REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12264/2010

In the matter between:

RICHARD KEAY POLLOCK, N.O.	First Applicant
FAZLUL HUQ SULIMAN, N.O.	Second Applicant

and

SIMCHA PROPERTIES 2 CC	First Respondent
SIMCHA PROPERTIES 20 CC	Second Respondent
SIMCHA PROPERTIES 17 CC	Third Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent
THE MASTER OF THE HIGH COURT, JOHANNESBURG	Fifth Respondent
INVESTEC BANK LIMITED	Sixth Respondent
BFPG DEVCO (PTY) LIMITED	Seventh Respondent

J U D G M E N T

LAMONT, J:

[1] The first and second applicants are the liquidators of Dynadeals Three (Pty) Ltd in liquidation. (I refer to Dynadeals as the insolvent.) The applicants brought an urgent application for interim relief seeking to interdict the first, second and third respondents from selling and the fourth respondent from executing or attesting any deed of transfer of two developments one known as Willaway Extension 14 (Willaway) and/or any erf which had been formed as part of the development and another of which is known as Bluehills Extension 30 (Bluehills). The application was brought pending an action to decide whether the dispositions were impeachable transactions. In error one of the developments was registered in the name of the second respondent. It is common cause that that was an erroneous registration.

[2] During October 2008 the insolvent concluded contracts to transfer Willaway to the first respondent and Bluehills to the third respondent. During March 2009 the insolvent transferred Willaway to the first respondent and Bluehills to the third respondent. At the time of transfer bonds were registered over the properties. A bond of R13, 5 million was registered over Willaway, of which R5, 1 million had been drawn down as at April 2010 as well as a bond for R2, 16 million which was registered over the Bluehills property.

[3] On 20 April 2009 a creditor of the insolvent known as Viewtown instituted action against the insolvent in respect of work done relating to the supply, installation and commission of electrical reticulation for two phases of Willaway for an amount of some R2,25 million. Accordingly as at that date at the latest that improvement had occurred. As at that date the insolvent also was indebted to Eksteen and Le Roux CC for some R3, 2 million having signed a written acknowledgement of debt in favour of that entity on 8 December 2008. This debt too arose out of improvements to Willaway. On 8 May 2009 the insolvent was placed in final liquidation pursuant to an application brought by itself for its own winding-up. In that application the insolvent alleged that it had no creditors save for some unspecified debts and accruals of some R482 000. 00. This allegation was patently false.

[4] Over the relevant period the members and directors of the insolvent, the first respondent and third respondent were identical.

[5] Subsequent to the winding-up no steps were taken to get a liquidator appointed. It was only during early June 2009 when the applicants' attorneys began investigations, that they were able to obtain the court order and bring the liquidation to the attention of the Master.

[6] The applicants obtained a valuation of one Havenga an associate valuer in terms of section 14 of the Valuers Act No. 23 of 1982. According to that valuation the value of the land constituting Willaway is approximately R8 million to R8, 5 million as at the date of transfer. The insolvent had purchased

Willaway for an amount of R6 million in 2005. Township development work had been done in respect of each of the properties subsequent to the purchase thereof. In particular insofar as Willaway was concerned during November 2008 there was an amount of some R12, 1 million made available towards guarantees required

[7] The Bluehills development was valued by Havenga at an amount of some R3, 7 million. The insolvent purchased Bluehills in May 2005 for R2, 5 million. The sale price to the third respondent by the insolvent was R2, 4 million.

[8] Although no township register had been opened for either Willaway or Bluehills the first and third respondents marketed residential erven which had been created within the development of Willaway. Of the 49 erven created a large number were sold pursuant to contracts with third parties (referred to as buyers).

[9] Applicants formed the view that disposition of Willaway to the first respondent constituted an impeachable transaction. The applicants sought data in relation to the discoveries they had made but were unable to obtain any detailed information and as at the date the application was launched had not obtained any undertakings.

[10] The application was brought as a matter of urgency in circumstances in which the applicants had little information relating to the case for the simple reason that the information relating to the case was all in the hands of the first and third respondents and they were making very limited disclosure.

[11] The applicant making use of such evidence as it had available to it urgently launched the application to prevent the sale and transfer of the developments and the individual erven in Willaway. Transfers were imminent.

[12] In my view the application was urgent and the applicants were entitled to proceed to court as a matter of urgency to seek relief. The liquidators were hamstrung in providing sufficient facts to the court at the time and provided such information as they were able. This resulted in a founding affidavit which dealt superficially with some data and which entertained hearsay evidence.

