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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 13878/05

JUDGMENT DELIVERED: 26 FEBRUARY 2008

REPORTABLE

IN THE MATTER BETWEEN:

CHRISTOPHER PETER VAN ZYL N.O.	APPLICANT
AND	
NEDBANK LIMITED	RESPONDENT

JUDGMENT

POSWA, J

[1] The applicant as the liquidator of Valuefin (Propriety) Limited (in liquidation) ("Valuefin"), applies in terms of section 26(1) of the Insolvency Act, No 24 of 1936 ("the Act") for an order setting aside certain transactions concluded between the Respondent and Valuefin prior to the liquidation of Valuefin.

[2] The applicant applies to have set aside three transactions, collectively referred to as "the impinged transactions". They are:

1. *a guarantee* dated 19 September 2000, in terms whereof Valuefin bound itself, jointly as well as severally, as surety and co-principal debtor in *solidum* for the payment on demand of all or any sum or any sums of money which Paradigm Capital Holdings Limited ("Paradigm Holdings"), then or from time to time thereafter might owe to the respondent, in respect of, *inter alia*, any indebtedness of Paradigm Holdings arising from money already advanced or thereafter to be advanced or by virtue of any individual or joint suretyship, guarantee or bond or otherwise ("the *September 2000 suretyship*");

2. *a deed of pledge* and cession dated 5 October 2000, in terms whereof, *inter alia*, Valuefin ceded, assigned and made over to the respondent in *securitatem debiti* all its right(s), title and interest in and to and pledged and delivered to the respondent, *inter alia,* all and any claims which then existed or may thereafter come into existence in favour of Valuefin, in respect of all debts then owing or which thereafter may become owing to Valuefin ("*the October 2000 pledge*");

3. *a reversionary cession and pledge,* dated 26 February 2001, in terms whereof*, inter alia*, Valuefin ceded, pledged and delivered to the respondent all reversionary rights and all remaining right(s), title and interest in and on the proceeds, the subject matter and the remedies in

case of breach of any rental and/or subscription agreement concluded between Valuefin and third parties and in terms of which rental and/or a subscription fee of any nature is payable and which had been pledged and/or a subscription fee of any nature is payable and which had been pledged and/or ceded previously as security for the debts of Valuefin *("the February 2001 pledge*").

The two securities (of 5 October, 2000 and 26 February, 2001, respectively) are ancillary to the guarantee of 19 September, 2000.

[3] Valuefin was placed under a provisional winding-up order on 15 June 2001 and under a final winding-up order on 24 July 2001. On 24 July 2001 the applicant was appointed as the provisional liquidator of Valuefin. On 17 October 2001 the applicant was appointed as the liquidator of Valuefin.

POINTS *IN LIMINE*

[4] In its answering affidavit the respondent raises the following three points in *limine*, viz.

1. Any claim which the applicant may have had to set aside any impugned transaction(s) as claimed in the notice of motion has

become prescribed in terms of the Prescription Act, No 68 of 1969 ("the Prescription Act");

2. The basis upon which the applicant bring this application, i.e. that each of the impugned transactions constituted a disposition of property not made for value within s 26 of the Act, is incorrect;

3. There are material disputes of fact in regard to a number of issues that are, in themselves, material to the determination of the relief claimed by the applicant; such disputes were known by the applicant at the time of the launching of the application or were reasonably foreseeable and rendered motion proceedings inappropriate.

[5] Regarding **disputes of fact**, the respondent submits that they render the relief claimed incapable of determination in motion proceedings. The very facts necessary to determine whether or not the respective dispositions were not for value are in dispute, so the respondent submits.

[6] The applicant deals with all three points *in limine*, in turn, as I shall more fully discuss.

HISTORY OF THE APPLICATION:

[7] The following dates, which are common cause, are of particular relevance with regard to prescription:

1. On 15 June 2001 Valuefin was placed under provisional winding-up order;

2. On 18 June 2001 the applicant was appointed the provisional liquidator of Valuefin;

3. On 24 July 2001 Valuefin was placed under a final winding-up order;

4. On 5 September 2001 an enquiry into the affairs of Valuefin was convened in terms of section 417 of the Companies Act, 1973 ("the Companies Act"), ["the enquiry"]. The enquiry continued on 6 and 7 September 2001,

5. On 17 October 2001 the applicant was appointed the liquidator of Valuefin;

6. On 15 November 2001 the second meeting of creditors of Valuefin was held before the Magistrate Wynberg. At this meeting the respondent submitted four claims, all of which were duly proved and admitted;

7. On 15 November 2001 documents recording the impugned transactions, i.e;

   (a) the September, 2000 suretyship;

   (b) the October, 2000 pledge; and

   (c) the February, 2001 pledge 2001, he made the respondent, who was to be subpoenaed, to produce relevant documents.

   were all submitted by the respondent to the applicant in support of its aforesaid claims.

8. On 20 November 2001 the applicant addressed letters to the respondent advising the respondent that each of its aforesaid claims had been proved and that any dividend accruing on such claims would be paid to the respondent only after a liquidation and distribution account had been confirmed by the Master;

9. On 15 November, 2001, the second granting of creditors was postponed to 21 November. It is common cause that, the respondent

produced such documents at the hearing on 21 November, 2001. Thus equally, the applicant was in possession of the respondent's claims, documents recording the impugned transactions, and the respondent's documentation containing full and detailed information in regard to the respondent's dealings with Valuefin and the Paradigm Group.

10. The present application was issued on 29 April 2005, three years, five and a half months after the date on which the respondent's claims were lodged, and three years, ten and a half months from the date of the provisional winding-up of Valuefin

11. On 15 November 2001, at the latest, the applicant was placed in possession of the documents relating to the impugned transactions as well as a range of documentation providing full and detailed information in regard to the respondent's dealings with Valuefin and the Paradigm Group.

A. PRESCRIPTION

[8] The applicant denies that the claims he seeks to pursue have

prescribed, notwithstanding the expiration of a period in excess of three years, before the launching of the present application, from the date of the liquidation of Valuefin. (He submits that the present application does not constitute a claim for a "debt", as envisaged in the Prescription Act. It is the exercise of a specific power granted to a liquidator and, accordingly, is not susceptible to the provisions of the prescription Act. The applicant's contention in this regard is evidently founded on the judgment in *Barnard and Lynn NNO v Schoeman and Another,* in which Nicholson, J held that a debt, as envisaged in s 29 of the Act, read with s 340(1) of the Companies Act, No. 61 of 1973 (the Companies Act), is not a debt, in the normal sense, but a specialised right of action bestowed on a liquidator, arising out of the statutory functions of a liquidator, and that such debt only comes into being once a court pronounces upon the disposition. The applicant further submits that it relies on the **remedy provided by s 32 of the Act, for setting aside a disposition of property under s 26 thereof, which is a right vested in the applicant by virtue and upon his appointment.**

PRESCRIPTION ACT, NO 68 OF 1969

The relevant sections of s15 of the Prescription Act read:

"15(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

15(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

15(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh

from the day on which the debt acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

16(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced."

[9] Although the applicant suggests that he relies on the interpretation given by Nicholson, J, only in passing, there is no doubt in my mind that that interpretation plays a major role in the applicant's adoption of his stance in this application. He, for instance, understandably, vigorously opposes any attempts by the respondent to demonstrate that the applicant is, in respect of this application, in the position of a creditor *vis a vis* the respondent. He similarly spent a lot of time and

effort around the question of what is or is not a "debt". He does not merely content himself with his submission that he, by virtue of being Valuefin's liquidator, is the respondent's debtor. It does appear to me, therefore, that the applicant relies on both his assertions that, for instance I have stated, he is merely the respondent's debtor, on the one hand, and, on the other hand, that, as a matter of law, a liquidator who operates in terms of section 26(1) of the Act, is not subject to the provisions of the Prescription Act.

[10] As the three securities stand, they constitute Valuefin's indebtedness to the respondent in the respective amount of approximately R7,8 million, R30,1 million and R6,5 million, together with interest in respect of each of those amounts, as from 16 June 2001. Notwithstanding his attitude, that he is not the respondent's creditor, the applicant says he was advised that he could not object to the inclusion of the amounts in question, without more. The securities on which the claims are based, must, so he is advised, first be set aside by the court, before he can successfully object to them. He was at pains to emphasise that the current application is merely an exercise of his

right, in terms of section 26(1) of the Act, to have the securities set aside.

[11] Apart from resisting the prescription aspect of the respondents point *in limine*, the applicant spends a lot of time demonstrating that the impugned securities are dispositions without value. With regard to the respondent's submission that there are disputes of fact, the applicant submits that there are, in fact, no material disputes of fact, such as would preclude him from obtaining the relief he seeks. **[Page 4 of the AA]**

[12] I find it convenient, at this stage, to set out the various statutory provisions which are relied upon by one party or the other in these proceedings or which, in my view, are relevant in determining what the correct decision should be.

That disposition without value.

Section 26(1) of the Act reads:

“26. Disposition without value; -

1) Every disposition of property would made for value may be set aside by the court if such disposition was made by an insolvent –

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets.

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent

exceeded his liabilities;

Provided that if it is proved that the liabilities of the insolvent at any time after the making of a 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."

Voidable Preferences

Although it is common cause between the parties that the applicable section of the Act is section 26(1), I find it convenient to include section 29 of the Act, as it was the operative section in *Bernard Lynn NO (supra)*. It reads:

"29. **Voidable Preferences –**

1) Every disposition of his property mark 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 this creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

Proceedings to Set Aside Improper Dispositions

The procedure for setting aside of an improper disposition, by a liquidator, is set out in section 32 of the Act, which reads:

"**32. Proceedings to set aside improper disposition –**

(1) (a) Proceedings to recover the value of property are arrived in terms of section 25(4), to set aside any disposition of property under section 26, 29, 30 or 31, of the recovery of compensation or a penalty under section 31, **will be taken by the trustee**.

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

(2) In any such proceedings the insolvent may be compelled to give evidence on a *subpoena* issued on the application of any party to the proceedings or he may be called by the court. When giving such evidence he may not refuse to answer any question on the ground that the answer may tend to incriminate him or on the ground that he is to be tried on the criminal charge and may be prejudiced at such a trial by his answer.

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

Section 35 of the Insolvency Act reads:

Section 45 of the Insolvency Act reads partly as follows, in respect of the duties of a trustee:

"25. Trustee to examine claims-

1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim against the insolvent estate at that meeting and every document submitted in support of the claim.

2) The trustee shall examine all available books and documents relating the insolvent estate for the purpose of ascertaining whether the estate in fact

owes the claimant the amount claimed.

3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the master and shall state in his report his reasons for disputing the claim. Thereupon, the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce of disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such deduction or disallowance shall not debar the claimant from establishing his claim by an action at

law, but subject to the provisions of section 75."

It is common cause between the parties that, to the extent that prescription is or may be applicable, it is governed by the provisions of the Prescription Act and that the relevant provision is section 11(d), where prescription grounds after the expiration of a period of three years. As already stated in this judgment, it is also common cause amongst the parties that the current application was brought long after the period of three years.

