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DISPUTE RESOLUTION ALERT

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Absolute or relative: The meaning of void in section 34 (1) of the Insolvency Act

The recent case of *CJ Pharmaceuticals Enterprises (Pty) Ltd and Others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy and Another* [2020] JOL 49266, has provided some useful clarification on the meaning of the word "void" in the context of section 34(1) of the Insolvency Act 24 of 1956 (Act).

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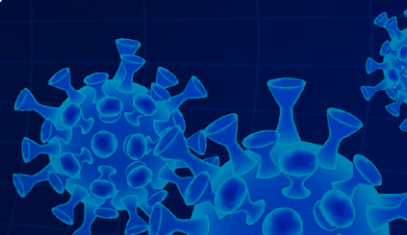
The case concerned whether a transfer of a business by a company in financial distress is void in terms of section 34(1) of the Act. Section 34(1) requires that notice of the intended transfer be published in the Gazette and two issues of an English and Afrikaans newspaper in the district in which that business is carried on, between 60 and 30 days of date of such transfer. Failing this, the transaction is "void against his [the company's] creditors" for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated during that six-month period.

The First Respondent, Main Road Centurion 30201 CC t/a Albermarle Pharmacy (Main Road), transferred its business to the Second Respondent, Arrie Nel Pharmacy Group (Pty) Ltd (Arrie Nel) on 30 November 2019. Main Road did not publish a notice as required by section 34(1) of the Act prior to such transfer, although it had offered to sell the business to the Applicants, before offering it to Arrie Nel. The Applicants, being creditors of Main Road, sought an order declaring the transfer to be null and void, thereby setting aside the transfer and ordering the business to be transferred back to Main Road.

The court was called upon to decide on two very interesting questions. Firstly, on the meaning of "void" in terms of section 34 of the Act and, secondly, on the meaning of "void" in terms of the common law, which will be discussed in more detail below.

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Absolute or relative: The meaning of void in section 34 (1) of the Insolvency Act...*continued*

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The court considered the meaning of void based on whether its meaning in the context of section 34(1) was absolute or relative. Void would have an absolute meaning if the transfer is considered void against all parties for all purposes. Void would have a relative meaning if section 34(1) applied specifically to creditors insofar as they had a claim against the trader whose business had been transferred. Thus, a relative interpretation would mean that the transfer is only void for the purpose of recovering the creditors' debt, rather than void generally.

This relative interpretation of void is applicable in section 34(3) of the Act which states that any person who has a claim against the trader of the business being sold, who has instituted proceedings against the trader in any court of law, and the transferee in the transaction was aware of the proceedings instituted, or who has instituted proceedings at a division of the Supreme Court with jurisdiction in the area in which the business is conducted, such transaction is void "for the purpose of such enforcement". This section allows for creditors falling within the aforesaid category to still enforce any judgment in their favour against the assets of the business transferred, irrespective of such assets being in the hands of the purchaser. It is clear that the meaning of void in section 34(3) is limited to creditors specifically enforcing their claims. The Applicants were not creditors in terms of section 34(3) of Main Road but argued that the lack of restrictive wording as in section 34(3) supported an interpretation of void in section 34(1) being absolute.

The Applicants contended that section 34(1) is meant to afford protection to creditors of dishonest traders attempting to dispose of their property without paying their debts, and thereby preferring certain creditors over others. Therefore, the use of the word void in this context should advance that purpose. The wording of section 34(3) clearly limits the meaning of void as being applicable insofar as it covers the amount of the claim the creditor is entitled to. Section 34(1) on the other hand has no such limitation in its wording, thereby suggesting an interpretation that a section 34(1) transaction is void in its entirety.

The court in the case of *Galaxi Melodies Pty Ltd v Dally NO 1975* and *Rustenburg Kloof Kiosk v Friedland, Hard, Cooper & Novis 1973* relied on an interpretation of section 34(1) that found that the transfer is void for the purpose of any recovery that creditors have against the assets of the business, and not void absolutely. The court thus confirmed that a relative interpretation is applicable to section 34(1).

On these facts, this interpretation means that Main Road's transfer was not outright invalid, but Main Road's creditors could have treated the transfer as void for purposes of recovering their debts and possibly levied execution on an asset included in the transfer, irrespective of it was held by Main Road or Arrie Nel. This was however not the relief claimed by the Applicants, which wanted the business to be transferred back to Main Road.

