

The true meaning of dispositions 'not made for value' in the South African Law of Insolvency

3 August 2022 8 min read

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A key task of a liquidator, once appointed, is to investigate the dealings by an insolvent company of its assets. This is a necessary incident of one a liquidator's primary duties, namely to protect and preserve the assets of the insolvent estate to the maximum benefit of the general body of creditors. In this regard, section 340(1) of the Companies Act 61 of 1973 (**1973 Companies Act**) provides that the provisions of the law relating to insolvency applies *mutatis mutandis* to the winding-up of a company.

Section 26(1) of the Insolvency Act 24 of 1936

One of those provisions is set out in section 26(1) of the Insolvency Act 24 of 1936 (**Insolvency Act**) and provides that "every disposition of property *not made for value* may be set aside by the court" if such dispositions were made by an insolvent in two circumstances.

1. The first, set out in section 26(1)(a) of the Insolvency Act is if the disposition occurred more than two years before the sequestration of insolvent estate, and it is proved that immediately after the disposition was made, the liabilities of the insolvent exceeded his assets.
2. The second circumstance is provided for in section 26(1)(b) of the Insolvency Act in cases where the disposition was made within two years of sequestration, 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.

In the recent judgment of *Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and others*^[1] penned by van der Merwe JA, the Supreme Court of Appeal had occasion to interpret the meaning of the words "not made for value" in section 26(1) of the Insolvency Act.

The facts

The appellants, in this case, were the joint liquidators of DexGroup, a company that had at all times since 2007 been unable to pay its debts and was finally liquidated on 26 October 2016. During 2010, DexGroup made dispositions of shares in Trustco Group Holdings Limited (**Trustco shares**) to Snowball (Pty) Ltd (the first respondent) and the other respondents.

The dispositions of the Trustco shares to the various respondents were at a price substantially lower than the prevailing market price of the shares. Consequently, the appellants instituted summons in the Western Cape High Court, arguing that the dispositions fell foul of section 26(1) of the Insolvency Act in that the value given for the shares was "illusory or merely nominal" and therefore, that they ought to be set aside.

The respondents excepted to the claim on the basis that there had been value given for the shares – *albeit* not full value. The High Court upheld the exception, and the liquidators appealed to the SCA.

South Africa lagging behind when it comes to cross-border insolvency.

Something for nothing?

The appellants contended that dispositions for less than 'reasonable market value' or a 'fair return or equivalent' are not made for value and because the respondents paid less than market value for the shares, the value given for the shares was "illusory or merely nominal".

The respondents raised two different, but related exceptions in response to the appellants' argument. Snowball's exception was founded on the narrow argument that "illusory or merely nominal" means no value at all and it argued that since it had paid money for the shares, there was clearly value given in the transaction.

The other respondents' exception was premised on the idea that a disposition "not made for value" would be one where either no benefit at all was received for the property, or that there was some benefit received for the property, but such benefit was merely illusory or nominal such that it amounted to no value at all.

An exercise in interpretation

After a thorough examination of the case law, van der Merwe JA concluded that the meaning of the phrase "not made for value" had not yet been settled by our courts. The SCA then went on to interpret the meaning of the phrase "not made for value". On the ordinary construction of those words, the SCA held that not made for value means for no value at all. To give the phrase the meaning contended for by the appellants (i.e. for less than a reasonable market value) would require a significant reading-in to the ordinary words of the section.

Nonetheless, the SCA went on to consider whether, given the context and purpose of the phrase, it should carry a different meaning. In this regard, van der Merwe JA pointed out that section 26 of the Insolvency Act forms part of a larger set of remedies available to a trustee (or in the case of a company, a liquidator) under the Insolvency Act.

Section 29(1) of the Insolvency Act provides that a disposition that had the effect of preferring one creditor over another may be set aside by a court, where such disposition was made when the debtor was insolvent or if it caused the debtor's insolvency.

Section 30(1) of the Insolvency Act

Section 30(1) of the Insolvency Act provides for the setting aside of a disposition by a debtor, if the disposition was made with the intention of preferring one creditor over another. Section 31 of the Insolvency Act permits the setting aside of a transaction entered into by a debtor prior to liquidation where the debtor, in collusion with another, disposes of property in a manner which has the effect of prejudicing creditors or preferring one creditor over another.

When considering all these remedies as a whole, it is evident that the provisions serve to protect creditors generally, instead of protecting creditors to the exclusion of all other considerations. Van der Merwe JA went on to state that the more objectionable the conduct, the more extensive the remedy catered for by the Insolvency Act. That being said, the Court held that there is nothing objectionable, commercial or otherwise, to the sale of property at a discounted price. Such a transaction is manifestly distinguishable from a case where a factually insolvent company is frittering away its assets for no return.

The Court further endorsed the line of thinking present in earlier case law, which said that the objection of section 26 of the Insolvency Act is not to prevent a person (or company) in insolvent circumstances from engaging in the ordinary transactions of life, but rather to prevent a person (or company) from impoverishing his (or its) estate without receiving any advantage in return.

Ultimately, section 26 of the Insolvency Act was intended only to apply to gratuitous dispositions.

Van der Merwe JA went on to point out that the endorsement of the appellants' argument would lead to absurd results. In terms of section 26(2) of the Insolvency Act, the recipient of property the disposition of which was set aside, does not have a claim in competition with the creditors of the insolvent estate.

Section 32(3) of the statute

Furthermore, in terms of section 32(3) of the statute, should the property have been alienated or consumed in the intervening period between when the disposition was made and then set aside, the recipient would be liable for the value of the property either at the date of the disposition or its setting aside – whichever is the higher.

The ultimate effect of the appellants' construction of the section would be iniquitous in that, should a *bona fide* purchaser with no knowledge of the insolvent circumstances of a seller conclude a transaction for property or shares at a discount in the ordinary course of business, the purchaser would have to return the property without any right to reclaim the purchase price.

This already inequitable situation would be further exacerbated in instances where the purchaser had alienated and consumed the property – thereby incurring liability at a potentially higher price. As such, the Court held that the appellants' construction would lead to absurd results.

The SCA found another reason to doubt the strength of the appellants' conclusions. In previous cases, it has been held that "value" does not necessarily connote monetary or tangible consideration. Instead, it has been previously established under section 26(1) of the Insolvency Act that value can include benefits that do not necessarily have a reasonable market value.

In sum, the SCA has clarified the law insofar as it relates to dispositions not made for value and reinforced the ordinary meaning of the phrase "not made for value" in terms of section 26(1) of the Insolvency Act which means for no value at all.

[1] (356/2021) [2022] ZASCA 91 (15 June 2022)



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