-

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 873/2010

In the matter between

GAZIT PROPERTIES (PTY) LTD **APPELLANT**

and

DEON MARIUS BOTHA N.O. **FIRST RESPONDENT**

IZAK JOHANNES BOSHOFF N.O. **SECOND RESPONDENT**

WERGELE STAFFORD MACKENZIE N.O. **THIRD RESPONDENT**

Neutral citation: *Gazit Properties v Botha N.O.* (873/10) [2011] ZASCA 199 (23 November 2011)

Coram: **HARMS AP, HEHER, SNYDERS, SHONGWE and MAJIEDT JJA**

Heard: **7 NOVEMBER 2011**

Delivered: **23 NOVEMBER 2011**

Summary: Insolvency – interpretation and application of s 29(1) of Insolvency Act 24 of 1936 – meaning of the phrase 'in the ordinary course of business' – payment made in terms of valid underlying contract by due date unaffected by illegality of the insolvent's business.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kruger AJ, sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the court below is set aside and substituted with the following:

'The plaintiff's claim is dismissed with costs'.

JUDGMENT

MAJIEDT JA (HARMS AP, HEHER, SNYDERS and SHONGWE JJA concurring):

[1] This is an appeal against the judgment of Kruger AJ, sitting in the North Gauteng High Court, Pretoria, in terms of which certain payments (dispositions) made by an insolvent company to the appellant (as defendant) were set aside in terms of the provisions of s 29(1) of the Insolvency Act 24 of 1936, (the Act) and whereby the appellant was ordered to repay the said monies to the respondents (as plaintiffs). The appeal is with the leave of the court below.

[2] The respondents sued as joint liquidators of Malokiba Trading 19 (Pty) Ltd (Malokiba), a company in liquidation, which ostensibly had conducted business as bridging financiers in respect of fixed property transactions.

Malokiba borrowed money from members of the general public as investors and lent same out for the financing of transfer costs or estate agents' commission or bridging finance in respect of fixed property transactions, prior to the registration of transfers. These transactions would occur on the back of valid transfers of fixed property. This was how Malokiba's business was held out to potential investors but the reality was different. It turned out that Malokiba often accepted investments and lent out money without back-up property transfers. The outcome was an inevitable debacle whereby new investors' funds were used to pay out earlier investors and, when insufficient new investment funds were received, the entire scheme collapsed.

[3] The appellant, Gazit Properties (Pty) Ltd (Gazit), was one such investor, having lent and advanced a total sum of R5 million to Malokiba. Written loan agreements were concluded between Gazit and Malokiba in respect of this money. In terms thereof Gazit would receive interest of 2.5 per cent of the capital loan monthly and the agreements would remain in force for an indefinite period, subject to cancellation by any party after the expiry of three months and on 45 days' notice. Gazit exercised its right of cancellation accordingly and the full capital and interest were paid by Malokiba.

[4] The amount in issue, R3 050 355, is in respect of payments made by Malokiba within the six-month period preceding its liquidation. The parties entered into a pre-trial agreement whereby Gazit admitted that immediately after every payment, Malokiba's liabilities exceeded its assets; that every payment had the effect of preferring Gazit as a creditor above Malokiba's other creditors; and that every payment to Gazit constituted an alienation of its assets by Malokiba. The parties also agreed that Malokiba did not intend to prefer Gazit above other creditors in making these payments and that the only issue which the court had to determine related to the liquidators' claim under s 29(1) of the Act and was whether the payments to Gazit were made in the ordinary course of business. Section 29(1) reads as follows:

'Every disposition of his property made by a debtor not more than six months before the sequestration of his estate . . . . which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.'

[5] The gist of Gazit's case was that Malokiba had repaid the loans in accordance with its obligations in terms of valid underlying loan agreements in the ordinary course of business. The liquidators, on the other hand, contended that the payments were not made in Malokiba's ordinary course of business, since its business was tainted. Three bases were advanced in the particulars for trial, namely:

(a) that Malokiba had contravened s 11(1) of the Banks Act 94 of 1990 in that it procured loans from the general public to be lent out further, without being registered as a bank;

(b) that the interest rate paid by Malokiba to investors exceeded the maximum allowed under Government Notice 1135 of 1999 (published in *Government Gazette* 20169 of 1999) and issued under s 26(6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988, meaning, presumably, that Malokiba conducted an unlawful harmful business practice; and

(c) that Malokiba's business constituted a prohibited pyramid scheme in terms of the same notice, with new investors' funds being utilised to make interest payments to existing investors.

