trustees, were false and fraudulent, and to the effect that :

6.11.1 the scheme was unlawful, not a pyramid scheme, and not a scheme conducted in contravention of any statutory or regulatory provisions;

6.11.2 the scheme was viable in the long term;

6.11.3 the deposits concerned would be utilised by Usapho Trust to purchase from certain estate

[6] Act No. 71 of 1988
[7] Published under Notice 1135 of 1999 in Government Gazette No. 20169 of 9 June 1999.

agents their rights in and to commissions which they had earned, but which had not yet been paid to them;

6.11.4 the abovementioned rights would be purchased by Usapho Trust at a premium relative to the commissions to be earned, in due course;

6.11.5 Usapho Trust would earn sufficient profits from the scheme to enable them to repay the amounts deposited with Usapho Trust, together with interest at the rates which were, in certain cases, usurious;

whilst, in truth, and to the knowledge of the trustees concerned, such deposits would be used to fund the repayment to other depositors of their deposits together with interest on those deposits;

6.12 the accuracy of the 9th, 10th and 11th liquidation and distribution accounts of Usapho Trust.

[7] Accordingly, of the five issues set out in paragraph [4] *supra* on which plaintiffs bear the onus of proof, only one issue remains in dispute, namely that referred to in sub-paragraph 4.4 : whether or not the admitted dispositions had the effect of preferring defendant above other creditors of Usapho Trust.

[8] To address the outstanding issue in respect of which they bore the onus of proof, plaintiffs called Mr *Wessel Greeff*, on whose behalf notices in terms of Rules 36 (9) (a) and 36 (9) (b) of the Uniform Rules of Court had been served and filed. This witness presented the 11th liquidation and distribution account of Usapho Trust in a way that demonstrated unequivocally that if regard be had to the length of time that the two capital payments made by defendant to Usapho Trust had been available for use by the latter, the amount of R12 000.00 paid by Usapho Trust to defendant on 27th March 2000 represented a return on investment of 42,1% per annum, and the amount of R12 000.00 paid by Usapho Trust to defendant on 3 June 2000 represented a return on investment of 74,2% per annum. He analysed and explained the schedule of claims against the insolvent estate of Usapho Trust in order to explain the mechanism by which he was able to represent the returns on defendant's investments in this way, as well as to explain his

concluding opinion that defendant had indeed been preferred above other creditors of Usapho Trust. For reasons which shall become plain immediately hereafter, it is not necessary to set out the evidence of Mr *Wessel Greeff* in any greater detail.

[9] After the evidence in chief had been led from Mr *Wessel Greeff*, the court took a short adjournment. On resumption of proceedings, Mr *Rorke* informed the court that Mr *Beyleveld*, who appeared on behalf of defendant, had indicated that having heard the evidence in chief of Mr *Wessel Greeff*, defendant was in agreement with all evidential aspects of plaintiffs' case. In the result, it was proposed that a further conference be held that afternoon in accordance with the provisions of Rule 37 of the Uniform Rules of Court, enabling the parties to place before the court a minute recording further agreement on outstanding issues. Mr *Rorke* informed the court further that agreement had also been reached during the adjournment on a further aspect of the case, namely that important portions of the evidence in *S v Maureen Clifford & Others*[8] as recorded before Kroon J had been agreed as reflecting accurately the *modus operandi* of those running the pyramid scheme through or in the name of Usapho Trust.

[8] Case No. CC62/04

[10] On the strength of the evidence led from Mr *Wessel Greeff*, and the prospect of further agreement being reached at the conference to be held in terms of Rule 37 of the Uniform Rules of Court that afternoon, plaintiffs closed their case.

[11] On behalf of defendant, Mr *Beyleveld* confirmed defendant's attitude towards the evidence of Mr *Wessel Greeff* and the prospect of resultant further agreement being reached, and closed defendant's case.