(6) For the purposes of this section, 'process' includes a petition, **a notice of motion**, a rule *nisi,* a pleading in reconvention, a third party notice referred to in any Rule of Court and **any document whereby their proceedings are commenced**."

(Emphasis added.)

What is a 'debt'?

[13] In paragraph 7 of his Heads of Argument, Mr Loxton, on the applicant's behalf, states the following:

> "7. Applicant's response in his replying affidavit is twofold. He denies in the first instance that the present application constitutes '*a debt*' as envisaged in the Prescription Act. Secondly and in any event, he disputes that he could reasonably have brought this application immediately after the second meeting of creditors (i.e. in November 2001), and thus that prescription should be regarded as having comments running at that time."

[14] It is true that, in his replying affidavit, the applicant justifies his failure to bring the application earlier (paragraph 17-40 of the replying affidavit). Whilst I am aware that, in his justification of his failure to bring the application within three years of his appointment, the

applicant is responding to the respondent's point *in limine,* it seems to me that the applicant's stance in the replying affidavit, in this regard, is a significant departure from his attitude in the founding affidavit.

It seems appropriate to have the following in mind, when dealing with the stance adopted by the applicant in his replying affidavit;

1. At the second meeting of creditors of Valuefin, on 15 November 2001, the respondent submitted, against Valuefin, the following claims a claim for R995,67 (in respect of monies loaned and advanced by the respondent to Valuefin ("**CVZ7"**); a claim for R7 825 252,10 ("**CVZ8"**); a claim for R3 017 069,30 ("**CVZ29"**); and a claim for R6 522 583,29 ("**CVZ10"**). **[Paras 12.1-12.4 FA, PP7-8.]**

2. The claim for R995,67 is described by the applicant as being "non-contentious" [**Para**

10, FA] and is, as such, not contested.

3. In not resisting the claim for R995,67, the applicant drew a distinction between it and the impugned transactions on the basis that the former "was based on a direct liability on the part of Valuefin to the respondent for monies loaned and advanced to it", whereas "the three remaining claims were ancillary obligations allegedly predicated on the 'Guarantee (incorporating session of slow funds)', dated 19 September 2000 … The said guarantee … annexure 'CVZ3', contained a recordal to the effect that it was given by Valuefin in consideration of the respondent: '**allowing Paradigm Capital Holdings Limited … banking facilities subject to the terms and conditions hereinafter set out.'**

4. In paragraphs 14-21 of the founding affidavit, the applicant deals with the alleged session, in detail and attacks its validity. He points out, *inter alia*, that, whereas the applicant attacks the validity of all three impound transactions the validity of the February 2001 pledge ("CVZ10") 'is even more remote to Valuefin than the other two' (**Para 16 FA),** in that it is not in favour of Paradigm Capital Holdings but is, instead, in favour of Aerial Empire and was concluded before Valuefin, whose operations commenced only on 28 March 1998, came into existence. (**Paras 16 and 21 FA**).

5. Whilst the applicant's submissions in this regard are not without substance, the respondent's submissions in response thereto are, in my view, equally not without substance. This forms part of the area of disputed facts that

are part of the applicant's problem in this matter. If annexure "CVZ3", the guarantee purporting to incorporate the session of all loan funds (**Para 13 FA)** is valid and it truly covers all three impugned transactions, the impugned transactions should stand or fall on the basis as to whether it is one made without value or not. In this regard the respondent responds as follows:

'49.2 As appears from annexure 'CVZ3' Valuefin bound itself to the respondent jointly as well as severally as surety and competence by the debtor, for the payment of all or any sums of money which Pam Holdings owed to the respondent, whether such indebtedness be incurred by Paradigm Holdings in its own name and whether solely or jointly with another or others or in partnership or otherwise, and whether such indebtedness should

arise from money already advanced or thereafter to be advanced by the respondent to Paradigm Holdings or by virtue of any individual or joint suretyship, guarantee or bond or purchase to any session or assignment from third parties or otherwise howsoever.

6. The applicant's response, in his replying affidavit, endorses, in my view, the question of the existence of the disputed facts. It states:

'75.1 *In the first place, while the benefit provided for Valuefin in guaranteeing the indebtedness of Paradigm Capital Holdings to the respondent is difficult in itself comprehend, it is impossible to conceive of any value accruing to Valuefin in its guaranteeing a debt of a company <u>other than</u> Paradigm Capital Holdings to the respondent and*

which debt proceeded Valuefin's very existence."

From my view of the facts, that dispute cannot be resolved on the papers. Mr Loxton did not, during his address, suggest that Mr Burger's summary of the effect of "CVZ3", if it is valid, is similar in the answering affidavit.

7. I also am of the view that the following response by the applicant, in his replying affidavit, does not help resolve the question as to whether annexure "CVZ3" is valid and the extent to which it affects the determination of the question whether or not, in this specific regard, the February 2001 pledge is in favour of also Paradigm Capital Holdings and not just Aerial Empire,:

"*75.2 In the second place the authority necessary in order for Valuefin to incur the liability to the respondent on*

which 'CVZ10' is based (i.e. the guarantee in respect of the debts of Arial Empire (Pty) Ltd) simply does not appear from the resolution on which the respondent relies (i.e. annexure 'CVZ11'.) I submit that in fact the antitheses is clear on <u>any</u> reading of the resolution, restrictive or otherwise."

Without seeking to make a decision on this aspect, I am of the *prima facie* view that, if annexure 'CVZ3' is valid, it is not necessary that Aerial Empire, for instance, be mentioned in annexure 'CVZ 11'.

8. Having admitted the claim for R995.67, the applicant "had misgivings regarding the remainder of the respondent's claims paid on the official guarantee of 19 September 2004 (it is common cause that that should be 2000) as well as the

securities ancillary to such guarantee) (**Para 27 FA)** and 'decided to treat such claims *for the time being* as concurrent – no dividend being payable in terms of the fifth account to concurrent creditors. He points out that the respondent did not object to the treatment of these suretyship claims "as concurrent claims" (**Para 28 FA).**

9. The following account of the applicant's process of reasoning, regarding the impugned transactions and the question of prescription, is important;

"*29. I have, however, now reached a state in the winding up of Valuefin where;*

29.1 I have paid all

those creditors whom I consider to be secured and preferred creditors.

29.2 I presently have at my disposal free resialue you in the amount of approximately R6 million for the purpose of declaring a dividend to concurrent creditors.

29.3 In addition, I

expect to collect further substantial amounts (of some R6 million to R8 million) over time which will also become available for distribution to concurrent creditor (less the usual realisation costs.)

30. *It is in this context that I have applied my mind as to how to treat the remaining claims of the respondent, and, in*

particular, whether:

to treat them as secured claims in which case the entire free residue (both presently in my possession and still to be collected), less realisation and other costs, will be awarded to the respondent.

to treat the claims as concurrent claims in which case the respondent will share in the aforesaid concurrent dividents ***pro rata*** *with other concurrent creditors.*

ute the said claims in their entirety

31. On consideration of the said claims, I have reached the conclusion that neither the claims nor the securities they relied upon by the respondent in respect thereof should be included in the next i.e. (sixth) Liquidation and Distribution Account in the

light of the following facts and circumstances:

33.1 The transactions (as referred to above) on which the claims alleged by Value fin (in the

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– *as well as the aforementioned securities on which the respondent relies in respect of such claim*

s – fall to be set aside as disposition s without value in terms of section 26(1) of the Insolv

ency Act, 24 of 1906 (as amended).

33.2 The respondent appears to have justified its alleged entitl

ement to obtai n the afore said guara ntees as securi ties from Value fin on the basis that they were

concl uded by Value fin at the time when the latter was a wholl y owne d subsi diary of Para

digm Capit al Holdi ngs. In truth and in fact, howe ver, this was – at no stage – the case.

”

In subparagraph 31.3 of the founding affidavit, the applicant elaborates on its attack on the resolution, annexure "CVZ 11", which I have already dealt with.

[14] In paragraphs 32 and 33 of the founding affidavit the applicant says the following:

"*32. I have been advised and accordingly submit that it is insufficient for me, in the present case, merely to object to the inclusion of the aforesaid claims in the proposed sixth Liquidation and Distribution Account. Instead – so I am advised – I am obliged to apply substantively to the above Honourable Court for an order setting aside the guarantees and securities referred to above on which its claims "being annexures 'CVZ 8' 'CVZ 29' and 'CVZ 10' predicated, in terms of sections (sic) 26(1) of the Insolvency Act as dispositions made without value.*

34. In the event, I seek an order setting aside the aforesaid guarantee dated 19 September 2000, on which the respondent's claims are based, as well as the securities (dated 5 October 2000 and 26 February 2001), given pursuant to such guarantees in terms of section 26(1) of the Insolvency Act on the basis that: -

34.1 the said guarantee and securities were concluded by Valuefin within two years of its liquidation of Valuefin as contemplated in section 26(1)(b) of the Insolvency Act;

34.2 the conclusion of such guarantee and securities on the part of Valuefin constitute dispositions not made for value as contemplated in terms (sic)

of section 26(1) of the Insolvency Act.

[15] The applicant seeks to gain a lot of mileage from the respondent's failure to object to the impugned transactions being lumped together with claims of mere concurrent creditors. [**Para 28 FA]** Whilst the respondent's explanation of this failure, as being "an administrative oversight" **[Para 51.2 AA**], may appear odd, I am not in a position to dismiss it as being unlikely, knowing as I do what human error can produce.

[16] From paragraph 12 of the answering affidavit, it appears that all four of the respondent's claims i.e. the claim for R995,67 and the three amounts claimed in respect of the impugned transactions, were duly submitted and proved, in accordance with the provisions of 44 of the Act. An inquiry into the affairs of Valuefin was convened in terms of section 417 of the Companies Act, 1973. That inquiry commenced on 5 September 2001 and continued on 6 and 7 September 2001,

whereafter it was postponed to 15 and 16 October, 2001. Thereafter, it was postponed to 12 November 2001, the respondent being *subpoenaed* to produce a wide range of documents at such inquiry, which *subpoena* was complied with by the respondent. In this regard, the respondent says the following in paragraph 20.5 of the answering affidavit:

"*20.5 The aforesaid documents provided full and detailed information in regard to the respondent's dealings with Valuefin in the Paradigm Group. Such dealings were extensively scrutinized in the course of the inquiry."*

[17] Whilst the applicant does not dispute that the claims were duly lodged in accordance with the provisions of 44 of the Act, he denies the respondent's submission, in paragraph 19 of the answering affidavit that, from as far back as 15 November 2001 or shortly thereafter in 2001, he was aware of 19.1 "the facts from which the alleged claims of the applicant against the respondent in terms of section 26(1) of the Insolvency Act, to set aside the impugned transactions, arose. It is in

any event difficult to imagine how the applicant would not have been aware of the facts in question by 15 November 2001 or by 12 November 2001, bearing in mind that on 15 November, 2001, the enquiry was postponed so that the respondent could be subpoenaed "to produce a wide range of documents at the enquiry", on the next date of hearing, i.e. 12 November 2001. The respondents duly complied with the subpoena (paragraph 20 of the answering affidavit). it is common cause that, at the section 417 inquiry in terms of the Companies Act, 1973. In any event, as I have already sated, the applicant does not state, in paragraph 33.1 of the replying affidavit, when it is that he became aware of these facts.

