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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

UMBOGINTWINI LAND AND INVESTMENT
COMPANY (PROPRIETARY) LIMITED ..... APPELLANT
(In liquidation)

vs

BARCLAYS NATIONAL BANK LIMITED ..... FIRST RESPONDENT

and

THE MASTER OF THE SUPREME COURT (NPD) .... SECOND RESPONDENT

CORAM : VILJOEN, BOTHA, GROSSKOPF, VIVIER, JJA et STEYN AJA
HEARD : 12 MAY 1987
DELIVERED : 17 SEPTEMBER 1987

JUDGMENT

VILJOEN, JA

The appellant is a company in liquidation.

In/.....

In relating the relevant history before the liquidation, I shall simply refer to it as Umbogintwini. On 22 December 1975 and in writing Umbogintwini bound itself as surety for and co-principal debtor with a company, Sandy's Supermarket (Pty) Ltd (hereinafter referred to as Sandy's), which is also now in liquidation, for the due repayment on demand of all sums of money which were then or might from time to time thereafter be owing by Sandy's to the first respondent (hereinafter referred to as the plaintiff). On 27 January 1976 Umbogintwini caused a first mortgage bond hypothecating a certain piece of land described as Lot 313 Athlone Park, Amanzimtoti, (hereinafter referred to as "the property"),

to be registered in favour of the plaintiff. This bond secured the due payment by Umbogintwini to the plaintiff of Sandy's indebtedness at any time up to an amount of R170 000 and an additional sum of R9 000 for certain contingent payments, costs and outlays. On 18 April 1979 Sandy's account with the plaintiff was overdrawn to the extent of an amount exceeding R234 000,00. Sandy's could not pay this amount and the plaintiff consequently sued the appellant (Umbogintwini which was at that stage in liquidation) for (a) payment of the sum of R234 400,34; (b) interest thereon at the rate of 13,5% p a from 19 April 1979 to date of payment; (c) an order declaring that the plaintiff's claim for which judgment is granted is

secured to the extent of R170 000 by virtue of the mortgage bond referred to and that, in the winding up of Umbogintwini, the plaintiff is entitled to preference attaching to such security and (d) costs. The Master of the Supreme Court, Natal, (hereinafter referred to as the Master) was cited, by reason of any interest which he might have in the outcome of the proceedings, as second defendant, and in the present proceedings he is cited as the second respondent. The Master has, however, notified the Registrar of this Court that he is not opposing the appeal and that he abides by the decision of this Court.

To the plaintiff's claims the appellant raised a number of defences, including a special plea,

and instituted a counterclaim that the suretyship and the bond be set aside as being dispositions without value as envisaged by section 26 of the Insolvency Act, 24 of 1936, read with section 339 of the Companies Act, 61 of 1973. The learned Judge a quo rejected the defences and granted judgment in the plaintiff's favour. He dismissed the counterclaim. As the defences, predominantly of a legal nature, were, subject to a slight difference of approach, reargued in this Court, they will be referred to and considered in due course and no detailed reference to them is made at this stage. With the leave of the Court a quo the appellant appeals against the whole of the judgment and order of the learned Judge.

The special plea was disposed of first and initially on

such facts as were relevant for purposes of adjudicating upon the special plea were put before the court a quo. However, inasmuch as the facts relating to the special plea are part and parcel of the entire history of Umbogintwini which culminated in the institution by the plaintiff of the claim against the appellant, I deem it convenient to relate the salient facts (to be supplemented where necessary at a later stage) in substantially chronological order.

Umbogintwini was floated on 10 June 1968. At all material times the directors were C Assimakopoulos and his wife A Assimakopoulos. They were also the only shareholders, C Assimakopoulos holding 99 shares and A Assimakopoulos one share.

It is not clear from the record when Sandy's was incorporated but it may fairly be assumed that it had existed for a number of years before it was finally wound up in 1979. It was a trading concern which conducted three supermarket businesses, at Pinetown, at Pietermaritzburg and at Mayville, Natal. At some stage during 1976 the directors of Sandy's consolidated the company's position by selling the Pinetown store and terminating the lease of the Mayville premises when it abandoned that operation. The company then concentrated on the Pietermaritzburg business. As appears from the directors' report prefixed to the accounts for the year ending 29 February 1976 they felt confident that the consolidation policy would result in an improvement of

Sandy's future profitability. The shareholders of Sandy's were C Assimakopoulos to the extent of seventy-five per cent and K Coussis to the extent of twenty-five per cent. These two gentlemen were the only directors.