[12] On the following day, 13th August 2013, a further minute dated 12th August 2013 was handed in by agreement between the parties, indicating that the following was now common cause :

12.1 certain findings of fact and conclusions drawn therefrom by Kroon J as reflected in an extract from the judgment in *S v Maureen Clifford & Others*[9], annexed to the further minute marked "A";

12.2 that the dispositions made to defendant by Usapho Trust had the effect of preferring him over other creditors of the insolvent estate of Usapho Trust;

[9] Case No. CC62/04

12.3 in respect of the payments made by defendant to Usapho Trust and the dispositions made by Usapho Trust to defendant, it is common cause that :

12.3.1 on 15 December 1999 defendant transferred the sum of R100 000.00 from his bond account to the bank account of Usapho Trust;

12.3.2 on 23 March 2000, being the date agreed between defendant and Usapho Trust for repayment, defendant received a cheque in the sum of R100 000.00 from Usapho Trust which was deposited into his bond account on 27 March 2000;

12.3.3 on 6 April 2000 defendant transferred from his bond account the sum of R100 000.00 to the bank account of Usapho Trust;

12.3.4 on 3 June 2000 the sum of R100 000.00 was paid into defendant's bond account by Usapho Trust, being three days after the date agreed for such payment;

12.4 the only issue which remains in dispute between the parties is whether the relevant dispositions were made in the ordinary course of the business of Usapho Trust.

[13] In my view, the evidence of Mr *Wessel Greeff*, taken in conjunction with the admissions made on behalf of defendant in the pleadings, and in both minutes prepared pursuant to conferences being held by the parties in terms of Rule 37 of the Uniform Rules of Court, demonstrates that all four of the dispositions set out in schedule "A" annexed to the particulars of plaintiffs' claims were in fact made by or on behalf of Usapho Trust to defendant.

[14] It follows that plaintiffs have discharged the initial onus of proof.

SUBSEQUENT ONUS OF PROOF

[15] The effect of the further agreements which resulted from the resumption of the conference in terms of Rule 37 of the Uniform Rules of Court on the afternoon of 12th August 2013 was to leave only one issue outstanding for determination by this court, namely whether the dispositions were made in the ordinary course of business. The parties are agreed that this is an issue on which defendant bears the onus of proof.

RELEVANT LEGAL PRINCIPLES

[16] The test as to whether a disposition is made in the ordinary course of business is an objective test. It amounts to a consideration of whether having regard to the terms of a transaction and the circumstances under which it was entered into, the conclusion can be reached that the transaction was one which would normally have been entered into by solvent business persons. Furthermore, the test is a wide one, in which regard must be had to all the circumstances under which the disposition under scrutiny took place. This approach has a long history within this Division, evident as it is in the approach adopted by Hattingh A J P in his analysis of the evidence placed before the court in *Featherstone's Estate v Elliot Brothers*[10]

[17] Judgments emanating from the Supreme Court of Appeal demonstrate consistency in the approach since the establishment of the principle almost a hundred years ago, when the court was known as the Appellate Division, that the test is a wide one. In *Jacobson & Co's Trustees v Jacobson & Co*[11], De Villiers A J A as he then was, expressed the principle on behalf of the full court as follows :

[10] 1922 EDL 233 at 242 to 244.
[11] 1920 AD 75 at 79.

> "*Now before the 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 which rests on a contract which itself is open to question cannot be said to be a delivery in the ordinary course of business.*"

[18] The Appellate Division revisited the principle approximately forty years later in *Hendriks, N.O. v Swanepoel*[12] when consideration was given to some of its earlier judgments and to relevant judgments of the Provincial Divisions. In a minority judgment concurred in by Steyn C J, von Blerk J A referred twice with approval to the statement of the principle which found expression in *Jacobson & Co's Trustees v Jacobson & Co* (*supra*)[13]. Reference was also made to *Rex v Abrahamson*[14], where Solomon J A had refrained from stating anything more than the following :

> "*It is unnecessary to give any definition of what is meant by disposing of goods otherwise than in the ordinary course of business, for the words explain themselves. Concrete examples of such disposal would be if the insolvent had given away the property to his friends, or had sold it at a substantial loss, when there was no need for him to do so.*"

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[12] 1962 (4) SA 338 (A).
[13] at 341 H to 342 A and at 343 B.
[14] 1920 AD 283 at 286.