In paragraph 19(2), the respondent recites:

> That the applicant was also aware of
>
> "19.2 the identity of the respondent as the alleged debtor in respect of the alleged claims referred to in paragraph 19.1 [of the answering affidavit], which claims, if valid, constituted debts within the meaning of section 12 of the Prescription Act."

[18] In paragraph 53 of his replying affidavit, the applicant denies that he

"was aware of the facts giving rise to the present application on November, 2004 or a few days thereafter", as alleged by the respondent, and "in particular [denies] that section 12 of the Prescription Act is relevant to the present application."

Section 12 refers to what happens at the hearing, in court, pursuant to a *rule nisi* granted by court in terms of section 11 of the Act, calling upon "the debtor" "to show cause why his or her estate should not be requested finally" (section 9 of the Act). Section 12 reads:

"(1) If at the hearing pursuant to the aforesaid *rule nisi* the court is satisfied that-

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*, and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of

the debtor if his estate is sequestrated, it may sequestrate the estate of the

debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matter set forth in the petition and postpone the hearing for any reasonable period but no *sine die*."

It is not clear to me why the respondent regards "the debtor" referred to in section 12 a person in the position of the respondent *vis-à-vis* Valuefin. The "debtor" can only be "a debtor who has committed an act of insolvency, or is insolvent," according to section 9(1) of the Act. I, therefore, find the applicants submission that section 12 is relevant appropriate.

This does not, however, remove what is common cause between the parties, viz, that the applicant was aware, by 15 November 2004 or thereabout of the respondent's claim against Valuefin.

[19] "In paragraph 18 of the answering affidavit, the respondent writes:

> 18. In accordance with the requirements of sections 45(1) and (2) of the Insolvency Act, 1936:

the aforesaid claims proved by the respondent (annexures "CVZ7", "CVZ8", "CVZ9" and "CVZ10") together with the documents submitted in support of such claims would have been delivered to the applicant; and

the applicant was required to examine all available books and documents relating to the insolvent estate of Valuefin for the purpose of ascertaining whether the estate of Valuefin in fact owed the amounts in question to the respondent."

The applicant replies to this averment as follows, in paragraph 52 of his replying affidavit:

"Lewis (the deponent to the answering affidavit) has misrepresented

the provisions of section 45 and I point out in this regard that:

52.1 It is evident from section 45.1 that it is only after a claim has been proved that the presiding officer must deliver the claims to the trustee (or, in the case of a company, the liquidator).

52.2 The trustee/liquidator is enjoined in terms of sections 45(2) and 45(3) to inspect the claims and to ascertain whether the amounts claimed are in fact due to the estate. If the liquidator disputes such claims, he is to inform the Master accordingly.

52.3 No time limit is imposed by either the Insolvency or Companies Acts as to when the claims are to be inspected (or objected to if they are disputed). I submit that, as a matter of practice, this will only take place shortly prior to the account dealing with such claims is lodged.

52.4 It is not denied by Lewis that five accounts have to date been lodged in respect of the Valuefin estate, nor is it averred by the respondent that it would have been appropriate to deal with the

respondent's claims prior to those of creditors which held a pledge of particular identified rental agreements."

[20] Whilst I agree with the applicant's submissions in paragraph 52, I do not accept the absence of a time limit in section 45 to mean that a trustee or a liquidator may remain, for any length of time, without examining "all the available books and documents relating to the insolvent estate for purposes of ascertaining whether the estate in fact owes the claimant the amount claimed" (Section 45(2) of the Act), simply because no time limit is provided in section 45. The applicant does not, as a matter of fact, submit that he did not acquaint himself with or "examine" the documents in which the respondent's claim were contained, immediately on receipt thereof. In this regard, I am of the view that sub-section (3) of section 45 of the Act is apposite. It reads:

"(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the

claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five."

[21] It is in my view,odd to contemplate a trustee pending the report to the Masters endlessly because no time limit is set. I shall deal with the question as to whether the applicant was entitled to delay, in this case, without reporting to the Master in terms of section 45(3) of the Act, for as long as he did, when I deal with what I consider to be the correct interpretation of the applicability or otherwise of the provisions of the Prescription Act to the facts of this case.

[22] From paragraph 30 of the founding affidavit, it is quite evident that the applicant was, for a considerable time, uncertain as to whether to

treat the impugned transactions as concurrent claims, in which event the respondent would have shared, *pro rata,* with other concurrent creditors, or to dispute the claims in their entirety, as stated in subparagraph 30.3. That decision had nothing to do with any conduct on the respondent's part. It also had nothing to do with the claims of other creditors or would-be creditors. The applicant has not explained why it took him that long, from November 2001 to 29 April 2005, when the present application was issued, for him to dispute the impugned transactions.

[23] Just as it appears that the applicant is of the view that it makes no difference how long, after he or she has received proved claims, a trustee may take to lodge an account, it appears that it makes no difference to the applicant, how long a trustee takes before dealing with claims by creditors who hold pledges of particular identified agreements. That, in my view, is not borne out by the provisions of section 75 of the Act which provides as follows, with regard to legal proceedings against the estate of a debtor:

"***75 Legal proceedings against estate –***

Any civil legal proceedings instituted against a debtor before the sequestration of his estate shall ***lapse upon the expiration of a period of three weeks*** *as from the date of the first meeting of the creditors of that estate, unless the person who instituted those proceedings gave notice, within that period, to the trustee of the estate, or, if no trustee has been appointed to the Master, that he intends to continue those proceedings, and after the expiration of a period of three weeks as from the date of such notice, prosecute* ***those proceedings with reasonable expedition****: Provided that the court in which the proceedings are pending may permit the said person (on such conditions as it may think fit to impose) to continue those proceedings even though he failed to give such notice within the said period if it finds that there was* ***a reasonable excuse for such failure****.*

(2)After the confirmation, by the Master, of any trustee's account in an insolvent estate in terms of section ***one hundred and twelve,*** *no person shall institute any legal proceedings against the estate in respect of any liability which arose before its sequestration:*

Provided that the court in which it has sought to institute the proceedings may, on such conditions as it may think fit to impose, but subject to the provisions of the said section, permit the institution of such proceedings after the said confirmation, if it finds ***that there was a reasonable excuse for the delay in instituting such proceedings.****" (Emphasis added).*

[23] The sort of time-limits provided in section 75 of the Act, and mention therein of "a reasonable excuse", with regard to legal proceedings against the estate of the insolvent, suggests in my view, that the legislature contemplates that all necessary action with regard to the finalisation of the affairs of an insolvent estate will be taken expeditiously. It will be noticed that a creditor or would-be creditor has to notify the Master, within three weeks from the date of the first meeting of the creditors that he intends proceeding with the action that had commenced before the sequestration of the estate. The Master is given a mere three weeks, after such notice, in which to get ready for the action to be proceeded with. The creditor is, thereafter, expected to prosecute the proceedings "with reasonable expedition". Even

though his or her action may not have prescribed, in terms of the Prescription Act, a creditor who has a claim against an insolvent estate is debared from bringing such claim after the convening, by the Master, of the trustee's account in such insolvent estate. The creditor can only proceed with the express permission of the court, after establishing that "there was a reasonable excuse" for the delay in instituting such proceedings."

[24] In the circumstances, it would, in my view, be incongruous for the legislature to be so stringent when it comes to time limits with regard to legal proceedings against the estate of an insolvent person and, yet, to allow a trustee unrestricted time in which to wind up the affairs of the estate. I would expect the "reasonable expedition" mentioned in s75(1) of the Act to apply equally to the conduct of a trustee (or a liquidator) in performance of his or her tasks, as assigned to him or her by the Act. .

[25] From what I have said above, it is evident that I am of the view that

the applicant's submission, in paragraph 7 of his heads of argument, based on what he avers in paragraphs 31-46 of his replying affidavit, *viz,* that: *he disputes that he could reasonably have brought this application immediately after the second meeting of the creditors i.e. (in November 2001)* is not borne out by his averments in his founding affidavit. It follows, in my view, that the main issue in this application is to determine whether or not the application's delay falls to be treated in accordance with the Prescription Act. That of course, brings up the applicant's submission that he is not, vis-à-vis the respondent, a creditor in this application.

Is The Applicant's Claim Akin To That Of A Creditor Who Seeks To Recover A Debt Owned To Him Or Her By A Debtor?

[26] Let me reiterate that the prevalent attitude in the applicant's resistance to the respondent's point *in limine,* with regard to prescription, is that he is not claiming to be the respondent's creditor, because he does not, accept that the respondent owes him a debt. He does, in other words, seek any payment or refund of money by the respondent. In fact, so

the applicant submits, the respondent contends that Valuefin, of which the applicant is a liquidator, is its, the respondent's, debtor. In making this application, the applicant is merely trying to set the record straight according to him, and to have it demonstrated that Valuefin has improperly been treated, by the respondent as its debtor. In making that assertion, the applicant relies on *Deloitte Haskins and Sells Consultants (Pty) Ltd v Bowthorpe Hellerman, Deutsch (Pty) Ltd* 1991 (1) SA 525 (A), at 532H and *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909C-D. These are authorities for the proposition that there has to be a *debt* immediately payable to or by a creditor in order for prescription to commence running. The respondent does not dispute this assertion, as it is, indeed, a correct statement of the law.

[27] Referring to section 26(1) of the Act, the applicant submits that, that section merely provides a mechanism by which a court may be called upon to pronounce on a disputed allegation of property by the insolvent. What the applicant is doing, on the basis of that section, so he submits, is merely to challenge the validity of the securities relied

upon by the respondent. The right which section 26(1) grants the applicant, to challenge the securities, does not, so he submits, have as its corollary a *debt* due by the respondent to the applicant, which would, of course, be capable of prescription. The applicant submits that, he is successful in his challenge, based on section 26(1), the rest will be taken care of by section 26(2), *viz;* that the dispositions set aside cannot give rise to claims in competition with the legitimate creditors of the insolvent estate.