Absolute or relative: The meaning of void in section 34 (1) of the Insolvency Act...*continued*

Under the common law, the *actio pauliana* applies to dishonest dispositions by an insolvent in which there was a transfer wherein the insolvent's assets were diminished with the intention to defraud creditors and provide an unfair advantage to one creditor over others.

Under the common law, the *actio pauliana* applies to dishonest dispositions by an insolvent in which there was a transfer wherein the insolvent's assets were diminished with the intention to defraud creditors and provide an unfair advantage to one creditor over others. On the facts, there was no indication that Main Road intended to defraud the Applicants, especially because the Applicants were given first option to purchase the business. Furthermore, the Applicants were aware of the intended transfer, and there was no indication that the transaction was intended to be a secretive transfer.

The application was accordingly dismissed.

It is clear that the meaning of void *vis-à-vis* creditors in the context of section 34(1) of the Act applies only insofar as it allows creditors of an insolvent to recover the debt owed to them by treating the transfer as void. This interpretation is an understandable one, as a creditor's interest in transfers made by a debtor only extends as far as a debt is owed to them. The transfer need not be treated as void in its entirety, particularly if there is no indication of fraud in the transaction, and no other creditors claimed against the insolvent estate in the six-month period. We therefore encourage clients to be aware of the section 34(1) requirements, lest a good deal turns into a void transaction.

Lucinde Rhoodie, Ngeti Dlamini and Charissa Barden

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Ensuring termination does not amount to repudiation

Repudiation is defined in *Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A)* as a situation “Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated...”.

Contractual relationships in business can easily become complex when one party appears to be unwilling to perform its obligations. Cancellation of a contract is a general remedy for breach of contract but can easily become mischaracterised due to the complexity of the relationship.

The Supreme Court of Appeal (SCA) in *MTN Service Provider (Pty) Ltd v Belet Industries CC t/a Belet Cellular (1077/2019) [2020] ZASCA 07* recently determined if MTN Service Provider (Pty) Ltd’s (MTN) cancellation of a dealer agreement (the agreement) concluded with Belet Industries CC t/a Belet Cellular (Belet) constituted a repudiation of the agreement.

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The summary of the MTN case is as follows: During 2010 MTN and Belet concluded a dealer agreement in terms of which MTN appointed Belet to market, promote, and facilitate distribution by MTN of network services and stock. In exchange for Belet’s services, Belet received commission and discounts on pre-paid stock.

The agreement allowed MTN to conduct routine general audits on Belet’s stores and, in preparation of the September 2011 audit, Belet’s general manager instructed shop assistants to place several ‘obsolete’ items into black bags. The black bags were placed in a trolley and kept outside the store.

MTN claimed that some items in the trolley were goods not supplied by MTN and that the goods were held in violation of the terms of the agreement. Further, Belet’s actions in removing the items from the store sought to frustrate the completion of the audit in a manner which irreconcilably affected the trust between the parties. MTN proceeded to cancel the agreement.

Pursuant to MTN’s cancellation of the agreement, MTN disposed Belet of its business by placing guards outside of the store. Belet claimed that MTN’s termination of the agreement constituted a repudiation of the agreement and Belet was entitled to claim damages suffered.

Ensuring termination does not amount to repudiation...*continued*

The SCA held that Belet did not repudiate the agreement and that MTN was not entitled to cancel the agreement.

The SCA agreed with the lower court's findings that there was no evidence that Belet had breached the agreement by placing items in black bags and removing them from the store as Belet was not contractually obligated to keep any of the items in the store. The SCA held further that MTN did not ask Belet for an explanation regarding the goods in the trolley nor had it given notice to Belet to remedy any purported breach.

The SCA held that Belet did not repudiate the agreement and that MTN was not entitled to cancel the agreement. Therefore, MTN's cancellation constituted a repudiation of the agreement and MTN was liable for damages incurred by Belet.

In conclusion, a terminating/aggrieved party must first consider all facts and clearly establish repudiation before it terminates the agreement. Wrongful termination of an agreement will ordinarily be seen as repudiation, allowing the other party to accept the repudiation, cancel and claim any damages suffered.

Rishaban Moodley and Neha Dhana



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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