During 1975 Sandy's was conducting two banking accounts, one with Western Bank and one with Nedbank. When Barclays Bank took over Western Bank the latter became Barclays Western Bank. As at 28 February 1975 Sandy's was indebted to Nedbank in the sum of R73 013 and to Western Bank in the sum of R64 000. In respect of the current account conducted with Nedbank there was, originally, an authorised overdraft limit of R35 000, which was subsequently increased. On 28 February 1975 the account was overdrawn to the extent of R73 013.

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This current account was secured by unlimited surety-ship undertakings by the directors of Sandy's and by Umbogintwini. By July 1975 Nedbank required Sandy's account to be closed by reason of Sandy's "kite flying" activities. Sandy's had deposited cheques drawn on Barclays Western Bank to the credit of its account in the books of Nedbank and by virtue of this manipulation managed to contrive credit for itself of up to four or five days before the cheques were cleared by Barclays Western Bank. Nedbank indicated to Sandy's that it was dissatisfied with the manner in which the account was being conducted and requested Sandy's to make other banking arrangements. As a consequence the directors of Sandy's transferred its Nedbank account to the

plaintiff. In September 1975 the plaintiff accepted transfer of the facility which Sandy's had enjoyed with Nedbank from the latter to itself and subject to adequate security being provided undertook to increase the facility. The security which was furnished was that which formed the subject matter of the claim in the court a quo. The facility was increased from time to time. In the meantime the plaintiff had also taken over Umbogintwini's account from Nedbank. Sandy's financial position deteriorated steadily. Its liabilities increased; it could not pay its debts and was eventually wound up by the court.

Umbogintwini was also placed in liquidation.

It was/.....

It was finally wound up by the court on 13 August 1979.

The same liquidator as had been appointed in Sandy's estate was appointed, on 1 October 1979, for the appellant. At a duly constituted meeting of creditors the plaintiff's claim was proved and admitted. The liquidator, however, disputed the claim after it had been proved and the Master disallowed the claim in terms of s 45(3) of the Insolvency Act. Such disallowance was communicated to the plaintiff in writing on 30 May 1983. On 5 August 1983 the summons initiating the action in the present matter was issued.

The defences which were raised by the appellant to the plaintiff's claims were summarised in the heads of argument prepared for the purposes of this appeal by counsel who appeared for the appellant in the Court a quo as follows:

"1. The/.....

"1. The Appellant raised a special plea wherein the Appellant alleged that by virtue of the Respondent's failure to comply with the provisions of Section 359 of the Companies Act No 61 of 1973 ("the Companies Act") prior to instituting the present proceedings against the Appellant, the Respondent's claim was deemed to have been abandoned by virtue of the provisions of Section 359 of the Companies Act.

2. A number of alternative defences based essentially upon the Appellant's contention that the signing of the suretyship and the granting of a power of attorney to pass the mortgage bond was not accompanied by any attendant value received by the Appellant. These alternative defences, in their turn, can be categorised under two main groupings as follows:

2.1 The transaction was hit by Section 26 of the Insolvency Act No 24 of 1936 in the form in which it existed prior to

its/.....

its being amended by the enactment of Act No 84 of 1984 and that accordingly the claim which the Appellant alleged was uncompleted could not give rise to any claim in competition with the creditors of the Appellant's estate.

2.2 That by virtue of the absence of attendant value, the Appellant and/or its directors lacked the authority to bind the Appellant to the suretyship and the mortgage bond."

The defence under paragraph 2.2 may conveniently be referred to as the ultra vires defence.

The learned trial Judge dismissed the special plea. He further held that the appellant had failed

to establish that the dispositions were without value. He found that that conclusion made it unnecessary for him to consider whether the 1984 amendment to s 26(2) of the Insolvency Act had any operation in the context of the case. Despite this view he nevertheless dealt with that issue briefly and came to the conclusion that section 26(2) only comes into operation when there is competition, in other words at the stage at which distribution is made. Until the competition arises it has no application; it follows, he held, that there is no question of retrospectivity in the true sense. The effect of this is that the amendment does apply,

he concluded.

Before this Court on appeal the appellant has been represented by Mr Heher who did not appear at the trial. Subject to two qualifications, his submissions are, substantially, those set out in his predecessor's heads of argument. The first qualification is that, instead of "Respondent's claim" in paragraph 1 of the summary of the appellant's defences in the heads he requests us to read "proceedings". The second is that, wisely, in my view, he has jettisoned the ultra vires defence.