[28] In paragraph 13 of his heads of argument, Mr Loxton submits on the applicant's behalf that the Prescription Act operates in respect of debts which are a corollary of claims, not defences. The only restrictions on when and how a liquidator can dispute an alleged creditor's claim are thus to be found in the Companies Act, 61 of 1993 read with the Insolvency Act, so the applicant goes on. There is, so goes the submission, no suggestion of any breach of or non-compliance with the Companies Act, read with the Insolvency Act, in the present case. He is unlike a liquidator who is pursuing a payment bay a company in liquidation, the value of which payment has been pronounced by a

court as part of its judgment. The applicant gives the example of a liquidator attempting to recover payment in terms of section 29 of the Act, where a company is in liquidation, on the basis that the debt has the effect of preferring the creditor who received such payment above other creditors. Emphasising that the current situation is not of that type, the applicant submits that, even in that situation, where, as the liquidator, he would not be resisting a creditor's claim for payment but would be seeking to recover money, his claim might still not constitute a debt as envisaged in section 12 of the Prescription Act. For this proposition, he relies on *Barnard Lynn NNO v Schoeman and Another* 2000 (3) SA 168 (N), in which it was held that an application by a liquidator in terms section 29 of the Insolvency Act, to recover payments by the company in liquidation, did not involve a "debt", as envisaged in sections 11 and 12 of the Prescription Act, but a "*specialised right of action* bestowed on the liquidator *arising out of his statutory function"* (171 F-G).

[29] Nicholson, J's judgment in *Barnard and Lynn NNO (supra),* was

heavily criticised in a judgment by Nel, J with which Potgieter, AJ concurred, in *Burly Appliances Ltd v Grobbelaars NO and Others* 2001 (1) SA 102 (C). Whilst Mr Loxton emphasised, in his argument, that the Court should bear in mind that the applicant in the present case is not bringing an application under section 29(1) of the Insolvency Act, he certainly supported Nicholson, J's judgment and draws support from it seeing the liquidator in *Barnard and Lynn NNO supra*, who was claiming to recover money, was correctly found not to be in the position of a creditor, on the basis that no debt had as yet been determined by a court, the position of the applicant, who is not attempting to recover money or any assets from the respondent, is, so goes the reasoning in the applicant's submission, in a much stronger position. Therefore, so concludes the applicant, the respondent's special defence of description is wholly misconceived and can be rejected without much more. Dealing with the concept of a *debt*, Mr Loxton submitted that it is not every claim, or right or power that gives rise to a debt. In the present case, so it is submitted, the applicant is facing a claim by the respondent, Valuefin's creditor. Seeing that a defence to a claim cannot prescribe, the applicant's

challenge to the respondent's claim can, therefore, not constitute a debt. Referring to *Burley Appliances supra*, Mr Loxton submitted that that judgment is distinguishable because it dealt with section 54 of the Close Corporation Act. During argument with regard to section 54 of the Close Corporation Act, reference was made to section 34 of the Insolvency Act, which deals with a "valuable sale of business". In the coarse of that argument, reference was, in passing and by way of comparison only, made to section 26 of the Insolvency Act, relying upon the decision in *Barnard and Lynn supra.* What was said in *Burley Appliances supra,* therefore, was, according to Mr Loxton, merely said *obiter.* I agree with Mr Loxton in this regard. That does not, however, in my view, mean that whatever was said in that regard, by the court in *Barnard and Lynn (supra),* is worthless. Indeed, I have found that judgment useful and, without repeating what is stated therein, I agree with the reasoning in criticising Nicholson, J's judgment.

[30] Mr Loxton submitted that, if the applicant had brought a claim for the

recovery of property under s 32 of the Insolvency Act, which is denied there could "well be an argument there that you are dealing with a debt". The debt is the obligation to restore the property and clearly, in that case, prescription may apply. But where there is no obligation upon the person who is the subject of an obligation under 26(2) to restore anything, to return anything, there is no debt. So, where you set aside a disposition which does not have, as its result, a transfer of property back to the liquidator, then you are not dealing with a debt and you are not concerned with prescription." (**Page 30 of the transcript of the addresses.)** It should be noted that, even in the situation referred to by Mr Loxton, where the claim is under s 32 of the Insolvency Act, the concession is only partialy it being that "in that case prescription may apply."

[31] On his part, Mr Burger, disagrees with the judgment in *Barnard and Lynn NNO* (*supra),* and agrees with that in *Burley Appliances (supra).* He submits that, after doing nothing about the respondent's admitted claims for over three years, the applicant suddenly realised, or as he suggests, was advised that he could not merely sit down and do

nothing about the claims and yet object to the inclusion in the proposed sixth account. He realised that he was, to use the applicant's own words in paragraph 32 of the founding affidavit, "obliged to apply substantively to the above honourable court for an order setting aside the guarantees and securities … in terms of section 26 of the Insolvency Act." As he says in paragraph 34 of his founding affidavit, "in the event, I seek an order setting aside the aforesaid guarantee dated 19 September 2000 on which the respondent's claims are based as well as the securities dated 5 October 2000 and 26 February 2001), given pursuant to such guarantee in terms of section 26(1) of the Insolvency Act…" Mr Burger then submits that what the applicant is doing is, exactly to enforce ratification which ratification is hit by the provisions of section 12 of the Prescription Act, in that it is a *debt*. In support of his submission that what is created by section 26(1) of the Insolvency Act is a right of action, Mr Burger refers the court to *Visser en Ander v Rousseau en Andere NNO* 1990 (1) SA 129 (A), at 159I-160A, where the following is stated:

"*Alhoewel die likwidateurs, wanneer hulle eis ingevolge artikel*

> *26(1) afdwing, dat ten behoewe en dan verdeel van die skuldeisers van die maatskappy doen, tree hulle nie op in die naam van, of in die plek van die skuldeisers nie; hulle tree op in hulle eie reg ter afdwinging van hulle statutêre vorderingsreg*." (Emphasis added.)

That, as I understand it, means that, although the liquidators, when they seek to enforce their claim in terms of section 26(1) of the Insolvency Act, do so on behalf and for the benefit of the creditors of the company, they do not act in the names of those creditors, they act in their own right and what they enforce is their statutory right of action. Mr Burger also referred me to the following sentence in *Barnard and Lynn NNO supra,* at 171F-G.

> "*This seems to me to be an indication that debt is not a debt in the normal sense but a specialised* ***right of action*** *bestowed on the liquidator arising out of his statutory functions."* (Emphasis added.)

[32] He emphasised the fact that, even according to Nicholsen, J, that is some form of "right of action".

[32] Mr Burger then referred the court to *Cape Town Municipality and Another v Aliance Insurance Co Ltd* 1990 (1) SA 311 (C) the judgment by Howie, J as he then was. For a better understanding of that case, it is important to have a clear understanding of the facts and I propose setting them out, *verbatim,* from the head note which reads:

> *"The plaintiffs had been jointly insured by the defendant under a policy in terms of which the defendant had undertaken to indemnify them against damage caused by a sewerage pipe then under construction. The pipeline had been damaged by thunderstorms in May and June 1984. The defendant failed to admit liability, whereby the plaintiffs instituted proceedings against the defendant, claiming an order declaring the defendant to be 'liable in law to indemnify the plaintiffs in terms of the policy in respect of all loss of damage to the works …' Shortly before the hearing of the action (set down for 20*

October 1987) the defendant filed a special plea, pleading that the plaintiff's right to an indemnity, if any, was a debt in terms of the Prescription Act; that by not later than 7 October 1994 the plaintiffs had knowledge of the identify of the debtor and of the facts from which the debt had arisen; that prescription had, therefore, commenced running on 7 October 1994 and that, accordingly, by 7 October 1997, the plaintiffs' right to an indemnity had prescribed. The plaintiffs in replication, contended that the institution of proceedings for a declarator had interrupted the running of prescription.

The defendant argued that, for judicial interruption of prescription to have occurred, the process so appointed by the plaintiffs would have to have been one whereby payment of the debt was claimed. Since the defendant's debt could only have been discharged by paying money, the claim, in order to effect interruption of prescription, had to have been one sounding in money. The plaintiffs had not claimed money, but had merely claimed a declarator. The summons in question had therefore

not been one for 'payment of the debt' within the meaning of section 15(1) of the Act, and prescription had not been interrupted. Moreover the declarator, if granted, would never become executable as required by section 15(4)."

[33] Submitting out that the applicant's action in the present application is similar to that of the plaintiffs in *Cape Town Municipality and Another v Aliance Insurance, (supra),* Mr Laxton further submits submits that the applicant's claim, in the present application, is, in essence, a *declarator.* The applicant, so he submitted, does not seek any ancillary relief in the form of a money judgment or repayment of money – all he seeks is a *declarator* that the impound transactions are dispositions regard value (**pages 55-56 of the transcript**).

[34] Mr Burger's submission that the applicant's action is, in essence, a *declarator*, is, in my view, correct. I did not understand Mr Loxton to argue the contrary, although he did not concede that the right of action created by s 26 places the applicant in the position of a creditor.

[35] On the facts of the case, which the learned judge analysed in great detail, in *Cape Town Municipality and Another v Aliance Insurance, (supra),* the Court came to the following conclusion:

> "*To sum up this far, defendant's debt to indemnify plaintiffs became due prior to 7 October 1984. Clearly too both plaintiffs knew before that date of the facts giving rise to the debt, namely that the pipeline had been damaged and displaced. Therefore prescription began to run by no later than 7 October 1984." (***Page 3 26G-H.)**

The question that remained, therefore, was "whether prescription was judicially interrupted in terms of section 15 of the Prescription Act.

[36] It will be remembered that the defendant's contention, in its special plea, in that case, was that:

(a) in order for an action to interrupt prescription, the process must

be one whereby payment of the debt is claimed;

(b) because the only way in which the defendant's debt could be discharged was for it to pay money, and thus interrupt prescription, the claim had to sound in money;

(c) the plaintiffs had not claimed money but had merely sued for a declarator;

(e) if the plaintiffs succeed in claiming their relief, the declarator could never "become executable", as required by section 15(4) of the Prescription Act; therefore

(f) the summonses in question were not for "payment of the debt" within the meaning of section 15(1) of the Prescription Act.

[37] The plaintiffs' contention was as follows:

(a) the current action was one to enforce fulfilment of the defendant's

obligation,

(b) an order in the plaintiff's favour and binding on all the parties and the issue of liability would therefore by *res judicata*;

(c) the plaintiffs were seeking to enforce the same or substantially the same right as the defendant alleged had prescribed, i.e. "*the right to an indemnity is the same or substantially the same right* ***as the right to be paid*** *pursuant to the indemnity"* (Emphasis added). (328B);

(d) section 15(1) of the Prescription Act is wide enough to include a process in which the creditor *claims performance of an obligation; consequently*;

(e) a declaratory order, if granted, will be final and will **compel the defendant to perform by paying**; and therefore,

(f) the order "will be executable", as required by s 15(4) of the Prescription Act.

