

COLLUDING TO AVOID CREDITORS CAN LEAD TO THE SETTING ASIDE OF A PROPERTY PURCHASE

M and Another v Murray and Others (251/2019) [2020] ZASCA 86 (9 July 2020)

In a judgment that tells a story of intricate planning to disseminate a pension fund pay-out where insolvency was anticipated, the very real risks that may arise are illustrated. In this instance, it included that the payments made for alleged divorce purposes and the purchase of properties had to be reversed.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Moreau married to each other out of community of property in 1980.

Mr Moreau was a judgment debtor of Lowveld Cooperative Investments (Lowveld). Lowveld's court action initially failed, but on appeal, judgment was granted (on 18 May 2009) in its favour for an amount of some R720,000. While the appeal was pending:

- Iprolog Pty) Ltd (Iprolog) was registered on 6 April 2009 and, on 30 April 2009, Mr Moreau became its sole director. On 5 May 2009, Mr and Mrs Moreau became trustees of a Trust which in due course became the sole shareholder of Iprolog.
- On 31 May 2009 Mr Moreau requested payment of his provident fund benefit from his retirement fund. On 15 June 2009 he received R4,6 million from the provident fund into his banking account. On 23 June 2009 he transferred R3,5 million of that amount into an attorney's trust account for the credit of Iprolog. This money was used for the purchase of two farms by Iprolog. The balance of R1,023,867 was paid directly to Mrs Moreau.
- Mr and Mrs Moreau 'separated' on 19 July 2009.
- On 21 July 2009 Mr Moreau's application for leave to appeal the Lowveld judgment was dismissed.
- Two days thereafter Mrs Moreau issued summons against Mr Moreau, claiming a decree of divorce but no patrimonial relief or maintenance. On 19 August 2009 they signed a settlement agreement in terms of which Mr Moreau undertook to pay her: (i) maintenance of R100,000 per month; (ii) some additional expenses; and (iii) it was recorded that in terms of their antenuptial contract, Mr Moreau was obliged to transfer certain assets, including an immovable property, to Mrs Moreau. In the settlement agreement it was further recorded, amongst other things, that '... in settlement of the sum of R1,023,867 due and payable in terms of a loan account held with Moreau and Associates as at 28 February 2008, Mr Moreau has liquidated his pension fund ... agreed to pay over the balance of the proceeds to Mrs M.' Lastly, the settlement agreement provided that Mrs M would retain ownership of two farms in Mpumalanga.

Mr and Mrs Moreau explained the payments as follows: They alleged that they had been experiencing marital problems for some years and that, in April 2009, Mrs Moreau finally decided that she wanted a divorce. Therefore, the pension pay-out was requested specifically to cater for the proprietary consequences of the marriage at divorce. In particular, it was stated that Mr Moreau owed her R4,7 million made up of: (i) the obligation in their antenuptial contract in terms of which Mr Moreau was obliged to purchase a property for Mrs Moreau for R100,000 (the equivalent value in 2009 being R3,7 million); (ii) the balance of R1 million representing a loan amount comprising

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unpaid wages when Mrs Moreau worked for Mr Moreau as a bookkeeper in his business as a financial advisor.

Thereafter:

- On 2 November 2009 Mr Moreau resigned as a director of Iprolog and Mrs Moreau replaced him.
- In May 2010 Lowveld commenced proceedings for the sequestration of Mr Moreau's estate. As of August 2010, the unsatisfied judgment debt, interest and costs due to Lowveld amounted to R2 million.
- During October and November 2010 the farms purchased by Iprolog were sold and a portion of the net proceeds thereof was used by Iprolog to purchase an immovable property in Edenvale for cash. In March 2011 Mr Moreau moved into this property and a month later, Mrs Moreau joined him there. They allege that this was a purely convenient arrangement because of Mrs Moreau's alleged ill-health, and that they lived in separate houses on the property.
- On 6 June 2011 Mr Moreau's estate was provisionally sequestrated and the final order of sequestration was granted on 1 August 2011. Murray and another were appointed joint trustees. On 1 March 2013 the trustees launched an application to have the payments made by Mr Moreau to Mrs Moreau and to Iprolog set aside. The High Court granted the order and Mr and Mrs Moreau appealed.

In the appeal, Mr and Mrs Moreau averred that the payments which the trustees sought to set aside were pension monies and that such monies, including the assets purchased with such monies, were exempt from attachment by the respondents in terms of section 37B of the Pension Funds Act. They also denied that there was a disposition of money from Mr Moreau to Iprolog. Instead, they said, Mrs Moreau had loaned money to the trust and the latter loaned it to Iprolog.

