

What amounts to “dispositions without value” in the context of section 26 of the Insolvency Act 24 of 1936?

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SUMMARY

Section 26 of the Insolvency Act 24 of 1936 aims to prevent natural and juristic persons from giving away their assets without receiving any value in return, in circumstances where immediately after releasing such assets they become insolvent. This paper demonstrates that it has not been easy for courts to adequately determine how value should be established for this provision not to apply. Several tests that have been established by courts are discussed with a view to demonstrate the difficulty faced by trustees and liquidators when seeking to set aside transactions in which they believe insolvent persons did not derive value. It will also be shown that the Supreme Court of Appeal crafted a new test that is way too simplistic, which may lead to prejudicial transactions that should otherwise be subjected to judicial scrutiny in terms of section 26(1) of the Insolvency Act being protected from the reach of this provision. This paper argues that there is an urgent need for legislative guidelines on what constitutes value in relation to the pre-liquidation/sequestration transactions to prevent the application of section 26(1) of the Insolvency Act.

1 Introduction

Generally, trustees and liquidators may be interested in transactions that natural and juristic persons concluded before the sequestration of their estates or liquidation. Particularly, when such transactions reduced the assets of these persons and granted some undue benefit to one or more of their creditors than they would have received post the granting of sequestration or liquidation orders. In terms of section 340(1) of the Companies Act¹ the court has discretion to set aside pre-liquidation transactions concluded by companies on application by liquidators who view such transactions as invalid. Chapter 14 of the now-repealed 1973 Act continues to apply to the winding up of insolvent companies.² In

¹ 61 of 1973 (hereinafter the 1973 Act).

² *Strydom v Snowball Wealth (Pty) Ltd* 2022 5 SA 438 (SCA) (hereinafter *Strydom*) para 2. See also *Commissioner for Inland Revenue v Bowman* 52 SATC 69 1990 (A) (hereinafter *Bowman*) at 72, where the court stated that “[s]ection 26 of the Insolvency Act is made applicable to companies in liquidation by the provisions of s 340 of the Companies Act 61 of 1973”.

terms of section 339 of the 1973 Act, provisions of the law relating to insolvency in the Insolvency Act³ are equally applicable to the winding-up of companies that are unable to pay their debts.⁴ This means that provisions relating to voidable preference,⁵ undue preference,⁶ collusive transactions,⁷ and transactions made without value⁸ contained in the Insolvency Act provide the basis upon which both liquidators and trustees can approach the court to set aside pre-liquidation/sequestration transactions. In certain circumstances, liquidators and trustees may also rely directly on the common law to reverse the pre-liquidation transactions. In this paper, the words “liquidators” and “trustees” as well as “pre-liquidation” and “pre-sequestration” will be used interchangeably depending on context.

This paper discusses the legal framework regulating pre-liquidation dispositions that liquidators claim insolvent companies did not derive value therefrom. The purpose of this paper is to demonstrate that courts have over the years adopted different tests when determining whether pre-sequestration transactions should be set aside on application by trustees. Generally, there are three scenarios with which courts may be confronted regarding pre-sequestration transactions. First, insolvent persons may have concluded transactions where assets were disposed of, but nothing was given in return. Secondly, insolvent persons may have concluded transactions where they received something less than the true value of the disposed assets. Thirdly, they may have concluded transactions where money was not given in return but some other benefits that somehow advance their interests were given or promised. While it is relatively easy for courts to determine disputes regarding transactions where nothing at all was given in return, it is still unclear how they should approach transactions where something inadequate or some non-monetary benefit was given. This creates interpretative challenges when determining whether such transactions should be regarded as dispositions not made for value.

In this paper, several tests that have been developed by the courts over a period of time will be discussed with a view to demonstrating that our courts have not yet provided adequate guidance on how value should be determined in the context of section 26(1) of the Insolvency Act.⁹ There is generally a dearth of research in South Africa regarding circumstances in which liquidators may approach the court to set aside pre-liquidation

3 24 of 1936 (hereinafter the Insolvency Act).

4 See *Spendiff v Kolektor (Pty) Ltd* 1992 2 All SA 50 (A) at 50.

5 S 29 of the Insolvency Act. See also Marumoagae “Impeachable transactions and available defences to those who transacted with companies before liquidation” (2022) *Speculum Juris* 293.

6 S 30 of the Insolvency Act.

7 S 31 of the Insolvency Act.

8 S 26 of the Insolvency Act.

9 See *Terblanche v Baxtrans CC* 1998 3 SA 912 (C) (hereinafter *Terblanche*) at 916, were the creditor that benefited from the transaction argued that once the trustee conceded that there was some value given, then s 26(1) of the Insolvency Act cannot apply.

transactions, hence the need to academically explore this topic. Nonetheless, this paper exclusively focuses on pre-liquidation transactions where liquidators are of the view that insolvent companies did not derive value from such transactions in terms of section 26(1) of the Insolvency Act.