Similar treatment was afforded to the judgment of Wessels A C J in *Estate Wege v Strauss*[15], in which the learned Judge found it unnecessary to give any definition of what is meant by disposing of goods otherwise than in the ordinary course of business. Delivering the judgment on behalf of the majority of the court, van Winsen J A stated :

> "*Die Hof benader die vraag of 'n transaksie in the gewone loop van sake geskiet het, objektief wanneer hy hom afvra of, in aggenoom die voorwardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvent besigheids mense aangegaan sou word.*"

[19] Consistency is preserved further by the consideration of the principle given some seventeen years later in *Paterson N O v Trust Bank of Africa Ltd.*[16] where in delivering judgment on behalf of the full court, Botha A J A stated :

> "*Since it is not necessary to do so in order to arrive at a decision in this appeal, I propose to say no more about counsel's submission, and to consider the circumstances surrounding the disposition without having regard to Strydom's insolvency at the time, or to his knowledge or the respondent's alleged knowledge of that fact. On the other hand, neither counsel suggested that there was any reason – and I can perceive none – why any of the other surrounding circumstances, i.e. apart from those bearing on Strydom's insolvency, should be excluded from consideration in determining whether the disposition was made in the ordinary course of business. Upon this footing I proceed to consider those circumstances.*"

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[15] 1932 AD 76.
[16] 1979 (4) SA 992 (AD) at 997 C to D.

This is followed by[17]:

> "*Even if the payment as such is to be regarded as the disposition for the purposes of applying the norm as to whether it was made in the ordinary course of business, the Court would still have to consider the terms of the contract and the circumstances under which it was entered into (cf. Hendrik's case supra and Jacobson and Co's Trustees v Jacobson and Co 1920 AD 75 at 79). However, on the facts of this case, it seems to me that it would be wrong to focus the attention mainly on the payment itself as the disposition in issue, and that it is necessary to take a broader view of the matter, in order to be able to assess properly the weight to be accorded to the surrounding circumstances in applying the test of the ordinary course of business.*"

[20] In the context of the enquiry into what constitutes the ordinary course of business in the present matter, it is important to note what the Supreme Court of Appeal has had to say about pyramid schemes. In *Fourie N.O. & Others v Edeling N.O. & Others*[18], Conradie J A commenced the judgment of the full court in the following manner :

> "*[1] The audacity of its perpetrators and the credudity of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. It was operated from the beginning of 1998 and, as all these schemes do, collapsed when the inflow of funds could no longer sustain the outflow of extravagant returns to participants. Each participant on average 'invested' in the scheme three times. Its turnover was some R1 5 billion. In order to throw regulatory authorities off the trial it was at one time or another conducted by entities called MPF Finance Consultants CC, Madicor Twintig (Pty) Ltd., Martburt Financial Services Ltd., M & B Koöperasie Bpk. &*

[17] at 1000 F to H.
[18] [2005] 4 All SA 393 (SCA).

> *Krion Financial Services Ltd. The way in which the scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with 'interest' was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that his already enormous interest was compounded. Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme investors received payment of their capital and their profit when due. Sometimes an investor would leave the capital and/or the profit in the scheme and this would then have been reflected by means of a book entry as a payment and anew investment. Other investors would take their capital and profit on the due date, some of whom returned after a while to reinvest a similar amount.*"

The paragraph which follows concludes with the sentence :

> "*It is anomalous to speak of investors in a scheme that was illegal from beginning to end but everyone else has done so and I shall do so too.*"

Investments in the pyramid scheme were found by Conradie J A to be "*illegal and therefore void*".[19]

[21] Two years later, Howie P commenced the judgment of the full court in *M P Finance Group CC (in liquidation) v Commissioner, South African Revenue Service*[20] in similar vein :

[19] at para. [13].
[20] 2007 (5) SA 521 (SCA).

> "*[1] For some years beginning in 1998 one* Marietjie Prinsloo *operated an illegal investment enterprise commonly called a pyramid scheme. As is the pattern with such schemes, it readily parted greedy or gullible 'investors' from their money by promising irresistible (but unsustainable) returns on various forms of ostensible investment. It paid such returns for a while to some before finally collapsing – owing many millions – when the predictable happened and the total amount of supposedly due returns vastly exceeded the total amount of obtainable investment money.*
>
> *[2] The scheme was conducted by way of successively created entities, incorporated and unincorporated. They were all eventually insolvent ….*"

[22] Giving judgment on behalf of the full court recently, Southwood A J A considered the declaration by Hartzenberg J[21]that Notice 1135 of 1999 issued in terms of s12 (6) of the Consumer Affairs (Unfair Business Practices) Act[22] identified a pyramid scheme as a "*harmful business practice*", enabling him to conclude it unlawful, and noted that the Supreme Court of Appeal had endorsed this finding. He concluded that "*In Notice 1135, the intention is clearly to outlaw pyramid schemes*".[23]

[23] In my view, a consideration of the legal principles which find expression in the authorities cited up to this point leads irresistibly to the conclusion that a disposition made in the ordinary course of business of a business such as that run by Usapho Trust, in the context of s29 (1) of the

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[21] In Philip Fourie N O & Others v Christiaan Serfontein Edeling & Others [TPD Case No. 1288/2003, 28 February 2013].
[22] Act No. 71 of 1998.