[38] Howie, J accepted the defendant's submissions that judgment for the plaintiffs *will not be final and executable, in that a further process would be required, by way of litigation in a form of an action* and an additional trial. That would then be executed, based on the successful outcome of the latter, action and not that of the declaratory order. His Lordship then went on to say the following:

> "*However, that is not the end of the matter. Section 15 of the Prescription Act must be interpreted having regard to* ***the purpose of the institution of prescription*** *and in the light of the legal provisions regarding interruption as they have developed until now. In this regard, I draw upon the explanation by professor JC De Wet in his 1967 memorandum on the 'Law of Prescription' contained in his 'Opuscula Miscellanea', a collection of lectures and opinions published in 1979". (328I-J)*

He pointed out that Professor De Wet was the author and draftsman of the present Prescription Act. Professor De Wet writes, inter alia, the

following in respect of prescription: *'Die hele doel van verjaring* ***is om 'n einde te maak aan 'n toestand van onsekerheid*** *wat deur tydsverloop meegebring word." (329D).*

I understand that to mean that the whole purpose of prescription is to make an end to the state of uncertainty that is created by passage of time, which reasoning found approval, as pointed out by Howie J, in *Murray and Roberts (Cape) (Pty) Ltd v Uppington Municipality* 1984 (1) SA 571 (A), at 578F-H. The learned judge then points out that the following, at 329D/E:

"It has been said that prescription wasn't reduced, not an order to assist the debtor, but in disapproval of negligence; Wessels Law of Contract (op cit para 28378.) Or, put another way, it is there to penalise inaction: ***Mazibuko v Singer*** **1979 (3) SA 258 (W) at 266 (A)"**

[39] Having regard to the fact that professor De Wet had remarked that the legislature cannot, when enacting a statute, legislate for every eventuality but will merely give guidelines, Howie, J pointed out that, in keeping with that approach, the present Prescription Act does not have a definitions section. Consequently so points the learned judge

out, a word like "debt" has different shades of meaning in, for example sections 10, 12(1), 12(3) and 15(1) respectively. In s 10, which lays down that a debt is extinguished by lapse of the prescriptive period, 'debt' means the obligation in terms of which the debt is due. In s 12(1) the expression 'debt is due' means performance of the debt is due. In s 12(3) 'debt arises' means the obligation to pay or perform comes into existence. In 315(1) the word 'debt' taken literally means money. However, where 'debt' is *something else other than money* the word must mean *that which is due* i.e. the product of performance. The provisions of the Act and section 15 in particular, *are clearly not confined to monetary debts Benson and Another v Walters and Another* 1984 (1) SA 73 (A) at 22D-E). Consequently, 'debt' in the present context must bear a wide and general meaning: (*Evins v Shield Insurance Co Ltd* 1979 (3) SA on 1136 (W) at 1141F-G*; Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370B.*"* The learned judge further says:

The learned Judge goes on to say:

> ***'What is important, however, is that the wide and general meaning of 'debt' is a pointer to the appropriate interpretative approach to section 15 in the context of the Act as a whole. Once it is clear that*** **'debt'** ***has*** **this loose connotation,** ***it follows that the same applies to the word 'payment'. Accordingly, one starting point is*** *that* **the language to be interpreted has an inherent elasticity.** *To be taken together with that is the consideration already mentioned that the legislative draftsman has not attempted in this particular statute to* **legislate exhaustively for all eventualities***." (330H-G)*

[40] With regard to "a proper construction of section 15(1) of the Prescription Act," Howie J points out that s 6(1)(b) of the 1943 Prescription Act:

> "*provided that prescription was interrupted by service on the debtor of any process whereby action was instituted.*

In the present Act the process must be one whereby payment of the debt is claimed. This change of language is ascribable, in my opinion, to the aforementioned legislative intention to institute strong prescription." 330C.

[41] The significance of the change from the 1943 Act to the current Act is that the spotlight is now on "*claiming payment of the debt,* as apposed to *claiming enforcement of the right".* **(330J-331A)** I understand this to be emphasis, now, on finality of action, as against the mere establishment of a right. That is in keeping with the strong prescription regime sought to be accomplished by the amendment. That does not, however, change the fundamental of the institution of prescription. At 331B, Howie, J, expresses the view that "the *dictum* in *Mokoena v SA Eagle Insurance Co Ltd* 1982(1) SA 780 (O) at 786A-C, that in both s 6(1)(b) of the 1943 Act and s 15(1) of the present Act, 'the same idea has been conveyed … in different language'" and reiterates what was stated in *Erasmus v Grunown and Ander* 1978 (4) SA 233 (O) at 245E, viz that "a 'right' and a 'debt'

are, after all, merely opposite poles of one and the same obligation." 331C. It is important, however, to bear in mind that the current Act emphasizes that "the process served must be *prosecuted to a final executable judgment*" (331H-J) and that, whereas in the 1943 Act "*a served summons interrupted prescription even if it was later withdrawn"* (331G) in finding that the plaintiffs *in Allianz Insurance (supra)*, had successfully interrupted prescription by bringing an action for only a *declaritor*, Howie, J accepted that that entailed a further action, viz for them to obtain damages against the defendant. In this regard he said the following:

"*Plaintiffs are quite patently not seeking to obtain payment of part of the indemnity now and part later. They are seeking to enforce their rights to the indemnity. If further proceedings are instituted by plaintiffs in due course to exact payment from defendant pursuant to judgment in the present case, such further action will be necessary by reason of the fact that the present action is only* ***concerned with the issue of liability,*** *and further action will cover elements of* ***plaintiff's claim not encompassed in the current action***. *Conversely, those*

elements of the claim covered in the present matter will be ***res judicata*** *hereafter. But the two actions together will still deal only with* ***one cause of action.*** *Although the relief in the present case differs from the relief which will, on the above supposition, be sought in the second action,* ***the precise form of the relief*** *and, if it is monetary relief,* ***the quantum thereof, are not elements of the cause of action****. For example, if D commits continuing wrongful acts accompanied by fault and thereby causes damages to P's property and thereby causes patrimonial loss, P's cause of action is fixed irrespective of whether he sues for damages or applies for an interdict". (Reference is made to***. **Evens v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838E-839C)** ***and Howie, J continues: "Therefore the cause of action upon which the present action is based is the same cause of action as that on which the supposed further litigation will be founded." (332H-333C.)***

[42] Conceding that, by having to have a second action, the plaintiffs will

be breaching the "once and for all' rule, Howie J accepted that that

> "*would occasion a departure from the normal position. Instead of* ***establishing their entire case in one action*** *plaintiffs will be seeking to do so by way* ***of a two-stage process***. *In my view, that consideration is irrelevant to the present issue of prescription. There may certainly be good reasons, generally, to look upon* ***piecemeal litigation*** *with disfavour. (See for example,* ***Geldenhuys and Neethling v Beuthian*** **1918 AD 426 at 446.)** ***Inter alia****, it may operate unduly onerously upon a defendant. But it is not helpful to generalise. The undesirability of suing piecemeal should not be allowed to influence* ***interpretation of the statute*** *under discussion. Notionally, evidence may eventually establish the issue of liability, as pleaded in this action, as the essential conflict area between the parties with* ***quantum*** *hardly in dispute. In any event, if a two-stage procedure does occasion defendant expense which would not have been incurred in a single action, that hardship can be met by appropriate costs orders,"(333E-*

G/).

[43] With regard to the requirement, in section 15(2), that the claim be "successfully prosecuted … under the process in question to final judgment", Howie J, poses a question which he then answers:

> "*Could it then be said that the order for payment had been obtained 'under' the process in question i.e. under the present summons? As a matter of direct cause and effect the answer must be in the negative. On the other hand, finding and establishing liability would undoubtedly have been obtained under the present process, i.e. 'under the process in question' and it would unquestionably be an essential link between that process and the final executable judgment, notwithstanding that* ***some further process will be required to initiate the supplementary*** *standard proceedings" (**333I-334A**).*

[44] I have deliberately quoted at length from *Allianz Insurance (supra).* I did so because Howie, J's judgment gives answers, in my view, to the

submission made by Mr Loxton, viz; that, based on the dictum in *Barnard and Lynn v Schoeman* (*supra),* a 'debt' "does not become due until the value thereof is pronounced by the court". Viewing a 'debt', with emphasis on the elasticity of language, coupled with the absence of a definitions section in the new Prescription Act, makes it possible, in my view, to interpret the applicant's action under s 26(1) of the Insolvency Act as being that of a creditor in pursuit of a debt, although the applicant is not seeking payment of money by the respondent. The change into a strong prescriptive regime does, in my view, also give a pointer on the question as to whether the applicant could justifiably, indefinitely, inactive, in the light of the need for finality mentioned by Professor De Wet. Before discussing these aspects, I should point out that Mr Burger brought my attention to the Appellate Division decisions of *Desai NO v Desai and Others* 1996 (1) SA 141 (AD) and *Naidoo and Another v Lane and Another 1997 (2) SA 913 (D), in which it is stated that the term "debt" in the Prescription Act has a wide and general meaning and includes an obligation to do something or to refrain from doing something. That view is, in my view, incorporated by Howie J in Cape Town*

Municipality and Another v Allianz Insurance (supra) when he refers to the "inherent elasticity" of the language and the "debt" having a "loose connotation" (330J).

[45] It seems to me that Mr Burger is correct in his submission that, when the applicant brings an application for a substantive remedy under s26(1) of the Insolvency Act, he is, in essence, exercising a right of action. That right of action was not for its own sake but a step towards ensuring that the insolvent estate of Valuefin is not unfairly depleted, by having to meet the amounts claimed in the impugned dispositions. I have difficulty with Mr Loxton's attempt to distinguish between a liquidator who seeks to recover property under s 32 of the Insolvency Act, on the one hand, and one who, as is the case in the present application, seeks to have a remedy under s 26(1).

[46] In my view, a trustee has only one object, viz. having the optimum amount of assets/money for legitimate creditors of the insolvent estate to share among themselves. In some instances his or her task is to

collect departed assets. In other instances it entails the warding off claims and legal proceedings that seek to deplete the existing assets of the insolvent estate. It is, in my view, both unconscionable and incongruous that

> "where the trustee has to chase the assets, to recover or collect them, he or she has to act within three years, where, as in this case, he or she has to resist seemingly false claims, that are designed to deplete the assets, he/she has unlimited time in which to do so. Mr Loxton's submission is, in my view, tantamount to saying that a trustee of an insolvent estate against which there are pledges and securities can never ever be in the position of a creditor against the holders thereof, with them becoming debtors, simply because the insolvent, of whom he or she is the liquidator, was a debtor in the relationship prior to the sequestration of his or her state. That, in my view, is tantamount to overlooking that the trustee acts, under section 32 of the Insolvency Act, as much in his or her own right, and not that of the debtors, as he or she does in other related sections of

the Insolvency Act. If Mr Loxton is correct in his submission, then a creditor has a choice between seeking relief under section 26 of the Insolvency Act, on the one end, and doing so under section 32 of the same act, on the other hand. As I read it, section 32 merely states that the six ways in which a trustee may "recover the value of property or a right" of the insolvent estate which has been "unlawfully" disposed of (s 25(4), or set aside any disposition of property (under ss26, 29, 30 or 31); or recover compensation and a penalty adjudged by the court under s 31(2). Section 32 cannot, therefore, be viewed as providing an alternative way of protecting the insolvent estate's property to that provided in s 26. Each of the sections (25(4), 26, 29, 30 and 31) is a process whereby a trustee may take action, by way of legal proceedings, to protect the insolvent estates properly. Whereas in ss25(4), 26, 29, 30 and 31(1) trustee is seeking to recover assets improperly disposed of, in ss 31(3) a trustee recovers compensation and penalty ordered by the court, in terms of s 31(2) when it sets aside a sequestration in terms of s 30(1). In all these sections, except s 25(4), there is

no mention of who may take action. In s 25(4) it is specifically mentioned that the trustee may "recover the value or the property" that has been "unlawfully disposed of". It appears to me that, in s 32(1)(a) the legislature wanted to specify who may take the appreciate legal action in ss 26, 29, 30 and 31 and, in doing so, repeated what it already provided in respect of 25(4). In s 32(1)(a) therefore, the trustee is specifically authorised to take legal action. In s 32(1)(b), the legislature authorises "any creditor" to take any such proceedings" as the trustee may have taken in terms of s 32(1)(a), if the trustee fails to do so. The creditor may bring the action "in the name of the trustee upon his [or her] indemnifying the trustee against all costs of such proceedings.