2 Legislative background

The role of Roman, Roman-Dutch, and English law in the development of the South African Insolvency Law is well documented,¹⁰ and there is no need to repeat it in this paper. Save, however, to point out that in 1916, the legislature repealed all the provincial laws that governed insolvency proceedings at the time and introduced what was seen as a “uniform” statute that sought to regulate the administration of insolvent and assigned estates within the Union of South Africa.¹¹ Among others, this “uniform” statute expressly allowed trustees of insolvent estates to institute legal proceedings to recover pre-sequestration transactions that prejudiced the interests of creditors who proved their claims. In particular, the repealed section 24 of the Insolvency Act 34 of 1916 dealt with dispositions made not for value.¹² It is disappointing that the legislature, in its unification effort, could not foresee that the phrase “dispositions not made for value” will cause serious interpretative challenges in commercial transactions and for the courts. In 1923, Van der Riet J, in *van Rensburg v Van Rensburg’s Estate*, correctly pointed out that “the expression ‘not made for value’ is nowhere defined in the Act”¹³

In 1924, while the court in *Est Mackenzie v WH Muller and Co*¹⁴ did not interpret the entire phrase “not made for value”, it nonetheless held that the word “value” in this phrase “must be construed with reference to all the circumstances in which the disposition has taken place”.¹⁵ This meant that each case must be considered on its own merits. Even though it was not entirely clear what this phrase meant, trustees were expected to prove that pre-sequestration dispositions were not made for value without any sort of judicial or legislative guidance.¹⁶ If a trustee, having regard to all the circumstances of the pre-sequestration transaction, was able to demonstrate that the transaction was without value, the onus shifted to the beneficiary of the disposition to prove that value was given

10 See *Fairlie v Rautenheimer* 1935 (AD) at 135 and 146; and *Scharff’s Trustee v Scharff* 1915 (TPD) 463. See also Bertelsmann et al *Mars The law of insolvency in South Africa* (2019) 9; Burdette “A framework for corporate insolvency law reform in South Africa” (LLD Thesis University of Pretoria 2002) 20-37; and Wiggins “Rethinking the structure of insolvency law in South Africa” 1997 *Journal of International and Comparative Law* 510.

11 Smith *The law of insolvency* (1973) 7.

12 S 24 of the Insolvency Act 32 of 1916 (repealed).

13 1923 (EDL) 200 (hereafter *Est Mackenzie*) at 210.

14 *Est Mackenzie* at 210.

15 1924 3 PH C49 (NPD) at 46.

16 *Hill v Maria Christ* 1927 (SWA) at 52.

to the insolvent by clearly setting out what such value was.¹⁷ This placed the parties at the mercy of the courts which had to exercise their discretion on whether value was derived by the insolvent person.

In 1932, the Appellate Division was called upon to interpret section 24 of the Insolvency Act 32 of 1916 (hereafter 1916 Insolvency Act) in *Estate Wege v Strauss*.¹⁸ The court did not deal with the entire “disposition not made for value” phrase. It decided to deal only with the word “value”. The court was of the view that there was nothing in the 1916 Insolvency Act that demonstrated that the Legislature intended to give some technical meaning to the word “value”, apart from its ordinary meaning.¹⁹ The ordinary meaning simply entails that there was some benefit provided to the insolvent. The court did not provide clarity on whether the adequacy of the benefit that was received played any role in the analysis and the extent to which the benefit might be seen as so insignificant that it could be regarded as having no value at all.

In *Estate Wege*, the court further seemed to suggest that where payment is promised in a transaction but not yet made and there are ways in which payment can be enforced, then such would be regarded as a disposition for value.²⁰ This seemed to suggest that if there are mechanisms to enforce payment on the disposition, the fact that at the time the disposition was made there was no payment, would not render the disposition to be that without value. In that, while the value may not have been derived at the time of the transaction, such value would be given eventually. The disposition must not have decreased the trustee’s estate. The court held that

[t]he object of [section] 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 his assets away without receiving any ... contingent advantage in return.²¹

If there is no contingent advantage gained by the insolvent estate, then the disposition will be one not for value. The court’s approach was an important starting point in the interpretation of what is actually meant by the phrase “not made for value”, even though this court did not thoroughly engage what this phrase entails, and in particular, the adequacy issue. In 1926, section 24 of the 1916 Insolvency Act was amended by section 13 of the Insolvency Amendment Act 29 of 1926 and in 1936, the 1916 legislation was repealed and replaced by the 1936 insolvency legislation.²²

17 *Estate Wicks v Wicks* 1929 (CPD) at 494.

18 1932 (AD) at 76 (hereinafter *Estate Wege*).

19 *Estate Wege* at 82.

20 *Estate Wege* at 82.

21 *Estate Wege* at 84.

