28 NOVEMBER 2018

DISPUTE RESOLUTION ALERT

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CAN SETTLEMENT AGREEMENTS HAVE THE EFFECT OF SETTING ASIDE *IN REM* JUDGMENTS?

"A judgment *in rem* determines the objective status of a person or thing" (Froneman J quoting Tshabalala v Johannesburg City Council 1962 (4) SA 367 (T) at 368H). More distinctly, "[a] judgment *in rem* is an adjudication, pronounced upon the status of some particular subject-matter... founded on a proceeding instituted...against or upon the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be".

THE AMBIT OF SECTION 420 OF THE COMPANIES ACT

In the recent reported judgment of *De Villiers v GJN Trust* (756/2017) [2018] ZASCA 80, the Supreme Court of Appeal (SCA) considered, among other things, the ambit of s420 of the Act, as well as the effect of a s420 court order, whereby the dissolution of a company is declared void.

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CAN SETTLEMENT AGREEMENTS HAVE THE EFFECT OF SETTING ASIDE *IN REM* JUDGMENTS?

The Constitutional Court found that the mere entering of a settlement agreement between the parties and making that settlement agreement an order of Court in an Appeal Court does not have the effect of setting aside a judgment in rem granted by the lower court.

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The Constitutional Court had to decide the meaning and effect of a settlement agreement on a judgment in rem in the case where such judgment was abandoned by the successful party, and the settlement agreement was made an order of court.

The Constitutional Court recently handed down judgment in the case of *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and others* [2018] ZACC 33. The Constitutional Court found that the mere entering of a settlement agreement between the parties and making that settlement agreement an order of Court in an Appeal Court does not have the effect of setting aside a judgment *in rem* granted by the lower court. This remains the case even if a party has agreed to abandon the lower court's *in rem* order.

The case concerned the award of a tender contract by Airports Company South Africa (ACSA) to Big Five Duty Free (Pty) Ltd (Big Five), to operate duty-free shops at its international airports for ten years, pursuant to a competitive bidding process. One of the parties competing with Big Five, and unsuccessful bidder, was DFS Flemingo SA (Pty) Limited (Flemingo).

The review application

Flemingo sought to review the tender granted to Big Five in the High Court. Part of the relief sought was an urgent interim interdict to prevent the implementation of the award until the review had been determined. Ultimately, Phatudi J found the award of the tender to have been unlawful and upheld the review, setting aside the tender (Phatudi J Order).

Big Five then appealed to the full bench of the High Court (Full Bench). However, before the full bench handed down judgment in the matter, Big Five and Flemingo entered into a settlement agreement. Flemingo agreed to abandon the Phatudi J Order and withdrew its review application. Without providing reasons, the Full Bench made the settlement agreement concluded between Flemingo and Big Five an order of court (Full Bench Order). No further leave to appeal was sought.

Notwithstanding the Full Bench Order, ACSA announced that it was bound by the Phatudi J Order and initiated a new bidding process.

Application for a declaratory order

Big Five launched an application seeking an order declaring ACSA bound by the Full Bench Order. The court *a quo* dismissed the application. Big Five then appealed to the Supreme Court of Appeal (SCA) which found in favour of Big Five and declared that ACSA was in fact bound by the Full Bench Order, which had had the effect of setting aside the Phatudi J Order.

ACSA appealed to the Constitutional Court had to decide the meaning and effect of a settlement agreement on a judgment *in rem* in the case where such judgment was abandoned by the successful party, and the settlement agreement was made an order of court.

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CAN SETTLEMENT AGREEMENTS HAVE THE EFFECT OF SETTING ASIDE *IN REM* JUDGMENTS?

CONTINUED

Parties must be very careful to record their intentions and purposes when entering into a settlement agreement to be made an order of court.

The Constitutional Court

The Constitutional Court upheld the appeal in favour of ACSA. In granting the appeal, the Court based its findings on the fact that the Phatudi J Order was a judgment *in rem*. The Phatudi J Order found that the tender awarded was in breach of s217 of the Constitution and that a settlement agreement, without the Appeal Court having considered the merits of the matter, could not cure the invalidity. In other words, an *in rem* judgment could not be set aside by the Full Bench without any consideration of the correctness of the merits of the matter.

In addition, the Constitutional Court found the provisions of the settlement agreement to be problematic in that they did not explicitly state that the agreement had the effect of setting aside the Phatudi J Order. The agreement stated that Flemingo *"abandons"* the Phatudi J Order, *"withdraws"* the review proceedings and that ACSA was free to implement the award of the tender to Big Five without limitation. The Court stated that it was not possible to ascertain the true intention of the parties from the settlement agreement, therefore the SCA incorrectly made a decision based on what the Court thought the intentions of the parties were. That being said, regardless of what the parties intended, the Court concluded that the settlement agreement did not have the effect of overturning the Phatudi J Order.

The essence of the judgment is that (i) in order for an *in rem* judgment to be set aside by a settlement agreement, the court making the agreement an order of court must give its sanction to the setting aside of the *in rem* judgment only if it is justified by the merits of the matter, not merely because agreement has been reached between the parties to do so; and (ii) the parties must be very careful to record their intentions and purposes when entering into a settlement agreement to be made an order of court.