[47] What is important to note and emphasise, for purposes of this case, is the act that s 26 provides one of the ways in which a trustee may protect the assets of the insolvent estate by taking legal proceedings. Section 32(1)(b) appears to me not to be absolving a trustee of his/her duties under these sections but to protect a creditor whose interests

may be jeopardised by the conduct of a negligent trustee.

[48] The idea that a trustee may remain for any length of time after being aware that a would-be creditor is relying on a doubtful security and do nothing about such a claim for is inconsistent with the reasons given by Prof De Wet for the switch from a mild to a strong prescription regime, with emphasis on eliminating uncertainty and ensuring that disputed debts are timeously adjudicated upon.

[49] In the circumstances, I find that the respondent's plea, on the point *in limine,* that the applicant's right to challenge the validity of the impugned transactions and the securities on which they are based, on the basis of provisions of s 26(1) of the Insolvency Act, succeeds. Even if my decision is incorrect on this aspect, I am of the further view that the application should fail on the basis of both the question of dispute of fact and whether, in fact, the impound transactions dispositions not made for value, in accordance with the provisions of s

26(1) of the Insolvency Act, as I shall demonstrate in what follows in this judgment.

B DISPUTES OF FACT

[50] In paragraph 7 of its answering affidavit, the respondent, pertinently in my view, submits that there is "a material dispute of fact in regard to a number of issues material to determination of the relief claimed by the applicant in this application." It goes on to state that "The applicant was aware, prior to his launching of this application, of such factual disputes, were against such factual disputes were reasonably foreseeable in view of the applicant's involvement in the affairs of Valuefin as meant to his appointment as the liquidator of Valuefin. On 17 October 2001 (in paragraph 49 of his replying affidavit), the applicant, having had the additional benefit of reading all the answers by the respondent, including some that I have not mentioned in this judgment, simply denied "that there is a dispute of fact" (anticipated

or otherwise that is was inappropriate for [him] to proceed by way of motion." Referring to the respondent's contention the applicant assured the Court, that he would demonstrate that "there is in fact no material dispute of fact which precludes the Applicant from obtaining the relief which he seeks (paragraph 5 of the applicant's heads of argument). The applicant has, in my view, failed in his attempt to demonstrate that. It appears to me that are in. I now mention some of them.

Ownership of Valuefin

[51] Disagreement on this aspect, as well as on the question whether or not Valuefin was a wholly owned subsidiary of the Paradigm Group, constitutes the vigorous ground of dispute under the topic whether or not the impound transactions were dispositions for value. In paragraphs 39 and 40 of his founding affidavit the applicant traces the history of Valuefin, from its "shell company" stage, on 27 February, 1998, its undergoing a change of name (as outlined in the Certificate of Change of Name, "CVZ15" and submits that Valuefin was, at that

stage, an entirely distinct entity from the Paradigm Group." In a copy of the share certificate of 5 November, 1998 ("CVZ16"), a certain Mr Anthony Murray Glass is reflected as owing 100% of the issued shares of Valuefin. The applicant pursues this history, in paragraphs 42 to 45 of the founding affidavit. The applicant continues in paragraphs 46 to 52 of the founding affidavit in important detail that can best be captured by quoting those paragraphs verbatim. They read:

"*46. During 2000, however, a dispute was raised by the-then CEO of the Paradigm Group, Mr Michael Forster, to the effect that, despite the wording of the Memorandum of Understanding and the de facto shareholding of Valuefin, Paradigm Capital Holdings enjoyed 100% of the beneficial ownership of Valuefin's shares.*

47. The same stance was adopted by the subsequent management of Paradigm following the resignation of Forster and its non-executive Chairman, Raymond

Mallach, in January 2004, in favour of a management team controlled by a certain Anthony Cotterell ("Cotterell') who had made a substantial equity investment in the Paradigm Group during July 2000. Cotterell's management team comprised inter alia of Mr Derek Cohen as Chairman and Mr Werner Alberts ("Alberts") as Managing Director. Herman remained on as Group Financial Director.

48. *Glass (in whose name the shares of Valuefin were registered) disputed the stance adopted by the management of Paradigm Capital Holdings and insisted that, at best, Paradigm Capital Holdings could lay claim to a maximum of 35% of Valuefin's shares.*

49. *In the event, Glass prevailed in his view as is apparent from the letter addressed by Alberts (of Paradigm) to Glass, a copy whereof is annexed, marked "**CVZ18**".*

50. I refer, in particular, to the introductory passage to the letter which reads as follows:

Dear Anthony

I write to confirm the arrangement that:

1. The shareholding of Valuefin is 35% Paradigm; 65% Anthony Glass;

2. The directors of Valuefin will be CK Herman and A Glass."

51. I should also point out that although Paradigm Capital Holdings had not been registered as the shareholder of Valuefin, Forster and Mallach decided that, insofar as the accounts of Paradigm Capital Holdings for the period 30 June 2000 were concerned, Valuefin ***"should be brought onto the balance sheet****".*

52. *In this regard, I annex marked "**CVZ19**", a copy of the Annual Report of Paradigm Capital Holdings for the year ended 30 June 2000 and refer, in particular, to annexure "A" thereto entitled "**Interest in Principal Subsidiaries**":. I point out that the Annual Report could not have been published prior to 17 November 2000 being the date on which Forster and Mallach signed their Report (under the heading "**Approval of Annual Financial Statements**"). I reiterate, in this regard, that the guarantee on which the respondent's various claims are predicated ("CVZ3") was signed some two months before the publication of the said Annual Report (i.e. on 19 September 2000).*

[52] The respondent responds to the applicant's allegation that the respondent owns, at the most, only 35 of Valuefin's shares, equally at length. Just as it was necessary to quote in detail from the founding affidavit, to clearly state the applicant's case, it is important to quote in detail, from the relevant portion of the

answering affidavit, the respondent's response, in paragraphs 57 and 58. In paragraph 56 of the answering affidavit, in agreeing with the applicant on the question of the inception of Valuefin, the respondent avers that "Valuefin was [from inception] inextricably linked to, and part of the 'nucleus' of the Paragon Group". Paragraph 57 and 58 reads:

"57. *On 19 august 1999 the respondent agreed to an increase in the existing facility granted by the respondent to Paradigm Capital Holdings (in an amount of R20 million) to R35 million until the end of September 1999 whereafter the full Group overdraft facility had to be reviewed."*

58. On 20 August 1999, being the day after the aforesaid short-term facility was granted, the following <u>wholly owned</u> subsidiaries of Paradigm Capital Holdings signed guarantees in consideration for the overdraft facilities so granted to Paradigm Capital Holdings namely:

58.1 The Soma Initiative (Pty) Limited (a copy of whose guarantee is annexed hereto, marked "CVZ25");

58.2 Medassess (Pty) Limited (a copy of whose guarantee is annexed hereto, marked "CVZ26");

58.3 Bohumi Corporate Finance (Pty) Limited (a copy of whose guarantee is annexed here, marked "CVZ27")."

[53] In paragraph 84, the applicant refers to another report in the respondent's internal system "CVZ45" and writes as follows about it and, generally about other related aspects in paragraphs 85-87.4:

"*85. The introductory paragraphs of the report were particularly instructive and read as follows:*

'Paradigm's interim results were published on 23 August 2000. These were faxed to us the day before together with additional information and a three month cash flow.

As far as the results are concerned, it was disappointing

to note that a net loss of R29,753m is reflected. When we spoke to Mike Forster on 15/8, we were advised that the profit cautionaries had been withdrawn and that a profit of approximately R42m would be published. We understood that a number of write-offs were to take place and were of the opinion that a R42m profit would be reflected after write-offs.

The balance sheet differs vastly from previous years. We are informed that there are now no off-balance sheet borrowings and that all borrowings are now reflected. The rental debtors and related borrowings from Valuefin have also been incorporated.

Valuefin was previously owned by some of the shareholders in Paradigm (loans by Foster R5m, Glass R5m and Rymer R2m). Paradigm took the option to acquire Valuefin and now own 100% at a cost of R1, with loans created in favour of the aforementioned

shareholders (Rymer is presently being repaid). We were not aware of this transaction and do not hold the guarantee of Valuefin. This will obviously need to be obtained." (my underlining).

[54] In the closing paragraphs of this document, under the heading "Recommendation", the following is recorded:

"The financial position of this group is still reasonably sound but very illiquid. Own means after deducting goodwill and allowing no value for investments is still in excess of R100m. The [il]liquidity is further reflected in their inability to finalise ongoing funding arrangements. It is also evident from the 3 month cash flow provided that they have an increased monthly requirement even with no ongoing discounting or securitisation included in their calculation.

It is recommended that the group be downgraded to a d with a final decision on the strategy to be made after the meeting with Tony Cotterell and Mike Fo[r]ster at the end of this month".

86.I refer in this regard to what has been stated above, and point out that:-

As a matter of fact, Valuefin was not a wholly owned subsidiary of Paradigm Capital Holdings, the shares thereof having at all times been registered in the name of Glass.

In any event, Paradigm Capital Holdings had not been given an option to acquire Valuefin at a cost of R1 or at all.

In fact, ex facie the "Memorandum of Understanding" concluded between Glass and Paradigm Capital Holdings dated 31 July 1998 (annexure "CV17" hereto, the "beneficial shareholding" of Paradigm Capital Holdings in Valuefin was clearly restricted to 35% only. This was confirmed by Paradigm Capital Holdings itself in a letter from Alberts to Glass dated 8 May 2001 (annexure "CVZ18"). .

No independent investigations appear to have been conducted by the respondent to verify the vague (and inaccurate) information which the respondent has presumably obtained from Forster regarding the said option on the part of Paradigm Capital Holdings to acquire 100% of Valuefin for R1,00."