22 S 1 of the Insolvency Act.

3 Determination of value

3 1 Overview

It is submitted that it is generally not ideal to place unnecessary legislative restrictions on those who conduct business with each other at arm's length and in good faith. However, there is a need to recognise that not everyone transacts in good faith and may conclude certain transactions knowing very well that there are other potential people who might be prejudiced by such transactions.²³ This is true for people who owe other people but proceed to dispose of their properties to some of their creditors without receiving any appreciable benefit and are eventually declared insolvent by the court. Section 26(1) of the Insolvency Act is aimed at responding to such situations by empowering trustees once sequestration orders have been granted to investigate transactions concluded by insolvent persons before such orders were granted to impeach such transactions.²⁴ In *Estate Jager v Whittaker*,²⁵ the Appellate Division viewed section 26 of the Insolvency Act as an important tool that trustees can use to protect the interests of the insolvent persons' creditors through the institution of court proceedings to set aside transactions which were made without value.²⁶ This section provides that:

[e]very disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent —

- (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
- (b) within two years of the sequestration of his estate, 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. Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

23 See generally *Ex Parte Kahn* 1919 (TPD) 75 at 77.

24 See generally *Stewart v Pillary* (8855/2017P) [2022] ZAKZPHC 49 para 15.

25 1944 (AD) 246 (hereafter *Estate Jager*).

26 *Estate Jager* at 250. See also Boraine and Keay "Challenging Pre-Bankruptcy Dispositions: An Australian-South African Comparison" 1998 *South African Mercantile Law Journal* 267, where the authors correctly argue that "[i]n South Africa, any disposition not made for value by the insolvent can be set aside by the court if the trustee can prove, in instances where the disposition was made more than two years before the date of sequestration, that immediately after the disposition was made the person disposing of the property was insolvent (liabilities exceeded assets). If the disposition was made less than two years prior to sequestration, the court can set it aside if the person who benefitted by the disposition cannot prove that the assets of the insolvent exceeded his or her liabilities immediately after the disposition was made".

This provision is aimed at protecting the interests of creditors through powers provided to trustees to approach courts to set aside pre-sequestration transactions that were made without insolvent persons deriving value in return.²⁷ To determine which transactions can be set aside, the legislature described the word “disposition” widely to cover not only the alienation of property but also agreements that create rights and obligations.²⁸ In terms of section 1 of the Insolvency Act, a disposition is described as

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 a disposition in compliance with an order of the court.

This is a process that leads to the insolvent person parting ways with a particular asset.²⁹ This description assists in the determination of whether, as a matter of fact, insolvent persons have relinquished their real rights to identified assets, either by way of alienation or contract. A contract generally creates an underlying obligation to perform or receive performance. Thus, transactions regarding payments made by insolvent persons to creditors who did not provide any performance in return in circumstances where there was no underlying obligation to make such payments will amount to dispositions made not for value.³⁰ In *Silver v Standard Bank of SA Ltd*,³¹ the court was of the view that the expression “for value” in the context of transactions concluded by persons before being declared insolvent means pecuniary value in the form of something sounding in money.³² This was a somewhat restrictive description that was merely focused solely on financial benefits. This case was discussed in the context of its specific circumstances, where the court was not required to evaluate circumstances where the insolvent may have benefitted by means other than payment of money.

Nonetheless, subsequent cases clarified that monetary payments are not the only indicators of value. In *Goode, Durrante and Murray Ltd v Hewitt and Cornell*³³ the court held that the word “value” is not restricted to a monetary or tangible material consideration.³⁴ The insolvent would have derived value if the creditor that benefited from the transaction demonstrated benefits derived by the insolvent person that came directly from the transaction.³⁵ It is submitted that where the insolvent person entered into a transaction that enabled it to be financially stable due to the opportunities created by such transaction, that would be a clear indication of value. The court in *Goode* accepted that a transaction that

27 *Estate Jager* at 250.

28 As above.

29 *Moodliar v Freese* 2019 JOL 49424 (WCC) para 25.

30 *Bowman* at 72.

31 1923 (OPD) 126 (hereafter *Silver*).

32 *Silver* at 127.

33 1961 4 SA 286 (N) (hereinafter *Goode*)

34 *Goode* at 291.

35 As above.

led to the continued financial stability of the insolvent company and the group of companies that the insolvent company belonged to was for value.³⁶ However, the court in *Langeberg koöperasie BPK v Inverdoorn Farming And Trading Company Ltd*,³⁷ as it will be shown below, was of the view that the potential for financial stability does not *per se* demonstrate value, particularly when liquidation is imminent.³⁸ The facts of each case are unique and must be assessed in totality to determine whether in such circumstances there insolvent derived value.³⁹

It is clear that once the issue of relinquishment of rights on a certain asset has been determined, the inquiry becomes whether “value” was promised or received from the transaction. To understand how value should be understood, there was a need for courts to provide some guidance, which they sought to do through the crafting of several tests that they used to determine whether in a specific transaction the insolvent person derived value.