As appears from paragraph 1 of the summary of the defences, the appellant relies on section 359 of the Companies Act. In terms of subsection (1)(a) all

civil proceedings by or against the company concerned shall, when the court has made an order for the winding-up of a company, be suspended until the appointment of a liquidator. Subsection (2) reads as follows:

> "(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
>
> (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."

In the present case the plaintiff did not institute proceedings before the winding up of the

company. The first portion of ss 2(a) is,therefore, not applicable. The words to be considered in the present context are "every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up." It is common cause that no notice was given to the liquidator within four weeks after his appointment, or at all, that the plaintiff intended to institute legal proceedings for the purpose of enforcing its claim against the appellant. It is also common cause that the plaintiff, before instituting action, did not approach the court for leave to proceed as a creditor would, in an appropriate case, be required to do as indicated by the words "unless the

Court otherwise directs" in s 359(2)(b).

In dealing with the issue raised by the special plea, the learned Judge a quo referred to s 366(1)(a) of the Companies Act which provides that in the winding up, inter alia, of a company by the court the claims against the company shall be proved at a meeting of creditors mutatis mutandis in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency. That brought into effect, said the learned Judge a quo, sections 44 and 45 of the Insolvency Act. He quoted sections 44(3) and 45(3) which he regarded as the relevant subsections. In both, the learned Judge said, counsel sought to construe the reference to section 75 of the Insolvency Act as a

reference to section 359(2) of the Companies Act by invoking the mutatis mutandis provisions in section 366(1)(a). A consideration of sections 44(3) and in particular 45(3) indicates,remarked the learned Judge, that those sections contemplate that after a dispute of a claim by the trustee, a report to the Master and a reduction or disallowance of the claim, there could be a resort on the part of the claimant to establishing his claim by an action at law. This resort, he said, was qualified only by the provisions of section 75 of the Insolvency Act. Without dealing specifically with section 75 the learned Judge dismissed the special plea, concluding as follows:

"Section 359(2) of the Companies Act limits

> the enforcement of a claim to the first four weeks after the appointment of a liquidator. That cannot possibly relate to a claim made or sought to be established subsequent to, as happened in the present case, a dispute by the trustee and a disallowance by the Master. The terms of section 359 of the Companies Act are wholly inappropriate to the situation which then obtains."

In the appellant's heads the argument advanced in the court a quo is substantially repeated. In my view s 44(3) of the Insolvency Act cannot be relevant because the proviso postulates a rejection of the claim by the officer presiding at the meeting of creditors, which did not happen in the present case. The relevant section is s 45(3) which provides:

> "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."

Section 75 of the Insolvency Act reads:

"(1) 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 that estate, or if no trustee has been appointed, to the Master, that he

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intends to continue those proceedings, and after the expiration of a period of three weeks as from the date of such notice, prosecutes 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 that estate in respect of any liability which arose before its sequestration: Provided that the court in which it is sought to institute 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."

Subsection (1) of s 75 cannot possibly, even in the insolvency context, apply to a situation such as is contemplated by s 45(3) because the latter provision deals with a reduction or disallowance by the Master of a claim proved in the insolvent estate, whereas section 75(1) applies to civil proceedings which have been instituted against a debtor before the sequestration of his estate. It is therefore surprising that the application of the proviso to s 45(3) is not restricted to s 75(2). This latter provision, even though not

relied upon in the present case, presumably because the Master has not confirmed the liquidation account before the institution of the action, may nevertheless be applicable to a company in liquidation, because s 359 of the Companies Act does not provide for such an eventuality. If that is so this would create a further bar to, but at the same time another possibility for, the institution of legal proceedings even after confirmation by the Master of the liquidator's account and would be inconsistent with the argument contained in the appellant's heads of argument that the words "subject to the provision of section seventy five" in the proviso to s 45(3) of the Insolvency Act should be interpreted to mean "subject to s 359(2)(b) of the Companies Act."

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This argument, in any event, begs the question because the enquiry remains: does section 359(2) render it obligatory for every person, including the person who has every intention to prove his claim in the insolvent estate, to give notice in terms of s 359(2) of the Companies Act? That it does is the contention advanced both in the appellant's heads of argument as well as by Mr Heher in his oral argument. The approach differed, however. Counsel who prepared the heads of argument acknowledged that s 359(2) of the Companies Act impliedly contemplates that there may, in an appropriate case, be two courses open for a creditor to enforce his claim against the estate viz by instituting proceedings or by proving a claim in the estate, and that the subsection should be read together with s 366(1)(a) of the Companies Act and the relevant provisions of the Insolvency Act. Mr Heher, on the other hand, emphasised

the word "proceedings" in the subsection and argued that s 359 is self-contained in that it is the only section in the Companies Act which deals with "proceedings." Whatever the circumstances under which or the time when civil proceedings to enforce a claim are instituted, counsel submitted, the subsection is the only applicable provision.