[13] Two points were raised *in limine*. The first was that the buyers should have been joined. It was submitted that the buyers had a direct and substantial interest hence a legal interest in the proceedings. In my view the purchasers have only an interest in the rights that they seek to exercise against the seller (in the present case the first respondent). The purchasers have in my view no rights as against the property which it is sought to interdict.

[14] The position in my view is similar to that which pertains in a case where a landlord seeks to eject a tenant and is not required to join on sub-tenants.

The sub-tenants have contractual rights against the tenant but no rights in the property. They therefore have no legal interest in the litigation.

[15] The second matter concerned the failure of the expert to both qualify himself, furnish an affidavit both by himself and by the persons on whose information he relied.

[16] In my view having regard to the urgency which existed at the time the application was brought, these omissions were excusable and I formed the view the fact that the case had not been better established in the founding affidavit did not disentitle the applicants to relief. The right of the applicants to relief must in my view be tested on the basis of all the evidence before me.

[17] For these reasons I dismissed the application *in limine* with costs.

[18] The applicants have instituted an action against the first and third respondents by way of action instituted during April 2010 under Case No. 15263/2010. In that action the applicants seek to impeach the dispositions on the basis of common law section 26, 29, 30 and no. 31 of the Insolvency Act No 24 of 1936.

[19] In order for the applicants to be successful the applicants are required to establish.

19.1. Under section 26 of the Insolvency Act No. 24 of 1936 a disposition not made for value and that immediately after the disposition was made the liabilities of the insolvent exceeded his assets.

19.2. Under section 29 a disposition made not more than six months before sequestration which has had the effect of preferring one creditor above another and that immediately after the disposition the liabilities of the insolvent exceeded his assets.

19.3. Under section 30 a disposition made of property at a time when the insolvent's liabilities exceeded his assets and the intention on the part of the insolvent of preferring one of the creditors above another.

19.4. Under section 31a disposition of property pursuant to a collusive transaction which has the effect of prejudicing the insolvent's creditors or of preferring one creditor above another.

[20] The principal submissions made before me concerned whether or not the applicant had established that the price at which the property should have been sold (the market-value) was disparate from the price at which it was in fact sold. I was invited to draw an inference that if there was a disparate price paid that the transaction was on the face of it impeachable. The contentions of the respondents were that the evidence which had been provided by the "expert" put up by the applicants was inadmissible in that it of itself relied on hearsay (the source of the value obtained by the expert was a variety of estate agents and other persons with expertise) and was not established by

way of affidavit. In certain circumstances hearsay which an expert has relied upon in the compilation of his report is permitted. See for example *Rusmarc SA (Pty) Ltd v Hemdon Enterprises (Pty) Ltd* 1975 (4) SA 626 (W).

[21] The salient features of the case relevant to dispositions are the following:

21.1 The members and directors of the insolvent and of the first and the third respondents are identical.

21.2 Transfer of the property occurred shortly prior to the winding-up.

21.3 The price paid for the property to the first and third respondents Is less than the price paid originally for the property by the insolvent.

21.4 The price at which the insolvent sold the properties to first and third respondents was the price required to meet the claims of the preferred creditors (bondholders) not the market value. That price coincidentally might have equated the market value. The parties made submissions relating to this issue and it was in this context that the matters (referred to above) relating to experts were …….

21.5 The insolvent and hence the concurrent creditors lost the chance of directing what should happen to the property pursuant to the transfer of the property to the first and third respondents.

21.6 The concurrent creditors will receive zero cents in the rand.

21.7 On the face of it the insolvents assets were less than its assets incurred after the disposition.

21.8 On the face of it the one property had been extensively developed at a costs of millions and that value is not reflected in the sale price. In respect of the one development where stands had already been from the property to be developed those stands were on offer at prices of the order of R900 000, 00. The resultant value of the defendant, assuming the properties were in its hands who taking into account the building contracts was approximately R45 million. There is no evidence as to what the costs of the building contracts would be.

21.9 The disposition appears on the face of it to be a unusual in that the members and persons in control of the property through the insolvent derive no advantage by the sale, but incurred the costs of transfer through the first and third respondents of transferring the property.

21.10 The insolvent's concurrent creditors before the disposition could look to an asset owned by the insolvent to meet their claims. After the disposition the insolvent became a shell owning only liabilities.

21.11 At a point in time a moneylender was prepared to lend an amount in excess of R12 million subject to security of a bond passed over one of the properties.

21.12 The disposition was part of a scheme divest the insolvent of the property re-vest the property in the hands of first and third respondents and wind up the insolvent.

[22] There is a dispute between the facts and opinions provided by the applicants "expert" which are not supported by affidavit, and the facts provided by the respondents "expert" under oath.