3 2 *Quid pro quo*

In 1944, the Appellate Division attempted to provide guidance on how the phrase “disposition not made for value” should be approached. In *Estate Jager*, the court held that this phrase in its ordinary signification means “a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*”.⁴⁰ The court in this case did not engage what *quid pro quo* entails in the context of section 26(1) of the Insolvency Act having regard to the complexities surrounding certain transactions, where value may not necessarily be monetary. The concept of *quid pro quo* generally entails a reciprocal exchange of something for a particular benefit in return.⁴¹ This concept requires one of the parties to do something such as selling their asset to another person who commits to reciprocate by also doing something, such as making payment for that asset.⁴² It becomes challenging when the reciprocal performance is not monetary or the payment provided is less than what the asset is worth. Under these circumstances, it will become challenging to assess whether there is value. At a very basic level, it appears that in *Estate Jager* the court’s characterisation of *quid pro quo* in the context of section 26(1) of the Insolvency Act was more in line with the insolvent’s

36 As above.

37 1965 2 All SA 463 (A) (hereinafter *Langeberg*)

38 *Langeberg* at 475.

39 See *Goode* at 291, where it was stated that “[w]hether an insolvent has received ‘value’ for a disposition must be decided by reference to all the circumstances under which the transaction was made”.

40 *Estate Jager* at 250. See also *Bowman* at 73, where this phrase was also used to explain what the phrase “dispositions made not for value” means. See also *Pro-Med Construction CC v Botha* (2012) ZAGPJHC 145 para 20.

41 Robertson et al “The appearance and the reality of quid pro quo corruption: An empirical investigation” 2016 *Journal of Legal Analysis* 377.

42 Lewinsohn “Paid on both sides: Quid pro quo exchange and the doctrine of consideration” 2020 *Yale Law Journal* 695.

relinquishment of rights on a certain property without receiving anything in return.

This approach suggests that there must be something that the insolvent person should have received or benefited from the transaction, failing which the disposition will be not for value. In *Estate Jager*, the court opined that the most obvious example of a “disposition not made for value” is a donation.⁴³ It is generally accepted that a donation is

an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality, whereby a person under no legal obligation undertakes to give something ... to another person ... in return for which the donor receives no consideration nor expects any future advantage.⁴⁴

Unfortunately in practice, transactions that insolvent persons conclude do not resemble classical cases of donations, and the courts are required to examine these transactions carefully to determine whether they can be declared dispositions made not for value. It is also worth noting that even donations when properly assessed, may have been made with a view to gain some form of advantage which may be clear some time in the future.

3 3 Fair and adequate return

With the passage of time, courts continued to grapple with the word value when trustees claim that insolvent persons did not derive any benefit from pre-sequestration transactions.⁴⁵ For example where insolvent persons did not receive any payment in some of the transactions they concluded before sequestration orders were granted. The complexity of some of the transactions led courts to introduce concepts such as nominal value, insufficient value, as well as fair and adequate return when determining whether there was value in a particular transaction.⁴⁶ For instance, in *Inverdoorn*, the court had to determine whether a subsidiary insolvent company derived value from binding itself as a surety and co-principal debtor of its parent company, where its liabilities exceeded its assets after the mortgage bond was registered.⁴⁷ This suretyship prevented the creditor from pressing the parent company (and by extension all the subsidiary companies in the group) into liquidation.⁴⁸ The creditor argued that the insolvent subsidiary company derived value from the principal debt it was called

43 *Estate Jager* at 250.

44 Joubert, Rabie and Faris *The law of South Africa* Vol 8 Part 1 (2005) para 301. This definition has received judicial endorsement. See *DE v CE* 2020 1 All SA 123 (WCC) para 38; *Mcbride v Jooste* 2015 JOL 33891 (GJ) para 14; and *Ashbury Park (Pty) Ltd v Dawjee* 2002 1 All SA 137 (N) at 141.

45 See generally *Boerdery (EDMS) BPK (in liquidation) v Trust Bank of Africa LTD* 1986 2 SA 850 (A) (hereafter *Boerdery*) and *Inverdoorn Farming and Trading Co Ltd (in liquidation) v Langeberg Kooperasie Bpk 1964* (2) PH C16 (CPD) (hereafter *Inverdoorn*).