4. **Were the securities genuinely for the benefit of Valuefin?**

[55] After analysing various documents and figures "CVZ45" concludes as follows: ***"It is recommended that the group be downgraded to a 'D' with a final decision on a strategy to be made after the meeting with Tony Coterell and Mike Foster at the end of this month."***

One picture that emerges from annexure "CVZ45" is that the Paradigm Holdings Group was undergoing a heavy financial storm of threatening proportions; the respondent was fully aware of this problem and was busy trying to measure the extent thereof; the respondent, based on the information before it and the views held by its senior financial officials, had not reached a stage where it believed that the Group could not

survive the storm; it is not clear from this document and the papers in general whether the defendant properly investigated the Groups financial risks, including that of Valuefin, who's existence as a significant member of the group it came to realise quite late; the third respondent took steps to cover itself, which included downgrading the group to grade "**D**", whilst awaiting "a final decision on the strategy to remain after the meeting with Tony Coterell and Mike Foster at the end of (that) month." ("CVZ45.") That is the interpretation and the only interpretation acknowledged by Mr Loxton.

[56] In response to the contents of this internal memorandum, (CVZ45) and others mentioned in earlier paragraphs in the founding affidavit, the respondent states, in paragraphs 63 of its answering affidavit:

> "*The reports, memoranda and correspondence referred to in these paragraphs [72-84 of the founding affidavit], other than annexure CVZ43, which is a public announcement by Paradigm Holdings,* ***form part of the ordinary management functions of the respondent pertaining to Paradigm Holdings***

and its facilities."

[57] It is not possible for the Court to determine, on the papers, the correctness or otherwise of this averment by the respondent, on quite an important issue. If the applicant is correct, then the securities were intended for one purpose and one purpose only, viz. to protect the respondent from the financial consequences of the collapse of the Paradigm Group. That immediately gives an answer to the third chapter of this judgment, viz the question of whether or not these securities were dispositions not for value, as alleged by the applicant. They would, of course, not have been made for value if the interpretation intended for. If, however, the respondent is correct that memoranda like "CVZ43" were part of business as usual for banks, a "part of the ordinary management functions", then they are what they are and are capable of sinister interpretation, which is Mr Burger's contention. That, of course, would remove the carpet from underneath the applicant's feet with regard to the question of dispositions without value. "CVZ17" and Albert's letter, "CVZ18" support.

The applicant's view that Valuefin was not a 100% owned subsidiary of Paradigm Capital Holdings Limited, read without the respondent's explanations in those regards.

[58] One final aspect I wish to refer to, contained in paragraph 64 of the founding affidavit, concerns an anomaly perceived by the applicant. The applicant refers to what he considers to be an anomaly, viz, that, whereas all other ("wholly owned") subsidiaries of Paradigm Capital Holdings furnish guarantees "immediately pursuant to and clearly in connection with the extension of overdraft facilities" to them, "the Valuefin guarantee of 19 September 2000 and subsequent security transactions on the part of Valuefin were concluded" without extension of overdraft facilities to Valuefin. The respondent responds, in paragraph 60.3 of his answering affidavit, as follows:

"*60.3 I further point out that in terms of this standard guarantee used by the respondent the surety binds itself*

> *jointly as well as severally, as a surety and co-principal debtor in* ***solidium*** *for the repayment on demand of all or any sum or sums of money.*

Once again, it is not possible for the Court, on this aspect, to determine whether the respondent would not, appropriately, have obtained guarantees from Valuefin, if the latter was part of the Paradigm family, without Valuefin receiving a direct benefit, by way of a credit facility.

[59] There are other disputes on very important aspects raised by the applicant. I have gone through them and the respondent's responses thereto painstakingly. It would serve no purpose to repeat all of them. Suffice it to say that it is impossible for the Court to decide in all those instances where the truth lies. It is, for instance, impossible for the Court to say what the normal relationship between a bank, such as the respondent is, and its huge customers, such as the Paradigm Holdings Group was to the respondent, in circumstances where the customer experiences financial problems. In that regard, the

respondent's submissions in paragraphs 62.1 to 62.3 and 67.1 to 67.4 of the answering affidavit are apposite. The Court would need to hear more evidence than has been presented before it to determine where the truth lies. These paragraphs read:

"*62.1 The* ***relationship between a bank and its customer****, particularly a large commercial enterprise which has a variety of banking means, including crediting and loan facilities****, it is a dynamic relationship in terms whereof the needs of the client inevitably change over time****. Changes may arise and/or all be influenced by any infinite number and/or combination of factors which may include an expansion or growth in the client's activities, general economic tendencies, cynical fluctuations of a general nature or specific to the client's market sector, changes in the management and/or control of the client and the like.*

6.2.2 ***In keeping with ordinary banking practice*** *the facilities of clients and the adequacy of* ***existing securities are assessed*** *by*

the respondent from time to time. Apart from these regular assessments, where requests are received by the respondent from a client for new or extended facilities, such requests are considered an assessed by the respondent prior to deciding whether to grant or refused the request. If granted, the relevant terms and conditions, including requirements as to security, also need to be considered and put into place.

*62.3The aforesaid practice was similarly followed in the case of Paradigm holdings. An "**Application for Facilities**" such as annexure "CVZ35" is a document generally used by the respondent in performance of the aforesaid functions.* ***It serves as a useful management tool in assessing the application in that it provides a convenient reference of the existing position of the client including existing facilities and securities."***

"*67.1 I admit that, as appears from the internal memorandum of the respondent, dated 23 August 2000 (CVZ45), certain concerns in regard to Paradigm Holdings were expressed*

arising from its interim financial results which were described as 'disappointing' and that the view was expressed, as appears from annexure CVZ46, that the respondent should either exit the group or place the group with the respondent's "Special Portfolio".

67.2I point out that the reason for the respondent placing a client in the special portfolio was ***to effectively manage a potential risk exposure*** *and to work closely with the client to the* ***mutual benefit of both the client and the respondents***.

67.3The decision to place a client with the special portfolio is designed to ensure the efficient and effective management of a potential risk so as to ensure the continued existence of the client to the mutual benefit of such client and the respondent .

67.4 The allegation in paragraph 92 [that 'The mandate of the

special portfolio department was simply to minimise any risk to the respondent and to maximise its security relative to its exposure] is therefore an inaccurate description of the function of special portfolio."

The respondent, in paragraph 67 of the answering affidavit, does not, in

[60] I am not in a position to determine whether, as a matter of banking practice, restrictions are not sometimes imposed with positive results in the case of some bank's clients. I would need to hear expert evidence in this regard in order to determine which version is correct. What the respondent says in paragraph 58.2 of the answering affidavit, in respect of the ownership of Valuefin, applies equally in respect of all the contentions issues. The respondent says, the following actual dispute in paragraph 58.2 of its answering affidavit:

"58.2 As appears from paragraphs 41-53 of the founding affidavit the ***applicant was acutely aware of this factual dispute and the institution of motion***

proceedings in these circumstances constitutes an abuse of the process of the above Honourable Court." *(Emphasis added.).*

At the end of his address as contained at page 44 of that transcript, Mr Loxton says the following:

"*M-Lord, that really deals with the matter. A lot was made by the deponent to the bank's affidavit to disputes of fact,* ***but we are perfectly content as the applicants to rest on the facts made out in the papers****. Where there is a dispute of fact of course* ***we bear the consequences of that,*** *unless your Lordship finds that the version put up by the bank is wholly unsupportable****. In fact, there are no real disputes because the case we make out is a case made out on the bank's papers"****. (Emphasis added.)*

From the plethora, virtually a litany, of annexures from 'CVZ2–CVZ60', (covering 352, pages and which contributed substantially towards in the

delay in finalising the judgment), on which the applicant relies in support for his submissions – most of which documents were obtained from the respondent – a sense of uneasiness is created regarding the purpose for which Valuefin was caused to make the three securities in the respondent's favour. I shall comment more about that when I deal with the question as to whether or not these three dispositions were with or without value.

[61] As is obvious from what I earlier said, I am going to deal with the question whether or not the three securities were dispositions made without value. I am, however, of the view that I need not consider this aspect, in the light of Mr Loxton's submission that, where there is a dispute of fact, the applicant bears the consequences thereof. Whereas the respondent submitted that if the Court is not disposed towards an order dismissing the application, on account of the existence of the irresolvable disputes of fact, it should refer the matter to trial, the applicant is apparently so assured of success that it has not considered this alternative route as the except I have referred to from Mr Loxton's address demonstratives. Although I am of the view that this

application should fail on the basis of the presence of unreasonable disputes of fact, I, nevertheless, deal briefly with the question as to whether the securities were or were not dispositions made without value.

[62] From what has been said, so far, in this judgment, it is evident that the issue of the ownership of the issued share capital of Valuefin is the crux of the dispute between the parties. Whereas, according to the respondent, Valuefin was a wholly owned subsidiary of Paradigm Capital Holdings, the applicant disputes that as a false, I have, at length, demonstrated why the applicant submits as or, at best, that Paradigm Capital Holdings had only 35% of the Valuefin shares – relying on some internal documents in the respondent's system.

[63] In support for his contention, the applicant has relied heavily on a memorandum of understanding that was concluded between one AM Glass and Paradigm Holdings on 31 July 1998 in which it is indicated that Paradigm Holdings wished to acquire 35% of Valuefin shares from AM Glass, at a purchase price of R15 million. That

memorandum of understanding was subject to rectification by the directors of Paradigm Holdings at the time when Paradigm Holdings was still known as Interactive Media Limited. There is no indication as to when, if ever, the memorandum of understanding was so rectified. Because Mr Loxton was very confident that this particular aspect of this case ought to determine the application, I take the trouble to deal with it in detail, although it is one of the aspects I considered – without mentioning them – when I dealt with the question as to whether or not there are resolvable material disputes of fact.

[64] According to a share certificate in respect of Valuefin, as at 5 November 1998, AM Glass reflected as a 100% shareholder in Valuefin. In a facsimile written by Werner Alberts, to Anthony Glass ("DVZ18"), dated 8 July, 2001 the following so reflected.

"*I write to confirm the arrangement that:*

(1) The sharehoding of Valuefin is 25% Paradigm,

65% Anthony Glass."

As Mr Loxton submitted, this facsimile appears to be confirmation of the memorandum of understanding of 31 July 1998.

[65] In response, Mr Burger, on behalf of the respondent, drew the Court's attention to the last sentence of the facsimile by Alberts, which reads as follows:

> "*If you are in agreement with the above please sign below and return by fax to me."*

As Mr Burger emphasised in his address, there are no signatures where it is provided for Anthony Glass and Paul Glass, respectively, to sign. Moreover, so the respondent points out, when Alberts deposed to an answering affidavit on Valuefin's behalf, during an application by the Paradigm Insurance Brokers, for liquidation of Valuefin, he stated the opposite of what he said in the facsimile of 31 July 1998**.**

"*28. As will be apparent from the aforegoing, the only contributor of share*

capital to Valuefin was Paradigm Holdings itself. Pursuant to each subscription for shares in Valuefin for R15 million, Valuefin had cash of R40 million and liabilities on loan account of R25 million. Accordingly, the only justifiable basis on which Paradigm Holdings could have been expected to subscribe to capital of R15 million was for 100% of Valuefin, and this was manifestly the real intention of the parties. However, Forster and the others who devised this scheme did not wish to show Valuefin as a subsidiary in Paradigm Holding's balance sheet and in the transaction it was accordingly dressed up as one for the acquisition of only 35% of Valuefin.