Insolvency Act, means a "*lawful*" disposition made in the ordinary course of a "*lawful*" business. (*Klerck N O v Kaye*[24]).

[24] This approach was adopted in this court in an action similar to the present brought by the trustees of the insolvent estate of Usapho Trust against an investor and creditor of Usapho Trust in terms of s29 of the Insolvency Act.[25] Pillay J, as he then was, concluded that the dispositions made by Usapho Trust to the defendant were not made in the ordinary course of business. He ordered that the dispositions be set aside as voidable preferences in terms of s29 of the Insolvency Act. The defendant made application for leave to appeal against the whole of the judgment of Pillay J, to the Supreme Court of Appeal. Leave to appeal was refused.

[25] On behalf of defendant, Mr *Beyleveld* submits that the applicable legal principles are not so clearly expressed as may be suggested by the preceding analysis. He submits that the Supreme Court of Appeal has itself revisited recently the legal principles applicable to a determination of whether a disposition is, or is not, made within the ordinary course of

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[23] Dulce Vita CC v van Coller & Others [2013] 2 All SA 646 (SCA) at para. [33].
[24] 1989 (3) SA 669 (C) at 676 C.
[25] Sackstein N O & Others v Benade [2009] JOL 23981 (ECP).

business, in its judgment in *Gazit Properties v Botha & Others N N O*[26]. A consideration of this judgment reveals that the liquidators (who were the plaintiffs in the action) initially adopted the argument that payments made to the defendant[27] by the company[28] prior to liquidation were not made in the company's ordinary course of business, since its business was tainted. Three bases for this argument were advanced initially in the court *a quo*, namely :

25.1 that the company had contravened s11 (1) of the Banks Act[29] in that it procured the loans from the general public to be lent out further, without being registered as a bank;

25.2 that the interest rate paid by the company to investors exceeded the maximum allowed under Government Notice 1135 of 1999[30], meaning that the company conducted an unlawful harmful business practice; and

25.3 that the company's business constituted a prohibited pyramid scheme in terms of the same notice, with new investors'

[26] 2012 (2) SA 306 (SCA).
[27] Gazit Properties (Pty) Ltd.
[28] Malokiba Trading 19 (Pty) Ltd.
[29] Act No. 94 of 1990.
[30] Published in Government Gazette 20169 of 1999 and issued under s26 (6) of the Consumer Affairs (Unfair Business Practises Act 71 of 1988).

> funds being utilised to make interest payments to existing investors.

In considering the arguments in the court *a quo*, Kruger A J held that the transactions had not been made in the ordinary course of business. He relied upon the tainted nature of the company's business and the fact that the company had entered into loan agreements under false pretences.

[26] In the appeal judgment relied upon by Mr *Beyleveld*, this reasoning was criticised by Majiedt J A, who delivered the judgment on behalf of the full court, stating :

> "*The underlying premise, which is to focus on the nature of the insolvent's general business practices, is in my judgment misplaced and concentrating on the 'tainted' nature of Malokiba's general business model is to misapply the provisions of s29 (1). What it requires is a close scrutiny of the dispositions itself (sic), viewed against the background of its(sic) causa.*".[31]

[27] I am unable to agree with the submission by Mr *Beyleveld* that the judgment in *Gazit Properties v Botha & Others N N O*[32] demonstrates a departure from the principles expressed hitherto in the judgments of the Supreme Court of Appeal to which I have referred. The primary perspective from which I arrive at this conclusion is that the basis of the

[31] Gazit Propeties v Botha and Others N N O 2012 (2) SA 306 (SCA) at para. [7].
[32] 2012 (2) SA 306 (SCA).

enquiry was much narrower than had previously been demonstrated by the various sets of facts as being necessary before the Supreme Court of Appeal. This is plain from the following :

27.1 *Gazit Properties (Pty) Ltd.* (*Gazit*) loaned and advanced a total sum of R5 000 000.00 to the company. Written loan agreements were concluded in terms of which *Gazit* was entitled to cancel them. This it did, and the full capital and interest due under the agreement was paid by the company to *Gazit*.[33] Various admissions were made by the liquidators. Importantly, one of these admissions was reflected in an agreement that the company did not intend to prefer *Gazit* above other creditors in making the payments to it. The only issue which the court had to determine was whether the payments to *Gazit* were made in the ordinary course of business as contemplated by s29 of the Insolvency Act;[34]

[33] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [3].
[34] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [4].