46 *Inverdoorn* at 58

47 As above.

48 As above.

upon to settle.⁴⁹ Further that the settlement amount was to be recovered from the parent company.⁵⁰ In dismissing this argument, the court was of the view that value “means adequate value and not some mere trifling consideration”.⁵¹

This approach appears to be in line with the approach adopted in *Bloom’s Trustee v Fourie*,⁵² where the court interpreted the word “value” under section 24(1)(b) of the 1916 Act, which was replaced by section 26(1) of the Insolvency Act to mean “adequate value” or “‘just’ and ‘valuable consideration’”. The court did not provide any analysis of what these phrases mean in the context of dispositions not made for value. It nonetheless, endorsed the view that “value when applied without qualification to property of any description necessarily means the price which it will command in the market”.⁵³ However, in *Bloom’s*, the court cautioned that emphasis on what the market commands may lead to dispositions of assets of large value being sold for entirely inadequate consideration or for merely trifling consideration and the trustee being prevented from setting them aside as dispositions, not for value.⁵⁴ In other words, what the market demands may not necessarily be the true value of the asset in question and its disposal may lead to the prejudice of other creditors upon insolvency. What would amount to inadequate consideration to the extent that there will be no value derived was unclear and required judicial clarity. The Appellate Division in *Swanee’s Boerdery (EDMS) BPK (in liquidation) v Trust Bank of Africa LTD*,⁵⁵ held that the valuable consideration in *Bloom’s* was no longer applicable in light of how it defined value in the cases of *Estate Wege* and *Estate Jager*.⁵⁶

As such, subsequent courts did not engage the concept of valuable consideration⁵⁷ but adopted the phrase “adequate value” in determining whether the disposition is not for value. Some of the decisions did not refer to the phrase *quid pro quo*, thereby causing some confusion about whether a different standard was to be adopted to determine whether there is value in any transaction that is sought to be set aside as disposition, not for value. In this approach, it appears that the thinking was that even if the insolvent derived some benefit, courts were duty-

49 As above.

50 As above.

51 As above. The *Inverdoorn* decision was unsuccessfully appealed to the Appellate Division. In its majority decision, the Appellate Division in *Langeberg Koöperasie BPK v Inverdoorn Farming and Trading Company Ltd* 1965 2 All SA 463 (A) at 46 (hereafter *Langeberg*) noted that “... the question whether an insolvent has received value for a disposition of property is one which must be decided by reference to all the circumstances under which the transaction was made”.

52 1921 TPD 599 (hereinafter *Bloom’s*) at 601.

53 As above.

54 As above.

55 1986 2 SA 850 (A) (hereinafter *Swanee’s*).

56 *Swanee’s* at 869.

57 See, for instance, *Cronje v De Paiva* 1997 2 All SA 80 (B).

bound to assess whether the benefit derived was adequate under the circumstances. In *Inverdoorn*, the court did not provide the criteria that could be used to determine the adequacy of the benefit received by the insolvent with a view to ascertaining whether a particular transaction had value. However, the court appeared to suggest an assessment of a “fair and adequate return to the company” which would benefit creditors should the company be insolvent as a test that could be utilised to determine “adequate value”.⁵⁸ It appears that the court, in this case, was of the view that a return to the company that is remote and illusory will not amount to a fair and adequate return.⁵⁹ Unhappy with this decision, the creditor appealed to the Appellate Division.⁶⁰ In dismissing the appeal, the Appellate Division held that for the insolvent company to have received value, “some benefit must actually have accrued or, at least have been reasonably likely to accrue in the future” to the insolvent company.⁶¹ Unfortunately, the court in *Langeberg* did not engage with the concept of “adequate value” and how it should be determined, despite the concept of adequacy gaining judicial momentum.

Most disappointingly, the court *Cronje v De Paiva*⁶² approved a statement that describes the phrase disposition not for value as “disposition for no or inadequate benefit or value is or has been received or promised as a *quid pro quo*”.⁶³ This court did not clarify what justified the adoption of the combination of different tests (as adopted in *Inverdoorn* and *Estate Jager* respectively) in the present case. The court did not explain in what way these two tests on their own were insufficient to describe dispositions without value. Furthermore, the court did not explain the benefits of the expanded test. This added to the confusion of how, when, and if each of these tests applies, since they were stated in the alternative.⁶⁴

3 4 Disposition made for less than the true value

In *Terblanche v Baxtrans*,⁶⁵ the court’s failure to adequately explain what is actually meant by “fair and adequate value” led to practical challenges when insolvent persons disposed of assets for less than their true value. Before the court granted the sequestration order in *Terblanche*, the

58 *Inverdoorn* at 59, where the court reasoned that “one may ask the question – would any reasonable board of directors, which took the trouble to investigate and weigh up the facts and circumstances, look upon this disposition as providing for a fair and adequate return to the company? I think not. In my view the transaction was gravely detrimental to the interests of the creditors of the company”.

59 *Inverdoorn* at 60.

60 *Langeberg* at 464.

61 *Langeberg* at 475 38. See also *Rousseau v Visser* 1989 4 All SA 127 (C) at 146.

62 1997 2 ALL SA 80(B) (hereafter *Cronje*).

63 *Cronje* at 86. See also De la Rey Mars *The law of insolvency in South Africa* (1988).210-211.

64 *Cronje* at 86.