The trustees alleged that there was collusion between Mr and Mrs Moreau to strip the former of all his assets and income to avoid paying his debt to Lowveld. The court *a quo* found in favour of the trustees and Mr and Mrs Moreau appealed.

HELD

Pension monies

- Section 37B of the Pension Funds Act reads as follows:

'Disposition of pension benefits upon insolvency

If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund ... is sequestrated... such benefit or any part thereof which became payable ... shall ... not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.'

- 'Benefit' is defined in section 1 of the Pension Fund Act as 'any amount payable to a member or beneficiary in terms of the rules of that fund'. The reference to 'payable', instead of 'paid' clearly envisages a sum to which a member of a pension fund or a beneficiary is entitled to receive, but has not yet received. So construed, the amount remains a 'benefit' to the extent it has not yet been paid to the member or beneficiary. Once the benefit is paid to him or her, the beneficiary ceases to be a 'member' of the pension fund according to the rules of the fund, and the money ceases to be a 'benefit'. The beneficiary may do as they please with it. Such a beneficiary can thus hardly complain if creditors lay their hands on the money to satisfy outstanding debts.

- Section 37B thus protects only the pension benefit of a person whose estate is sequestrated, which Mr Moreau's estate was not when he received his pension pay-out. If the pension benefit is received before a beneficiary's estate is sequestrated, section 37B does not find application.

Setting aside the dispositions made

- In terms of the Insolvency Act 24 of 1936, a disposition may be set aside by virtue of either section 26 (as dispositions without value), section 29 (as voidable preferences) or section 31 (as collusive dealings before sequestration). The court *a quo*, correctly, identified section 31 to be the applicable section on the facts of this case. Section 31 reads as follows:

'Collusive dealings before sequestration

After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

Any person who was a party to such collusive disposition shall be liable to make good any loss caused to the insolvent's estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefitted by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

Exclusions in terms of section 2 of the Insolvency Act

- It was however argued that the exclusionary provisions of section 2 applied. The definition of 'disposition' in section 2 is as follows: 'Disposition means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, *but does not include disposition in compliance with an order of the court*; and "dispose" has a corresponding meaning.'
- It brooks no debate that the payments made by Mr Moreau to Mrs Moreau constitute 'dispositions' within the meaning of the Insolvency Act. As I have already stated, there were two of those. The first was for R3,500,000 into an attorney's trust account for the credit of Iprolog on 23 June 2009 and used towards the purchase of property in Iprolog's name. The second payment was made shortly after the divorce decree was finalised. It was submitted that despite the payment date for the R3,500,000 being June 2009, the money only accrued to Mrs Moreau on 26 August 2009, after the decree of divorce was granted and the property had been transferred into Iprolog's name. Thus, it was said that Mrs Moreau was only 'paid' after the divorce order was granted, and 'in terms' thereof. This submission had to be rejected. It was contrived to bring the disposition within the ambit of the exclusionary provisions of the definition of 'disposition' in section 2 of the Insolvency Act referred to above. The disposition was to Iprolog and occurred on 23 June 2009 when the money was paid into the attorney's trust account. That Iprolog was only free to use it later was irrelevant. The exclusionary provisions of section 2 did not apply to this payment, and it was accordingly susceptible to being set aside in terms of one or other of the three sections of the Insolvency Act referred to above.
- The payment of R1,023,867 stood on a different footing as it was made after the divorce decree was granted on 21 August 2009, thus notionally protected by the exclusionary provisions of section 2. However, those provisions did not serve as an absolute bar. Our courts have held that in certain instances, a disposition made in terms of a court order may be set aside. From the papers filed in the court *a quo* and the record of the oral evidence, it was clear that there was a carefully designed plan by Mr Moreau to keep the pension money from

his creditor, Lowveld. Mrs Moreau and Iprolog were very much part of that plan. This commenced in April 2009 when Iprolog was incorporated. As a result, the disposition in terms of the divorce order was designed to defraud and would not be upheld.

- Therefore the conclusion was inescapable that the protective provisions in section 37B did not apply to Mr Moreau after the pension was paid to him. Further the dispositions made became susceptible to being set aside pursuant to the provisions of section 31 of the Insolvency Act: Mr Moreau made a disposition of his money to Mrs Moreau in collusion with the latter, which had the effect of prejudicing Mr Moreau's creditor (Lowveld). The prejudice was self-evident. Iprolog was not a creditor of Mr Moreau and the disposition had the effect of preferring her above Lowveld.

CONCLUSION

The dispositions were thus correctly set aside by the court *a quo*. The appeal failed.