[6] At the trial the liquidators expressly abandoned ground (c) and did not raise the allegation under (b). It was, in particular, never alleged that the interest rate paid under the loan agreements with the appellant was unlawful. Before us the liquidators also did not rely on (b). The focus was the contravention of the Banks Act and, in spite of the particulars for trial, on the

allegation that the appellant and other investors had been misled in lending money to the company and that the appellant had been repaid from money sourced from new investors. Before us the liquidators put their case as follows:

'It is clear that the loan agreements are tainted and cannot be regarded as genuine loans in view of the evidence to the effect that the appellant had been deceived to make investments, ostensibly earmarked for specific property transactions, whilst this was not the true situation; the appellant failed to adduce any evidence to negate the conclusion that it had been paid by funds sourced from new investors.'

[7] The high court, in adopting the argument of the liquidators, laid heavy emphasis on the fundamental contamination ('fundamentele kontaminasie') of the transaction whereby Malokiba repaid the loans to Gazit. Such contamination, held Kruger AJ, was to be found in Malokiba's contravention of the Banks Act followed by ('opgevolg deur') a transaction not made in the ordinary course of business because, he said, it was a transaction 'wat gebuk [gegaan het] onder die bewese omringende wanpraktyke' namely that Malokiba had entered into loan agreements under false pretences. The underlying premise, which is to focus on the nature of the insolvent's general business practices, is in my judgment misplaced and concentrating on the 'tainted' nature of Malokiba's general business model is to misapply the provisions of s 29(1). What it requires is a close scrutiny of the dispositions itself, viewed against the background of its causa.

[8] The general test of what constitutes a disposition in the ordinary course of business is well established. In *Estate Wege v Strauss* 1932 AD 76 the matter concerned a transaction between a professional bookmaker (Strauss) and his client (Wege) and this court had to determine whether the transaction had been concluded in Strauss's ordinary course of business. Wessels ACJ found that in the special type of business of that kind it is not normal for a bookmaker to permit the settlement of betting debts to stand over for an

unlimited period of time and that the late payment therefore was not done in Strauss's ordinary course of business. He said that 'if a debtor pays a debt in accordance with the stipulations of his contract, then such payment is *prima facie* made in the ordinary course of business'. This means that one first has to have regard to the nature of the obligation in terms of which the disposition or payment was made. This was made clear by Van Winsen JA in *Hendriks NO v Swanepoel* 1962 (4) SA 338 (A) at 345B when he said the following:

'Die Hof benader die vraag of 'n transaksie in die gewone loop van sake geskied het, objektief wanneer hy hom afvra of, in ag genome die voorwaardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvente besigheidsmense aangegaan sou word.'

The same approach was adopted in *Amalgamated Banks of South Africa Bpk v De Goede & 'n ander* 1997 (4) SA 66 (SCA) at 78C-D where FH Grosskopf JA said the test under s 29(1) involved the question whether the underlying transaction was one 'met gebruiklike terme wat gewone besigheidsmense normaalweg onder die gegewe omstandighede sou aangegaan het.'

[9] Gazit accepted that it bore the onus of proving that the payments had been made by Malokiba in the ordinary course of its business. It led evidence, as did the liquidators. It is not necessary to detail and discuss the evidence. On the common cause facts and on the admissions by Gazit in the pre-trial agreement mentioned above, Gazit's loans had been repaid by Malokiba in accordance with the terms of the parties' loan agreements, ie by due date and on the terms as stipulated in the loan agreements. It is eminently a case of solvent business people entering into an agreement whereby the one lends and advances money to the other and the latter in turn agrees to repay that loan with interest over a period of time and the capital in full by the end of the agreement (whether that end occurs by the effluxion of time or on notice or by some other event, as is stipulated in the loan agreement). This means that since Gazit was vested with a contractual right to be repaid as soon as it

cancelled the loan agreements in accordance with the terms of cancellation, Malokiba concomitantly had a contractual obligation to make the repayment.