65 1998 3 SA 912 (C) (hereafter *Terblanche*).

insolvent sold his tractors and trailers worth R1,276,000 to one of his creditors for R450,000.⁶⁶ Upon his appointment, the trustee brought an application to set aside this transaction as a disposition not made for value. The trustee argued that dispositions that are made for less than the true value of the disposed assets are *prima facie* without value.⁶⁷ The creditor argued that the concept of true value was vague and imprecise because it is not clear whether it refers to book value, market value, replacement value of the disposed asset, or something else.⁶⁸ The creditor further argued that the adequacy of the value was an immaterial aspect of the transaction.⁶⁹ In reply, the trustee was of the view that where the circumstances do not demonstrate that some other benefit was received by the insolvent in return for the disposition, then the creditor's contention would mean that the value provided is far less than the true value of the asset would render the disposition immune from attack under section 26 of the Insolvency Act.⁷⁰ In determining this issue, the court started by criticising the parties for their failure to distinguish between the concepts of "no value" and "inadequate value" and their lack of recognition of the relationship between these concepts in the context of section 26 of the Insolvency Act.⁷¹ The court rejected the submissions that section 26 can only apply where there is a total absence of value and that inadequate value is always *prima facie* evidence of "no value at all".⁷²

The court reasoned that "[t]he question of adequacy should ... not be equated with the concept of illusory or nominal value. Illusory or nominal value is what those words suggest - no value at all".⁷³ The court attempted to differentiate between the concept of adequacy and those of illusion or nominal value in the context of dispositions not made for value. The court held that:

"Illusory value" is merely an illusion and "nominal value" is value in name only. Adequacy, on the other hand, in relation to value connotes a far more extensive idea. 'Illusory value' and "nominal value" will always be inadequate. However, a price or a benefit may be inadequate in relation to the value of the item but may nevertheless not amount to illusory or nominal value.⁷⁴

This approach suggests that when determining whether there is value, each case should be dealt with on its own merits. Even though the court sought to distinguish between these concepts, it did not provide clarity on how applications to set aside dispositions where inadequate value has

66 *Terblanche* at 914-915.

67 *Terblanche* at 916.

68 As above.

69 As above.

70 As above. The trustee argued that "then a disposition of assets with a value of R2 million for R10 would be immune from attack under s 26".

71 *Terblanche* at 916.

72 *Terblanche* at 917.

73 As above.

74 As above.

been given should be approached. In particular, whether section 26(1) of the Insolvency Act should find application in such pre-liquidation transactions. When some value is given, there is no clarity as to when value will be regarded as a mere illusion or being of value in name only. Nonetheless, the court emphasised that when trustees are of the view that the benefit associated with the disposition is illusory or nominal in that it amounts to no value at all, then this must be pleaded and proved.⁷⁵ This further suggests that it will then be at the discretion of the court whether any value was derived in a particular case, which may also lead to similar cases being decided differently.

3 5 No value at all

In *Strydom*, the Supreme Court of Appeal was presented with a golden opportunity to reflect on section 26(1) of the Insolvency Act to clarify not only what exactly the phrase “disposition not made for value” means but also how value should be determined for this provision to find application. In this case, before being declared insolvent, the company sold its shares to different purchasers for less than the reasonable market value of those shares.⁷⁶ Upon being appointed, liquidators of the company found transactions that led to the sale of these shares impeachable and applied to the court to set them aside as dispositions not made for value in terms of section 26(1) of the Insolvency Act.⁷⁷ In determining whether to set aside these transactions, Van der Merwe JA correctly observed that previous cases did not definitively decide whether this provision “contemplates a claim based on a disposition for inadequate or insufficient value as opposed to no value at all”.⁷⁸ In fact, none of the cases decided before *Strydom* adequately explained how value should be established to determine whether section 26 is applicable. All these cases adopted vague tests such as valuable consideration, inadequate value, nominal value, and illusory value without providing the proper context within which these tests should be applied.

In *Strydom*, the court embarked on a survey of selected previous cases and summarised the way the courts in these cases tried to define the word “value” in the context of section 26 of the Insolvency Act without commenting on the soundness or otherwise of their approaches. The court distinguished these previous cases on the basis that they were more focused on the nature of the transactions before them as opposed to the meaning of the phrase “disposition not made for value” in section 26(1) of the Insolvency Act, which was the main issue before the court in *Strydom*.⁷⁹ On the one hand, the creditors that benefited from the dispositions argued that this phrase meant no value at all.⁸⁰ On the other

75 As above.

76 *Strydom* paras 4-5.

77 *Strydom* para 1.

78 *Strydom* para 10.

79 *Strydom* para 3.