In the matter of Swaanswyk Investments (Pty) Ltd v The Master and Another 1978(2) SA 267(C) Van Zijl JP, after having referred to sections 339 and 366(1) of the Companies Act and to sections 44(3) and 45(3) of the Insolvency Act, said at 269 in fine - 270A:

> "From these sections of the Companies and Insolvency Acts it appears that a creditor has, in respect of the recovery of a debt owing to him by a company which has been placed under a winding-up order, two courses open to him. He can give the required notice in terms of s 359 of the

> Companies Act and sue in the courts for the recovery of his debt, or he can take advantage of the liquidation order and try to prove his debt at a meeting of creditors and, if he fails to prove it, he can then sue in the courts for the recovery thereof. In other words, if he fails to prove his claim at a meeting of creditors, he can attempt to do so in the courts."

Counsel for the appellant criticised this judgment. In the heads of argument the submission is made that Van Zijl JP, in stopping short of considering the words "but subject to the provisions of section seventy-five" in the proviso to s 45(3) of the Insolvency Act, failed to appreciate the import of these words. As I have pointed out above, this argument begs the question. Mr Heher, on the other hand, was constrained to argue that the judgment was wrong because s 45(3) of the

Insolvency Act does not, in his submission, apply at all.

I do not agree that s 359(2) is self-contained. One cannot ignore the reality that there are, in an appropriate case, two courses open to a creditor of a liquidated company to recover his debt. One is to institute legal proceedings and the other is to prove his claim in the estate. In terms of s 364(1)(a)(ii) of the Companies Act the Master is enjoined to summon a meeting of creditors for the purpose of the proof of claims against the company. The Companies Act does not, however, prescribe the procedure according to which such claims have to be proved. It simply provides in s 366, as was stated above, that the

provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency would apply. That law at the present time is Act 24 of 1936, as amended. Section 39 of this Act deals with the time and place of meetings of creditors and subsection (2) provides for the designation of an officer to preside over the meeting. Section 44 sets out the procedure to be followed for the proof of claims against the estate. Such claims are, in terms of ss (1), required to be liquidated claims. It has been decided, however, that unliquidated claims may also be submitted for proof in the estate. See Cachalia v De Klerk NO and Benjamin NO 1952(4) SA 672 (T) 677F - 678

For the purposes of this judgment it is not necessary to inquire into the correctness of this decision because in

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the present case the claim concerned is a liquidated claim and, in my view, every creditor who has at least a liquidated claim against the estate, has, as Van Zijl JP said in Swaanswyk's case supra, two courses open to him. After the liquidation of the company the creditor has to decide whether to submit a claim for proof in the estate or to proceed in terms of s 359(2)(a) to enforce his claim against the company. S 359 deals with the institution of legal proceedings if that is, at the stage of the initial election, the course decided upon. That does not rule out the possibility that legal proceedings

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other than those contemplated in s 359(2) may, depending upon the vicissitudes following in the wake of the creditor's initial election to pursue his claim by proving it in the estate, be instituted at a later stage.

In my view s 359(2)(a) is capable of one construction only. The obligation to give notice within a period of four weeks after the appointment of a liquidator is imposed upon the creditor who intends to institute legal proceedings forthwith.

The creditor who intends to enforce his claim by proving it at a meeting of creditors of that estate is not hit by the provision at all.

Had the legislature intended to impose the obligation on a creditor who might at a later stage decide or be compelled to institute civil proceedings against the estate, it could easily have provided therefor in clear terms. The provision was designed, in my view, to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors, the nature and validity of the claim or contemplated claim and how to deal with it - whether, for instance, to dispute or settle or acknowledge it. Cf Randfontein Extension Ltd v South Randfontein Mines Ltd and Others, 1936 WLD 1 at 3. In the case of claims sought to be proved in the estate, the liquidator does not require such an opportunity.

If the claim is rejected by the officer presiding in terms of s 44(3) of the Insolvency Act, the liquidator would be fully apprised and if disallowed by the Master in terms of s 45(3) he would be fully aware of the nature of the claim concerned because the Master acts on his report. Consequently, in neither case would he require three weeks time within which to consider the claim.