29. *Normally, Anthony Glass would continue to have share holder control of Valuefin.Forster was worried as he put it, that Anthony Glass, might, a virtue of his control, run off with the capita, put into the company by Paradigm holdings. Accordingly, Forster required Anthony Glass to hand over his share certificate (representing 100%) of the issued shares of Valuefin) together with a share transfer form signed in blank. In this way, the shares were placed under the exclusive control of Paradigm Holdings, which could at any time*

cause itself to be registered as the sole shareholder of Valuefin (in accordance with the true position).

30. Anthony Glass duly complied with Forster's instruction. I annex marked "WA2" a copy of the share certificate and, marked "WA3", a copy of the share transfer form signed by Anthony Glass in blank. Until very recently the only registered shareholder of Valuefin was Anthony Glass, but he manifestly held the shares for Paradigm Holdings as beneficial owner.

31. Forster and Mallach decided that for the accounts of Paradigm Holdings for the period ended 30 June 2000 Valuefin should be brought onto the balance sheet. This was done, as appears from Paradigm Holding's annual report for the year ended 30 June 2000 (annexure T1 to Toy's founding affidavit).

[66] According to the respondent, Valuefin was a significant debtor of Paradigm Holdings, with its cash flow shortfall being provided and funded by Paradigm Holdings. It also received its bridging finance

from Paradigm Holdings. In paragraph 39 of its answering affidavit, the respondent states, *inter alia,* the following:

"*39. The extent to which the continued existence of Valuefin was depended on the continued existence of Paradigm Holdings and the Paradigm Group, and* ***vice versa****, is further evident from the following facts and circumstances which also clearly demonstrate that none of the impugned transactions constituted a disposition without value, but that, to the contrary, Valuefin received substantial value, both directly and indirectly;*

39.1 As already dealt with, the rental agreements were discounted by Paradigm Select to Valuefin. The rental stream accruing to Valuefin in terms of the discounted rental agreements was substituted during the initial period of the rental agreements. There was a cash-flow shortfall in Valuefin. Such shortfall was funded by Paradigm Holdings;

39.2 Due to the escalations built into the rental agreement, after the initial negative cash flow period the increased rental stream was such that it would have generated substantial income and profits in Valuefin;

39.3 In order to achieve such profits, Valuefin required bridging finance to trade through the initial period in which it would have a negative cash-flow. This bridging finance was provided by Paradigm Holdings and hardly contributed to the overdraft indebtedness of Paradigm Holdings to the respondent which at the date of the liquidation of Paradigm Holdings on 3 July 2001 amounted to approximately R37 million;

39.4 …

> *39.5 Apart from the indebtedness to Valuefin to Paradigm Holdings on loan account, Valuefin also became indebted to Paradigm Select in respect of rental agreements discounted by Paradigm Select to Valuefin which Valuefin had not paid for. At the date of its liquidation the indebtedness of Valuefin to Paradigm Select in this regard, amounted to approximately R150 million." (*I have deliberately omitted subparagraphs 39.4 and 39.6-39.9.)

[67] In response to the respondent's contention that Valuefin was indebted to Paradigm Holdings, the applicant states;

"*The respondent's contentions are … belied by the financial position of Valuefin at its liquidation. At Valuefin's liquidation, it had a claim against Paradigm Holdings for approximately R27,3 million, while there was no corresponding liability on the part of Valuefin to Paradigm Holdings."*

[68] The applicant's response continues as follows, and I quote from the applicant's heads of argument:

> "*52. The respondent has also alleged that Valuefin was reliant on Arial Empire to retain the equipment of Multi-Choice and DSTV subscribers. That is, however, gainsaid by the fact that Arial Empire was liquidated well before Valuefin, which continued to exist without it. Paradigm Holdings was also quite prepared to* ***let [Arial Empire] go***.
>
> *53. Valuefin was a separate company, … It had its own assets … While Valuefin was to some extent dependant on another Paradigm Holding's subsidiary, Paradigm Select, Valuefin's existence and operations were this considerably less interconnected and intertwined with the Paradigm Group than the respondent has tried to portray."*

[69] In an endeavour to demonstrate how difficult it is to resolve a conflict of this nature purely on affidavits, I have quoted, at length, from both the applicant's submissions and the respondent's submissions on this aspect. Whereas the current enquiry is simply whether or not the impound transactions were dispositions without value, it became very impugned that that answer depends on the question of the extent to which Valuefin is interrelated with and depends on the Paradigm Group, i.e. Paradigm Limited Holdings and the other Paradigm subsidiary companies it at all . It will have been observed that every aspect of what I have mentioned is heavily disputed.

[70] Although the applicant's submissions have done enough to create suspicion as to the accuracy of the submissions made by the respondents - especially with regard to the extent to which Valuefin would or would not have suffered if the respondent had refused to make the securities available - the respondents explanations are not all without substance. I am not in a position, on the basis of the

information I have obtained from my reading of the papers, especially the numerous annexures ("CVZ2 – CVZ60"), many of which are very long and detailed), to say whether or not Valuefin was a wholly owned subsidiary of Paradigm Holdings, as submitted by Mr Burger, or whether, as Mr Loxton submitted, Paradigm Holdings, at best, owned only 35% of Valuefin's subscribed shares. Whilst, for instance, the conflict between Mr Albert's facsimile, in which he suggests that Paradigm Holdings had only 35% of shares in Valuefin, is in conflict with his averment where, as a deponent to an answering affidavit in the Paradigm Insurance Brokers application for liquidation, he stated that Paradigm Holdings owns 100% of the Valuefin shares, it is not, on the papers, possible to determine whether the correct situation is that contained in the facsimile or that contained in the answering affidavit.

[71] It will not help, in my view, in a matter of such seriousness, and importance, for me to follow the technical approach suggested by Mr Loxton, that of treating the answering affidavit as being of less significance than the facsimile, in that the answering affidavit was not

being made in respect of the current application but in respect of a previous application. Besides the fact that I do not understand why an affidavit becomes less important because it is made in respect of another application, the fact of the matter is that what was said in that affidavit was incorporated in the respondent's answering affidavit in the present application.

[72] Whilst on that aspect, I may as well mention that there is an important aspect that would need much more attention than Mr Loxton seems to be attaching to it, namely, the fact that, when forwarding the facsimile to, Anthony Glass, Alberts expected signatures to endorse agreement with what he was purposing. It may well will be that, when that matter is fully dealt with, the absence of the signature may turn out to be of less significance that the fact that it was Albert himself who made the proposition. All these problems might be cleared during cross-examination of the respective witnesses or deponents if the dispute went to oral argument. What remains undisputed, now is that a document that was intended to be completed with signatures has none. How can it be relied upon without much more? As I have

already pointed out, the respondent has tendered what, at this stage, amounts to a plausible explanation of the apparent conflict between the facsimile and the affidavit.

[73] The applicant, especially through Mr Loxton's address, repeatedly emphasised that the suggestion that the respondent would have withdrawn the overdraft facilities if Valuefin had failed to sign the sureties is not borne out by what really happened when the respondent ultimately called out the overdraft. I am not certain that the potential of harm caused by a bank's pulling out of a huge overdraft becomes less so in nature because nothing, in actual fact, results from such calling up of the overdraft. It would appear to me that, when one examines the probable consequences of the respondent's projected conduct, one must not do so on the basis, primarily of the benefit of hindsight. I am also not certain that, as Mr Loxton seems to be convinced, a bank's reluctance to move for a liquidation of its own client must, in business terms, be interpreted negatively. I would prefer to hear evidence from experts in business transactions as to what banks ordinarily should do in such circumstances. Assuming,

for instance, that the respondent had obtained the sureties in due course, i.e. without an ulterior motive, would there have been any need for it to rush for the liquidation of the Paradigm Holdings group? I do not know the answer to that question.

[74] Regarding the question, for instance, whether or not Valuefin was a significant debtor of Paradigm Holdings, Mr Loxton, in paragraph 51 of the applicant's heads of argument, submits that Valuefin's financial position at the time of its liquidation is a significant factor in disproving that contention. He points out that it held a claim against Paradigm Holdings for approximately R27,3 million, whereas there was no corresponding liability on the part of Valuefin to Paradigm Holdings. Whilst that is a significant submission on the applicant's part it seems to me that the consequence of a finding on that factor it is of such huge proportion that it could not be decided entirely on the papers as they stand. It is also strange, in my view, that the respondent would have continued to pour in funds for Paradigm Holdings to try to stave off liquidation proceedings against it, when, with the knowledge the respondent ought to have had as a bank, it was

obvious that Paradigm Holdings was a spent force. Whilst it may be argued that it was banking on the securities, that is, in my view, a factor on which it would be better to have more evidence.

Applicable Law on Dispositions Without Value

[75] From what has been said up to now, it is common cause that the applicable portion of the Insolvency Act in this case is section 26. Although my decision, regarding the question whether or not the impugned transactions were dispositions made without value, is based on the fact, i.e. it is factual, I am not unmindful of the applicable law in this regard. I was addressed by both parties, fully, on the various authorities in which this aspect has been dealt with. In view of my decision viz. that there are inadequate facts on which to determine whether or not the relationship between Valuefin, on the one hand, and Paradigm Capital Holdings and its other subsidiary companies, on the other hand, was of such a nature that the financial collapse of these other companies, especially Paradigm Holdings itself, was likely to result in the demise of Valuefin, is based on facts, the authorities are

not of great relevance. It seems to me, however, that the decision in *Langeberg Kooperasie BPK v Inverdoorn Farming and Trading Company Ltd* 1965 (2) SA 597 (AD) *would* be extremely pertinent to the facts of this case. Some of the important considerations in that regard would be:

(a) whether the suretyship agreements were not imposed upon Valuefin as the directors of Paradigm Capital Holdings

(b) (the extent to which Valuefin could have survived, as a separate entity, even after the demise of the rest of the Paradigm Holdings Empire, especially when the nature of its functions is taken into account; and

(c) what, precisely, resulted in Valuefin being liquidated i.e. whether it was not, as a matter of fact, the fact that the rest of the Paradigm Group family had disappeared.

For reason given, I am not called upon, on the facts of this case, to

apply the principles communicated in *Langenberg Korp (supra).* In fact, I cannot do so.

[76] In the circumstances, I have arrived at the following conclusion:

(1) The application fails in respect of each of the following respects:

(a) claim has prescribed in terms of section 11, read with section 15, of the Prescription Act, 68 of 1969;

(b) there are material disputes of fact which cannot be resolved without oral evidence;

(c) the applicant failed to prove that the three impugned transactions were dispositions made by Valuefin in contravention of the provisions of section 26(1) of the Insolvency Act, No 24 of 1936;

Consequently I make the following order:

1. The application is dismissed;

2. The applicant is to pay costs, including costs occasioned by the engagement of the services of two counsel, one of whom is senior counsel.

J N M POSWA
JUDGE OF THE HIGH COURT