80 *Strydom* para 24.

hand, the liquidators argued that this phrase meant less than the reasonable market value thereby yielding counter-performance that does not amount to a fair return or equivalent.⁸¹ After assessing these arguments, and in line with the view that insolvent persons must not be allowed to impoverish their estates by giving their assets away without receiving any present or contingent advantage in return,⁸² Van der Merwe JA opined that section 26(1) “was intended to apply only to gratuitous dispositions”.⁸³

At first sight, Van der Merwe JA’s approach appears to be correct, but on careful consideration, his approach appears to be very simplistic. Gratuitous dispositions are “[b]estowed or granted without consideration or exchange for something of value”.⁸⁴ This approach does not assist in explaining what value is and how it should be determined in the context of section 26 of the Insolvency Act. With respect, the court’s attempt to distinguish previous cases from *Strydom* on the basis that those cases were more concerned with the nature of the transactions before them is not convincing. In fact, this was a misdirection that prevented Van der Merwe JA from adequately interpreting what the phrase “disposition not for value” means. This phrase is intrinsically linked to the nature of the transactions that insolvent persons concluded before their sequestration or liquidation. It is the nature of those transactions that provide a sense of whether any value was derived or was to be derived. Failure to accord the necessary importance to the nature of the transactions, in the same way, previous cases did, led Van der Merwe JA to take a blanket approach to the concept of value. Van der Merwe JA concluded that the ordinary meaning of the phrase “disposition not for value” means “for no value at all”.⁸⁵

In coming to this simplistic and unwarranted conclusion that is likely to lead to serious practical consequences, Van der Merwe JA did not adequately consider the position where there might be some form of value, but that value is insignificant and prejudicial to other creditors – particularly where the disposition had the effect of reducing the estate of the insolvent person. In justifying his approach, Van der Merwe JA was of the view that an approach that would subject dispositions that are less than the reasonable market value or where a fair or equivalent return was not provided, to the provisions of section 26(1) of the Insolvency Act would amount to an absurdity.⁸⁶

The court reasoned that this approach will prejudice *bona fide* purchasers who, unaware of their sellers’ financial circumstances and in the ordinary course of business, purchase assets for less than their

81 *Strydom* para 36.

82 *Estate Wege* at 84

83 *Strydom* para 32.

84 Farlex “The free dictionary” <https://legal-dictionary.thefreedictionary.com/gratuitous> (last accessed 2023-02-20).

85 *Strydom* para 24.

86 *Strydom* para 33.

reasonable market value or do not provide fair or equivalent returns for what such properties are worth.⁸⁷ The court opined that, by making this provision applicable under these circumstances, these purchasers would be forced to return assets without the right to reclaim purchase prices.⁸⁸ Surely, creditors that transacted in good faith and at arm’s length should be able to plead and prove their defences. However, this does not justify, not subjecting these transactions to the “section 26(1) judicial scrutiny” where trustees and liquidators can satisfy the court that insolvent persons did not derive value from transactions sought to be impeached, particularly those transactions where insignificant or inadequate value was given to the prejudice of other creditors.

It is submitted that the Supreme Court of Appeal missed a golden opportunity of crafting a business-like workable test that can be used to determine whether a particular transaction should be set aside as a disposition not made for value in terms of section 26(1) of the Insolvency Act. With respect, it is submitted that the Supreme Court of Appeal did not settle the interpretation of the phrase “dispositions not made for value” in section 26(1) of the Insolvency Act. The court, while mentioning them in passing, did not adequately deal with the concepts of inadequate value, *quid pro quo*, nominal or illusory value with a view of clarifying why they are not suited to provide a contextual and purposive interpretation of the phrase “dispositions not made for value”.

The court in *Strydom*, did not clarify why the blanket approach of “no value at all” was a more appropriate test to apply in the interpretation of this phrase. This approach will have the unintended effect of closing the door on trustees and liquidators and prevent them from approaching courts to test whether there was a genuine commercial transaction with the expectation of some advantage at the time the transaction was entered into, which was equal to or more than the risk incurred by the creditor that benefited from the disposition.⁸⁹ It is submitted that section 26(1) of the Insolvency Act should apply to transactions that led to one of the parties being sequestrated or liquidated where such a party did not receive adequate compensation or benefit in return.⁹⁰ In my view, the concept of adequacy, irrespective of the nature of the benefit provided to the insolvent person, is central to the determination of whether the insolvent derived value from the transaction sought to be impeached.

87 As above.

88 As above.

89 See *Eckhoff v Hartshorne* (2022) ZAWCHC 68 para 30. See also generally *Umbogintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank* 1987 4 SA 894 (A).

90 See Mabe “Setting aside Transactions from Pyramid Schemes as Impeachable Dispositions under South African Insolvency Legislation” 2016 *PER* 3.