27.2 *Gazit* contended that the company had repaid the loans in the ordinary course of business in accordance with its obligations in terms of valid underlying loan agreements;[35]

27.3 in meeting the argument raised on behalf of *Gazit*, the liquidators at the trial expressly abandoned :

27.3.1 reliance upon the contention that the company's business constituted a prohibited pyramid scheme in terms of notice 1135 of 1999;[36]

27.3.2 the complaint that the interest rate paid was in excess of that permitted by notice 1135 of 1999;[37] [38]

27.4 essentially, the liquidators' complaint that the disposition which had been made to *Gazit* was not in the ordinary course of business was ultimately restricted only to the following narrow issues :

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[35] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [5].
[36] Published in Government Gazette 20169 of 1999 and issued under s26 (6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

27.4.1 the alleged contravention of the Banks Act[39]; and

27.4.2 the allegation that investors had been misled in lending money to the company and that the investors in question had been repaid from money sourced from new investors. I do not understand the judgment to go so far as to state that the manner in which investors had been misled was fraudulent. It is self-evident that the limited bases of the liquidators' complaints do not encompass a complaint that the disposition was made to *Gazit* as part of an illegal pyramid scheme.[40] That characteristic, in my view, immediately distinguishes the factual circumstances their under consideration from those which are reflected in the evidence and the content of the various agreements reached between the parties in terms of the provisions of

[37] Published in Government Gazette 20169 of 1999 and issued under s26 (6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.
[38] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [6].

Rule 37 of the Uniform Rules of Court which has been placed before me.

[28] The second perspective from which I arrive at this conclusion is an analysis of the manner in which the expression of principle relied upon by Mr *Beyleveld* finds expression within the linguistic context of the judgment itself. In deciding whether the disposition made to *Gazit* was made by the company in the ordinary course of business, the Supreme Court of Appeal made what appears, with respect, to be a rather curious observation when it stated that what is required "*is a close scrutiny of the dispositions itself (sic), viewed against the background of its (sic) causa*".[41] In my view, it seems highly unlikely that in making this statement, the Supreme Court of Appeal intended to revisit and express differently, the principle of law to be applied in approaching the question of whether a disposition is made in the ordinary course of

business. There are three reasons for my view :

28.1 firstly, in its consideration of the nature of the disposition made to *Gazit*, the Court itself recognised the

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[39] Act No. 94 of 1990.
[40] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [12] and at para. [13].

appropriateness of the broad approach to the question repeatedly endorsed hitherto by referring expressly and with approval to the nature of the enquiry as expressed by van Winsen J A in *Hendriks N O v Swanepoel*;[42] [43]

28.2 secondly, had the Supreme Court of Appeal intended to depart from the broad approach laid down consistently in the authorities emanating from that court, to which I have referred earlier in this judgment, as well as the various decisions of the Provincial Divisions which have followed the legal principles expressed hitherto, the Supreme Court of Appeal would have dealt with the historic expression of the broad approach to the question more meaningfully, and in detail, so as to explain why a new principle of law was being established and the long established principle of law was being rejected. I am unable to find evidence of any such process in the judgment relied upon by Mr *Beyleveld*;

28.3 thirdly, had the Supreme Court of Appeal intended to hold that a disposition made by an illegal pyramid scheme was

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[41] Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) at para. [7].

> one made in the ordinary course of business, such a finding would have had to deal, for the same reasons as those expressed in the preceding sub-paragraph, with the trenchant views on the illegality of pyramid schemes which the Supreme Court of Appeal itself has expressed in the judgments on the point to which I have referred earlier. It has not done so.

[29] It follows further that I am of the respectful opinion that if I am wrong in discerning the intention of the Supreme Court of Appeal, and if by saying that what is required "*is a close scrutiny of the dispositions itself (sic), viewed against the background of its (sic) causa*" the Supreme Court of Appeal indeed intended to restate what the principle of law is to be applied in the approach to the question of whether a disposition falls within the ordinary course of business, then, with respect, it erred.