I have accordingly come to the conclusion that s 359(2) of the Companies Act is not applicable to the circumstances of the present case and that the special plea was correctly dismissed by the learned trial Judge.

I proceed to consider whether the disposition was for value or not. There is no cross-appeal against the learned Judge's dismissal of the counter-claim.

Section 26(1) of the Insolvency Act is, therefore, not relevant to the present appeal. Section 26(2) is, however. The relevant portion of this subsection, as it read prior to the amendment in 1984, provided:

> "A disposition of property not made for value --- which was uncompleted by the insolvent, shall not give rise to any claim in competition with the creditors of the insolvent's estate."

By s (1) of Act 84 of 1984 the following proviso was added to the subsection:

> "Provided that in the case of a disposition of property not made for value, which was uncompleted by the insolvent, and which:
>
> (a) was made by way of suretyship, guarantee or indemnity; and
>
> (b) has not been set aside under subsection (1),
>
> the beneficiary concerned may compete with the creditors of the insolvent's estate for an amount not exceeding the amount by which the value of the insolvent's assets exceeded his liabilities immediately before the making of that disposition."

It is common cause that the undertakings concerned constitute "dispositions" within the meaning

of s 26(2) read with the definition of "disposition" in s 2 of the Insolvency Act. See Langeberg Koöperasie Beperk v Inverdoorn Farming and Trading Company Limited 1965(2) SA 597(A). It is also not in issue that the dispositions were "uncompleted" within the meaning of s 26(2). See South African Fabrics Ltd v Millman NO and Another 1972(4) SA 592(A) 601 A - H. The appellant's case is that no value was given for the dispositions and that the terms of s 26(2) as it was before the addition of the proviso should be applied. The amendment is not applicable, it was submitted, because the commencement date of the amending Act was 18 July 1984; that was subsequent to the winding up of Umbogintwini and, indeed, subsequent to the insti-

tution of the action in August 1983. The learned Judge erred, it was contended, in his decision that the proviso applied because s 26(2) only comes into operation when there is competition, in other words, at the stage at which the distribution is made and that it was accordingly not necessary to decide whether the proviso operated retrospectively or not. It was contended on behalf of the appellant that the proviso operates as at the date of liquidation of a company at which date there would be a concursus creditorum, that the proviso was not retro-active and that the plaintiff could, accordingly, not rely thereon.

The first inquiry on this issue is whether the dispositions constituted, as counsel for the appellant

submitted dispositions not for value.

The onus in this respect is on the appellant. See Swanee's Boerdery (Edms) Bpk (In Liq) v Trust Bank 1986(2) SA 850(A) 859 C. The meaning of the term "value" was considered in Estate Wege v Strauss 1932 AD 76 in which case the Court was concerned with s 24 of the previous Insolvency Act 32 of 1916. That section was for all practical purposes worded similarly to s 26 of the present Act. Wessels ACJ said at 84:

> "The object of s 24 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving away his assets without receiving any present or contingent advantage in return."

It was stressed by counsel for the appellant

that the Court is in the present case not concerned with the advantage which the directors of Umbogintwini would have gained, but with the advantage to Umbogintwini, a juristic person. The only evidence relied upon by the appellant for the proposition that no value was given emerged from the interrogation during an inquiry under the Companies Act of Rees who was the bank manager who arranged the overdraft facilities for Sandy's. Counsel conceded that a bank manager who arranges overdraft facilites for a client may be completely unaware of the relationship between the surety and the principal debtor and that, in the ordinary run of cases, his concern would chiefly be the credit-worthiness of the surety. Of course,

he runs the risk of the suretyship guarantee being set aside as a disposition without value but whether a bank official who is usually not versed in insolvency law, would consciously direct his mind to this danger is doubtful. Rees certainly did not. That is clear from a perusal of his evidence which he gave while he was, ad nauseam and very unjustly, interrogated about the affairs of Umbogintwini and Sandy's. The person who could have proved that no value passed, was Assimakopoulus, but he was never called. In spite thereof, argued Mr Heher, enough was extracted from Rees during the interrogation (a copy of which record was handed in at the trial in terms of s 415(5) of the Companies Act) and from other witnesses called by

the plaintiff at the trial, to discharge the onus.

The concession made by Rees which is relied upon, reads thus:

> "And if I can just get it clear with you, at the stage when this suretyship was given,and the bond was registered, no value was given, was it? By the bank in respect of the suretyship to Umbogintwini Land & Investments? --- No, not to Umbogintwini Land & Investment Company.
>
> No value whatsoever was given? -- No, not directly. By that I mean indirectly the company might have had to sell their property to provide Sandy's with the working capital that they were looking for. So indirectly they did have the benefit but not directly."