[10] The liquidators, as mentioned, relied on the fact that in accepting deposits from the general public and lending same out to others, Malokiba had conducted the business of a bank in contravention of s 11(1) of the Banks Act and that this some way or other tainted the loan agreements. The fact that Malokiba did contravene the Act does not mean that the loan agreements were not normal agreements within the terms of the *Amalgamated Banks* dictum quoted above. There is nothing in the Act that leads to such a conclusion, see ***Oilwell v Protec* 2011 (4) SA 394 (SCA)** para 19. To the contrary, the provisions of s 83(1) of that Act, which empower the Registrar of Banks to direct the recipient of money unlawfully obtained while unlawfully carrying on the business of a bank to repay such money, lead ineluctably to the opposite conclusion.

[11] In any event, on the assumption that the loans were on this ground void, the money had to be repaid by the company on demand. This is not a case where the *par delictum*-rule could find any application. No evidence was tendered that the investors, in particular Gazit, knew that Malokiba's business was illegal. As Conradie JA put it in a different but analogous context in *Fourie N O v Edeling N O* [2005] 4 All SA 393 (SCA) par 13 (that matter concerned undue preference to creditors in terms of s 30(1) of the Act, but contextually the position is no different than the present matter):

'The scheme never had the least entitlement to repay investors' money until the date which had supposedly been agreed as the due date for repayment. The perpetrators of the scheme knew the investments to be illegal. There is, on the other hand, no evidence that any of the investors knew their investments to be tainted, nothing from which to infer that any one of them acted *ex turpi causa*. That being so, no question arises of relaxing the [*par delictum*] rule . . . . Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the *condictio ob iniustam causam.*'

[12] That brings me to the other instances of 'fundamental contamination'. The first is that Malokiba misled Gazit in entering into the loan agreements as to the purpose for which the money would be put to use. I fail to understand the relevance of this point. Gazit was entitled, had it become aware of the misrepresentation, to cancel the contracts. But until cancelled, it remained valid and enforceable and payment in its terms (especially by the guilty party) could never be regarded as not being in the ordinary course of business.

[13] The last point of contamination relates to the fact that Malokiba did not have money to repay the loan unless it utilised the money raised through misrepresentations from new investors. The fact that Malokiba's liabilities may have exceeded its assets at the time of payment is irrelevant – *Hendriks NO v Swanepoel*, supra, at 345C; *Pretorius' Trustee v Van Blommenstein* 1949 (1) SA 267 (O) at 276. Nor does it matter where the funds to make the payment had been procured from. There is no authority which counsel could refer us to which has the effect that the source of payment is material to an enquiry whether a disposition was made in the ordinary course of business. Payment of a debt with stolen money does not taint the payment. This is not a case where in making the dispositions or payments Malokiba committed an offence or acted in fraud of the rights of third parties – *Du Plooy NO v National Industrial Credit Corporation Ltd* 1961 (3) SA 741 (W) at 744C-D.

[14] Much reliance was placed by the liquidators on this court's recent judgment in *Janse van Rensburg NO v Botha* [2011] ZASCA 72. That case concerned a disposition to one of the Krion scheme investors, which the scheme's liquidators sought to have set aside under s 29(1) of the Act. They were successful. But counsel wrongly contended that that case is on all fours with the present case. The issues in that case were set out in para 3 of the judgment. Disposition in the ordinary course of business was not one of them.

[15] In summary therefore, Malokiba duly complied with its contractual obligation to repay the loans to Gazit, which had become due when Gazit cancelled the loan agreements in accordance with its terms. The tainted nature of Malokiba's business is irrelevant to the fact that such repayment was made in Malokiba's ordinary course of business. The high court therefore erred in upholding the liquidators' claim in terms of s 29(1) of the Act.

[16] The appeal is upheld with costs. The order of the court below is set aside and substituted with the following:
'The plaintiff's claim is dismissed with costs.'

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	P ELLIS SC
Instructed by	:	KMG & Associates Incorporated, Brooklyn Lovius Block Attorneys, Bloemfontein
Counsel for respondents	:	J G WASSERMAN SC (with him P A SWANEPOEL)
Instructed by	:	Tintingers Incorporated, Pretoria Symington & de Kok, Bloemfontein