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THE AMBIT OF SECTION 420 OF THE COMPANIES ACT

The dissolution of a company should not be declared void "unless some unforeseen event such as the discovery of new assets has occurred.

In the recent reported judgment of *De Villiers v GJN Trust* (756/2017) [2018] ZASCA 80, the Supreme Court of Appeal (SCA) considered, among other things, the ambit of s420 of the Act, as well as the effect of a s420 court order, whereby the dissolution of a company is declared void.

The SCA agreed with the interpretation of Hathorn J in the Natal Milling case, and consequently held that s420 of the Act, "defies precise definition", providing the court with a wide discretion to declare the dissolution of a company void.

Section 420 of the Companies Act, No 61 of 1973 (Act), states:

> When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved."

In its judgment, the SCA considered the *Goodman v Suburban Estates, Ltd (in liquidation)* and others 1915 WLD 15 case. In this case, Mason J stated, with reference to s193 of the Transvaal Companies Act, No 31 of 1909 (which was similar to s420 of the Act) that the dissolution of a company should not be declared void "unless some unforeseen event such as the discovery of new assets has occurred or unless there has been some fraud or concealment practices or unless the dissolution has become either by reason of surrounding circumstances or through some contrivance of parties the instrument of injustice".

The SCA further considered the *Ex parte Liquidator Natal Milling Co (Pty)* Ltd 1934 NPD 312 case. In this case, Hathorn J, with reference to s191 of the old Companies Act, No 46 of 1926 (which was also similar to s420 of the Act), pointed out that "according to my view the power of the Court to make an order declaring the dissolution to have been void is unlimited in any respect, and as the circumstances under which the section may be brought into operation are likely to vary in every case, it seems to me inadvisable to lay down any principle upon which the Court will act".

The SCA agreed with the interpretation of Hathorn J in the *Natal Milling* case, and consequently held that s420 of the Act, "defies precise definition", providing the court with a wide discretion to declare the dissolution of a company void.

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THE AMBIT OF SECTION 420 OF THE COMPANIES ACT

CONTINUED

When a court order is granted declaring the dissolution of a company void in terms of s420 of the Act, the company is recreated as a company in liquidation, with the rights and obligations that existed upon its dissolution.

The SCA further held that:

1. The effect of a s420 court order is to revive the company and to restore the position that existed immediately prior to its dissolution. Thus, when a court order is granted declaring the dissolution of a company void in terms of s420 of the Act, the company is recreated as a company in liquidation, with the rights and obligations that existed upon its dissolution;
2. It is not the aim of s420 of the Act to set aside the entire liquidation process of a company for purposes of commencing the liquidation afresh. All steps taken during the prior liquidation, up to the time of dissolution, will stand; and
3. A s420 order does not have the effect that the company's already-final first and final liquidation and distribution account will be reopened. Further assets of the company that are recovered by the liquidators after the company has been revived, must be dealt with in a further liquidation and distribution account in terms of s403 of the Act.

Stephan Venter and Kgosi Nkaiseng

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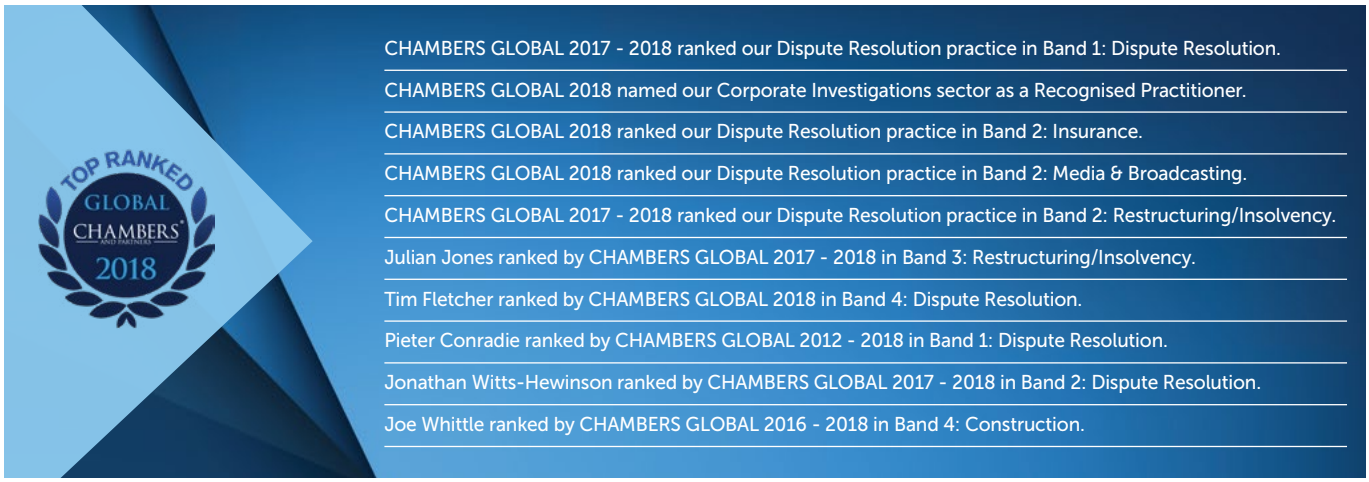

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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