4 Desirable approach for dispositions without value

At this stage, it is not clear from the Supreme Court of Appeal's reasoning and conclusion in *Strydom*, whether post this decision lower courts should not apply all the other tests that were applied before this decision and only focus on whether insolvent persons derived no value at all when determining whether dispositions before them are made not for value. In other words, did the Supreme Court of Appeal intend a rule of thumb that the phrase "dispositions not made for value" (in terms of section 26(1) of the Insolvency Act) then means "for no value at all"? The Supreme Court of Appeal rejected the liquidators' interpretation that "dispositions for less than the 'reasonable market value' or a 'fair return or equivalent' are not made for value".⁹¹ This was surprising given its reasoning that

it is an established principle that 'value' under [section] 26(1) includes benefits that do not have a reasonable market value and in respect of which a fair return or equivalent could not be evaluated or expressed in monetary terms.⁹²

With respect, a blanket approach of subjecting only those clear-cut transactions where no value at all was given appears to be unbusinesslike and would provide an unwarranted defence to beneficiaries of transactions that were highly prejudicial to the insolvent persons creditors and which led to the insolvency of insolvent persons. While the approach in *Strydom* provides an answer to transactions where insolvent persons clearly did not receive any benefit in return for their performance, it, unfortunately, does not provide answers to transactions where some benefit was derived but such benefit is viewed as inadequate. The court's approach in *Strydom* is too narrow and may not be responsive to the practical realities of business conducted in circumstances where one of the parties thereto is subsequently sequestered or liquidated. Clear legislative guidelines, or at the very least judicial guidelines, regarding what amounts to inadequate value are urgently needed. It is submitted that transactions that are proven to have provided inadequate value, which may not necessarily be nominal, should be subjected to section 26(1) of the Insolvency Act to enable trustees and liquidators to prove in what way those transactions were made "not for value".

5 Conclusion

Trustees and liquidators have a duty to approach the court to set aside certain transactions made by insolvent persons before such persons were declared insolvent to recover assets that were unlawfully disposed

⁹¹ *Strydom* para 34.

⁹² As above.

of.⁹³ Courts are generally approached because a disposition without value is voidable and not per se invalid.⁹⁴ In this paper, the requirements that trustees and liquidators should satisfy to be successful with their applications to set aside pre-liquidation, or sequestration, transactions as dispositions without value were deliberately not discussed, because they are adequately discussed elsewhere.⁹⁵ It suffices to mention that a disposition by the insolvent person must have been made not for value either within or after two years and the trustee or liquidator must prove that immediately after the disposition was made the assets of the insolvent exceeded the insolvent’s liabilities.⁹⁶

The focus of this paper was on the judicial interpretation of the phrase “disposition not for value”. It was shown that initially, the judicial test adopted to interpret this phrase was whether the insolvent obtained just and valuable consideration. It was demonstrated that some courts evaluated whether any benefit or value was received by or promised to the insolvent person as a *quid pro quo*. While certain courts assessed whether the value that the insolvent person derived was inadequate, nominal, or illusory, it was shown that notwithstanding, the adoption of these different tests, the application of a particular test and the context within which it should be applied to determine whether there was value in a particular transaction remained difficult to understand.

This led the Supreme Court of Appeal to deviate from all these tests and try to adopt an ordinary and literal interpretation by holding that the phrase “disposition not made for value” means circumstances where no value *at all* was provided. It was argued that the Supreme Court of Appeal’s approach is not sound and may lead to unintended consequences in practice by shielding prejudicial pre-liquidation, or sequestration, transactions from judicial scrutiny. This may prevent trustees and liquidators from initiating processes aimed at reversing objectionable and prejudicial transactions that led to the insolvent

93 Boraine “A perspective on the doctrine of voidable dispositions in South African insolvency law” 2000 *International Insolvency Review* 68.

94 *Harcourt v Eastman* 1953 2 All SA 1 (N) at 1.

95 See Bertelsmann et al *Mars The law of insolvency in South Africa* 10ed (2019) 275; Sharrock, van der Linde and Smith *Hockly’s Insolvency Law* 9ed (2012) 140; Boraine 2000 *International Insolvency Review* 68: “In South Africa any disposition not made for value by the insolvent can be set aside by the court if the trustee can prove, in instances where the disposition was made more than two years before date of sequestration, that immediately after the disposition was made, the person disposing of the property was insolvent (liabilities exceeded assets). If the disposition was made less than two years prior to sequestration, the court can set it aside if the person who benefited by the disposition cannot prove that the assets of the insolvent exceeded his or her liabilities immediately after the disposition was made. Where it is proven that at any time after such a disposition has been made, the insolvent’s liabilities exceeded his or her assets by less than the amount of the disposition, the extent to which it can be set aside is limited to the amount of such excess”. (Footnotes omitted). See also Nathan *South African Insolvency Law with rules and forms* (1936) 134-138.

96 *Van Wyk Van Heerden Attorneys v Gore* (2022) ZASCA 128 para 4.

persons' insolvency that occurred before sequestration or liquidation orders were granted by the court.⁹⁷ Most importantly, it was argued that there is a need for adequate legislative guidelines that can provide guidance on what should be regarded as inadequate value in the context of section 26(1) of the Insolvency Act.

⁹⁷ *Strydom* para 24.