[30] I am of the respectful opinion that the explanation for the apparent contradiction is more prosaic. In my view, and for the reasons expressed in this judgment, the ratio of the decision in *Gazit Properties*

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[42] 1962 (4) SA 338 (A) at 345 B.
[43] at para. [8].

v Botha & Others N N O[44] must be limited to a finding that on the agreed facts of that case, and the narrow contentions relied upon, the disposition in question was one in the ordinary course of business. If this is correct, the decision is innocent of the effect claimed by Mr *Beyleveld* on behalf of defendant in this matter, namely a departure from the well-entrenched application of the broad approach maintained in the earlier judgments of the Supreme Court of Appeal identified in this judgment. In my view, that is as it should be. I find the well-established principle of the broad approach to remain intact and to be applicable in this matter.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS IN THIS MATTER

[31] In light of the professional analysis of the nature of the two capital investments made by defendant to Usapho Trust contained in the evidence of Mr *Wessel Greeff*, with which defendant agreed after hearing the evidence, the nature and extent of both agreements reached by the parties in terms of the provisions of Rule 37 of the Uniform Rules of Court to which reference has been made in this judgment, including the agreement that the dispositions had the effect

[44] 2012 (2) SA 306 (SCA).

of preferring defendant over the creditors of the insolvent estate of Usapho Trust, and the fraudulent nature of the manner in which those capital investments were obtained which is evident from the portions of the judgment of Kroon J in *S v Maureen Clifford & Others*[45] [46], and upon application of the principle of a broad approach, I am readily persuaded

[45] Case No. CC62/04.

[46] The relevant portions of the judgment are as follows :

"[906] Daar is ook ander getuines wat bewys dat die voorstellings vals was, insluitende die getuienis van die ondervind vanaf 'n vroeë stadium van kenbare kontantvloeiprobleme, die onsuksesvolle pogings deur beleggers om die geld aan hulle verskuldig te verhaal, die talle keer wat Usapho tjeks deur die bank gedishonoreer is, die wyse waarop Usapho sy banksake hanteer het (waarna ek in 'n ander samehang terugkeer) waarby ingesluit is die toevlugneem tot wisselruitery en die ontvangs van geld onwettiglik vanuit ABSA se tesourie voorgeskiet, die kenbare en toenemende afname in finansiële transaksies deur Usapho aangeknoop, die vervanging daarvan met die *modus oprandi* ingevolge waarvan beleggers se geld hoofsaaklik aangewend is om ander beleggers uit to betaal, die naarstigtelijke soeke na verdure beleggings met gepaardgaande aanbod van aansienlik verhoogde rentekoerse, en in etlike gevalle die versoek dat beleggings in kontant of by wyse van kontantjeks of deponering in rekenings anders as Usapho rekenings by ABSA geskied (sodat beleggingsgeld nie in Usapho se bankrekening beland waar dit gebruik sou moet word om Usapho se verplitings teenroor ABSA te delg en nie beskikbaar sou wees vir gebruik deur Usapho om beleggers uit te betaal nie), en die oorweging gegee aan die sekwestrasie van Usapho.

[914] Daar bestaan geen twyfel dat bevind moet word dat beskuldigde 1 van die valsheid van die eerste vier voorstellings bewus was nie. Sy was per slot van sake die baas van Usapho se besigheidsbedrywighede. Dit is net nie aanvaarbaar dat sy nie goed besef het, en wel reeds teen die begin van Januarie 2000, dat Usapho in finansiële verknorsing verkeer nie, dat Usapho nie naastenby genoegsame inkomste genereer om sy verpligtings teenoor beleggers na te kom nie, dat beleggers se fondse nie soos voorgehou aangewend word nie maar is hoofsaaklik aangewend om ander beleggers uit te betaal, dat 'n belegging by Usapho inderdaad geensins as 'n veilige een beskou kon word nie, en dat Usapho inderdaad nie in staat was om sy verpligtings teenoor beleggers na te kom nie, en, heel belangrik, dat met verloop van tyd Usapho se finansiëele posisie net gedurigdeur versleg het, met 'n al toenemede onvermoë om aan die al groeiende verpligtings teenoor beleggers to voldoen. Sy is in elk geval keer op keer inderdaad no betrek by die aspekte gedek deur die getuienis in para [906] hierbo na verwys wat boekdele spreek van 'n skuldige gewete aan haar kant wat betref Usapho se aansienlike en toenemende finansiële weë en onvermoë om sy verpligtings teenoor beleggers na te kom.