[23] This is an interlocutory matter and it is necessary for the applicants to establish a *prima facie* right. A *prima facie* right is constituted by proof which if uncontradicted and believed at the trial would establish the right in question. The proposition is that it must be established that the applicants could obtain the rights they seek to protect at a trial. See *Webster v Mitchell* 1948 (1) SA 1186 at 1189. If serious doubt is thrown upon the case of the applicant then he could not succeed in obtaining temporary relief for his right *prima facie* established may "only be open to some doubt". However, if there is mere contradiction or an unconvincing explanation the matter should be left to trial and the right being protected in the meanwhile subject of course to the respective prejudice in the grant or refusal of the interim relief. The question which I must ask myself is whether the applicant if the facts he has set up are established at trial has a reasonable prospect of success. In my view it is not necessary for the applicant to presently prove the facts. He must set up facts which show that he has witnesses which can establish them and then I am entitled to find that he has a reasonable prospect of success. This is particularly so in the context of the present application which came as a

matter of extreme urgency relying on hearsay. There is no reason not to accept that the witnesses referred to by the expert of the plaintiff and the expert himself will be available at the trial and give appropriate evidence. All the relevant issues concerning the value of their evidence can be canvassed by proper cross-examination. For present purposes I take into account the fact that there is albeit not on properly established evidence an indication that there are views of persons who profess to be experts that the property in question had a greater value than that was achieved by the sale. There is corroborative evidence for their views in the matters set out supra.

[24] In my view it is not necessary for the applicant to establish the extent of the disparity between the price otherwise then as part of evidence entitling me to infer a benefit or preference. On the fact of it the evidence establishes a scheme. A consequence of this scheme is that the directors of the insolvent and the concurrent creditors in insolvency have lost the right or chance to direct what should happen to the property forming the subject matter of the disposition. The loss of a chance has a value and the effect of the loss of this chance is on the face of it that the creditors have been prejudiced. See as to loss of a chance *De Klerk v Absa Bank Ltd and Others* 2003 (4) SA 315 at 329 *et seq*.

[25] If the applicants show a scheme which on the face of it is has the effect that the disposition which occurred in its implementation has the effect of prejudicing creditors then they are entitled to relief under section 31.

[26] The applicants have in my view *prima facie* established this.

[27] I am required to weigh up the harm which the applicants suffer against the harm which the first and third respondents suffer. The harm the liquidators suffer is immediately apparent. The only asset owned by the insolvent has been sold. The income from the sale has been used to pay preferred creditors. There is no money available to pay any of the other creditors. The only source of money is the property.

[28] The harm the first and third respondents suffer is that they are unable to deal in the properties. Insofar as the third respondent's property is concerned there is no immediate prospect of dealing therein taking place accordingly the harm it may suffer is small. Insofar as the first respondent's property is concerned various sales have been concluded pursuant to which purchasers have paid deposits and in respect of which delivery can be effected and the building contracts executed.

[29] The purchasers of the first respondent can, if they are not prepared to wait, exercise the rights conferred on them under the contracts. If there are cancellations the buyers will have claims for deposits. There is no definite evidence as to what this amounts to but it seems to be a relatively small amount. The first respondent suffers harm in that it is unable to continue dealing with its property. This effectively puts the business of the first respondent on hold until the matter is resolved. In my view if this business be put on hold the harm suffered by the first respondent is still less than the harm

suffered by the applicant. The properties came to be in the state in which they currently are by reason of the activities of the directors while the properties were in the hands of the insolvent. In my view the prejudice the insolvent suffers is more than the prejudice suffered by the freezing of the business of the first respondent as the property remains available to be recovered by the applicants. The first and third respondents were chosen as vehicles to trade in interests which prior to the disposition vested in the insolvent, those interests which but for the disposition have been available to the insolvent to pursue. This feature of the case in my view must carry some weight.

[30] I would accordingly grant an order as follows:-

1. Pending the final determination of the action instituted by the applicants as plaintiffs under case no 15263/2010 the first, second and third respondents are interdicted and restrained from selling and the fourth respondent from executing or attesting any deed of transfer for either:

the whole of the township know as Willaway Extension 14 and/or Blue Hills Extension 30; or

1.2 any individual erf forming part either of Willaway Extension 14 or of Blue Hills Extension 30.

2. The first and third respondents are directed to jointly and severally pay the costs of the applicants including the costs consequent upon the employ of two counsel.

LAMONT J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for Applicant	:	I Miltz SC
Instructed by	:	John Davidson Inc
Counsel for Respondent	:	PJ van Blerk SC
Instructed by	:	Michael Werner & Associates Inc
Date of hearing	:	13 May 2010
Date of Judgment	:	04 June 2010