In my view, apart from the fact that Rees manifestly did not have all the facts at his disposal, his concession carried very little weight. What

Fannin J said in Goode, Durrant and Murray Ltd v Hewitt and Cornell NNO 1961(4) 286(N) at 291 E - H appears to me to be particularly apposite to the circumstances of the present case:

> "The word "value" is not, however, confined to a monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. Whether an insolvent has received "value" for a disposition must be decided by reference to all the circumstances under which the transaction was made. Hurley & Seymour, NO v W H Muller & Co 1924 NPD 122 at p 133. In this case, as I have said, the Company is one of a group of companies, and it guaranteed the obligation of another member of the same group as a result of financial pressure upon that fellow member, and on the parent company. On those facts, it seems to me impossible at this stage to say that no "value" was given for there are many important benefits which such a transaction might bring

to the Company, such as, for example, the continued financial stability of the whole group of companies."

As Beyers JA pointed out in the Langeberg Koöperasie case supra at 604 B the view expressed by Fannin J is consistent with other decisions referred to.

The evidence placed before the court a quo established the facts which were set out by me above in recounting the history. In addition certain other facts need to be mentioned. The account of Sandy's with the plaintiff was initially debited with the Western Bank debits. The basis upon which the plaintiff took over the Nedbank current account required that account to be settled with Nedbank. For the

purpose of accommodating the Western Bank debit and of settling Sandy's Nedbank debt the plaintiff accorded Sandy's extended facilities which required the unlimited guarantees of the directors and of Umbogintwini as well as a mortgage bond over the property. Those securities were proposed at the outset of the relationship between Sandy's and the plaintiff and prior to the closure of the Nedbank account. The only substantial assets of Assimakopoulos were his shares in and loans to Umbogintwini in the sums of R11 021,00 and approximately R55 000 respectively and a smaller loan to Sandy's Supermarket which by the end of 1976 had been repaid. In 1975/6 Sandy's financial position was not good but, as stated above,

the directors were optimistic that it would improve after the consolidation. There appears to have been some basis for this optimism inasmuch as Sandy's was only liquidated in 1979, more than three years after the dispositions.

I agree with counsel for the plaintiff that the advantage gained by Umbogintwini as a result of the dispositions was considerable. Prior to 1975 Umbogintwini was already the guarantor (for an unlimited amount) in respect of Sandy's overdraft with Nedbank. Nedbank required that the account be closed. It is overwhelmingly probable that Sandy's could not have met Nedbank's requirements from its own resources. Had Sandy's not arranged an overdraft

with the plaintiff, it is probable that Nedbank would have called upon Sandy's sureties who would have had a right to contribution inter se. Had Nedbank called upon Assimakopoulos to pay, he would have had to call upon Umbogintwini to repay his loans which might have caused Umbogintwini to go into liquidation. Umbogintwini could not repay Assimakopoulos nor, if called upon directly, could it have paid Nedbank without either selling or mortgaging the property. Had appellant mortgaged the property it would have become liable to pay interest to its mortgagee and, presumably over the course of time, to repay the capital borrowed. Accordingly, when Umbogintwini agreed to stand surety for the

facilities offered by the plaintiff to Sandy's the contingent liability created by the unlimited guarantee to Nedbank was in effect replaced by the unlimited guarantee to the plaintiff. In addition, Umbogintwini avoided the imminent need to borrow (and thus incur actual liability) or sell its property. The relief which the plaintiff provided in the form of the facilities must have contributed to the sanguine hopes of Umbogintwini's directors that Sandy's would prosper again and to a belief, consequently, that the contingent liability would never be converted into an actual liability. In fact, the contingent liability did not ripen into an actual liability for over three years.

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Regard being had to all these circumstances, the court a quo was, in my view, fully justified in coming to the conclusion that the liability to Nedbank was effectively extinguished by a course of dealing which culminated in the dispositions in issue - a course of dealing which was not unattended by some commercial advantage to Umbogintwini. The appellant has accordingly failed to prove that the dispositions were not made for value. In view of this conclusion it is unnecessary to decide whether the proviso to the amended s 26(2) of the Insolvency Act operated or not.

The appeal is dismissed with costs.

JUDGE OF APPEAL

BOTHA JA
GROSSKOPF JA
VIVIER JA
STEYN AJA

- CONCUR