[1046] Ek het reeds vroeër in verskeie opsigte opgemerk dat die bedoeling van die beskuldigdesmet hul betrokke optrede was om Usapho te bevoordeel. Inderdaad, was dit deurentyd hul bedoeling: hulle wou die voortbestaan van Usapho verseker en daarom wou hulle verhoed dat enige tjeks teruggetuur word as verwys na trekker. (Soos beskuldigde 4 teenoor Cutting opgemerk het die terugstuur van tjeks as verwys na trekker sou 'n spyker in beskuldigde 1 se doodskis gewees het). Hul optrede was egter ten koste van ABSA. Die motief vir hul optrede was die voordeel van Usapho,maar hul oogmerk *vis-à-vis* ABSA/Streekkrediet was bedrog. Die nodige wederregtelikheidsbewussyn aan hul kant is derhalwe bewys.

that the dispositions made to defendant in this matter cannot be said to have been made in the ordinary course of business by or on behalf of Usapho Trust. The illegality of the business operations, the manner in which participation therein was secured and the exorbitant returns on "*investment*" alone are features which militate against a different conclusion. Taken together with the other factors, these features make the decision that the dispositions were made other than in the ordinary course of business of Usapho Trust, irresistible.

[32] It follows that defendant is liable to pay to plaintiffs, in their capacities as the duly appointed trustees of the insolvent estate of Usapho Trust, the four payments referred to in schedule "A" to the particulars of claim in the total amount of R224 000.00.

LIABILITY FOR INTEREST

[33] S32 (3) of the Insolvency Act[47] provides as follows :

> "*When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover*

[47] Act No. 24 of 1936 (as amended).

> *any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or the date on which the disposition is set aside, whichever is the higher.*"

[34] In *Janse van Rensburg N.O. & Others v Steyn*[48] the Supreme Court of Appeal has held that s32 (3) of the Act, quoted in the preceding paragraph, only allows this court to award a judgment creditor who has obtained an order setting aside an impeachable disposition (such as the dispositions under consideration in the present matter) *mora* interest from the date of judgment. I do not consider that authority to be distinguishable on its facts from the circumstances which are under consideration in this matter. Accordingly, that decision is binding on this court.

CONCLUSION

[35] It follows that I am of the opinion that plaintiffs are entitled to an order setting aside the dispositions set out in schedule "A" to plaintiffs' particulars of claim on the basis that they are impeachable dispositions,

in terms of the provisions of s29 of the Insolvency Act[49], together with interest thereon to be calculated at the prescribed rate of interest from the date of this judgment to date of payment.

[36] Whilst, objectively speaking, the monetary value of the claim in plaintiffs' hands is not particularly large, recovery thereof required that complex and intricate legal principles be canvassed and applied to the prerequisite evidence. In my view, this process justified the involvement of two counsel on behalf of plaintiffs. However, the costs occasioned by the involvement of two counsel were not sought.

ORDER

[37] In the result, I making the following order :

(a) it is hereby directed that each disposition made by or on behalf of Usapho Trust to defendant, as set out in schedule "A" to plaintiffs' particulars of claim, is set aside in terms of the provisions of s29 of the Insolvency Act, No. 24 of 1936 (as amended);

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[48] 2012 (3) SA 72 (SCA).
[49] Act No. 24 of 1936 (as amended).

(b) defendant is hereby directed to make payment to plaintiffs of each amount reflected in schedule “A” to plaintiffs’ particulars of claim, in the total sum of R224 000.00;

(c) defendant is hereby directed to make payment of interest on each of the amounts reflected in schedule A” to plaintiffs’ particulars of claim to be calculated at the prescribed rate of interest of 15,5% *a temporae morae* from the date of this judgment to date of payment;

(d) defendant is hereby directed to pay plaintiffs’ costs of suit.

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R W N BROOKS
Judge of the High Court (Acting)

Appearances:

For the Plaintiffs:	*Adv S C Rorke S.C. and Advocate O H Ronaasen instructed by de Villiers Incorporated, Port Elizabeth*
For the Defendant:	*Adv. A Beyleveld S.C. instructed by Pagdens Stultings, Port Elizabeth*