

SOUTH AFRICA / JUDGMENT

**CJ Pharmaceuticals Enterprises (Pty) Ltd and Others
v Main Road Centurion 30201 CC t/a Albermarle
Pharmacy and Another (7909/2020) [2020] ZAGPJHC
353; 2021 (5) SA 246 (GJ) (21 December 2020)
[2020] ZAGPJHC 353**

COURT

South Gauteng High Court, Johannesburg

BEFORE

JT BoltAR

CASE / FILE NUMBER

7909/2020

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IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG LOCAL

DIVISION JOHANNESBURG)

Case

Number: 7909/2020

REPORTABLE

YES

OF INTEREST TO OTHER JUDGES

NO

REVISED

21 DECEMBER 2020

SIGNATURE

In the matter

between: CJ PHARMACEUTICAL
ENTERPRISES (PTY) LTD First
Applicant
DIS-CHEM
DISTRIBUTION (PTY) LTD
Second Applicant
THE LOCAL CHOICE
(PTY) LTD
Third Applicant
and
MAIN ROAD
CENTURION 30201 CC t/a
ALBERMARLE
PHARMACY
First Respondent
ARRIE
NEL PHARMACY GROUP (PTY) LTD
Second
Respondent

JUDGMENT

HEARD REMOTELY VIA TEAMS PLATFORM

JT BOLTAR AJ

INTRODUCTION

1. The First Respondent (“Main Road”) had a retail pharmacy business, which it transferred to the Second Respondent (“Arrie

Nel”). The date on which such transfer occurred is disputed, but it is common cause that it had occurred by 30 November

2019 and that Arrie Nel has carried on that business since the date of transfer.

2. The Applicants seek an order declaring the transfer to be “null and void”, setting it aside and ordering the business to be “transferred back” to Main Road. Two bases are relied upon by the Applicants for that declaration. The first is that (according to the Applicants) the transfer is void in terms of subsection 34(1) of the Insolvency Act, 24 of 1936. The second is that the transfer is void in terms of the common law because there was “fraudulent collusion between the respondents in order to detrimentally prejudice the rights of the applicants and others as creditors of [Main Road] by, inter alia, wilfully diminishing [Main Road’s] asset base”.

3. The Applicants contend that the effect of the transfer being void is that the business and the fruits derived from it after the transfer date are assets of Main Road (and not of Arrie Nel), resulting in Main Road having sufficient assets to be rehabilitated under the control of a business rescue practitioner. On this basis, the Applicants also seek an order in terms of section

131 of the Companies Act, 71 of 2008, placing Main Road under supervision and commencing business rescue proceedings.

4. Therefore, it is necessary to consider whether the transfer of the business from Main Road to Arrie Nel is void on a basis relied upon by the Applicants and, if so, the effect thereof.

SUBSECTION 34(1) OF THE INSOLVENCY ACT

5. Subsection 34(1) of the Insolvency Act provides that where a notice of intended transfer has not been published in respect of a relevant transfer by a trader, within the period before the date of transfer, specified in that subsection, such transfer “shall be void as against [the trader’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 at any time within the said period”.
6. It is common cause that Main Road did not publish a notice of intended transfer of its business to Arrie Nel prior to the date of transfer, as contemplated in subsection 34(1). Consequently, the provision of subsection 34(1) that “the said transfer shall be void as against [Main Road’s] creditors for a period of six months after such transfer” applied.
7. At all relevant times, Main Road’s creditors included some (and possibly all) of the Applicants. Therefore, in terms of subsection 34(1) the transfer of Main Road’s business to Arrie Nel was “void as against [such] creditors for a period of six months after [the] transfer”. As it is common cause that such transfer had occurred by 30 November 2019, that period had expired by 30 May 2020.
8. It follows that by 30 May 2020 the transfer of Main Road’s business to Arrie Nel was no longer “void as against” any Main Road creditor in terms of subsection 34(1). It continued to be “void” only “as against” any Main Road creditor contemplated in subsection 34(3), and for the purpose specified in that subsection. Subsection 34(3) reads:

“If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader -

- (a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or
- (b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate’s court of that district,

the transfer shall be void as against him for the purpose of such enforcement.”

9. The Applicants do not contend that any of them is a Main Road creditor contemplated in subsection 34(3) or that the transfer of Main Road's business to Arrie Nel is void in terms of that subsection. However, as elaborated on below, they contend that the wording of subsection 34(3) is relevant in interpreting the word "void" in the phrase "void as against creditors" in subsection 34(1).

The word "void" can have an absolute meaning or a relative meaning.[1] If it has an absolute meaning in the context of subsection 34(1), during the specified six month period the relevant transfer is void as against all persons and for all purposes. In contrast, if the word "void" has a relative meaning in the context of subsection 34(1), during the specified six month period the transfer is void only as against persons specified in that subsection and for their purposes (and is otherwise valid).

In particular, if the word "void" in the phrase "void as against ... creditors" in subsection 34(1) has a relative meaning, during the specified six month period the transfer is void only as against the transferor's

creditors and for their purposes. The effect is that during that period and despite there being a valid transfer, the creditors

may treat the transfer as being void for the purpose of recovering payment of their debts.[2] During that period, the creditors could, for instance, levy execution on an asset included in the business transferred, irrespective of who holds that asset.

The interpretation of the word "void" in subsection 34(1) "is a unitary endeavour requiring the consideration of text, context and purpose".[3] The purpose of subsection 34(1) is to afford protection to creditors of a trader who might wish to dispose of their property without paying their debts or who might wish to benefit certain creditors to the prejudice of others.[4] The word "void" advances that purpose, irrespective of whether it has an absolute or a relative meaning. If it has a relative meaning the protection afforded to creditors is that, during the specified six month

period, they may treat a relevant transfer by the trader as being void for the purpose of recovering payment of their debts.

The Applicants contend that the word "void" has an absolute meaning in the context of the reference in subsection 34(1) to a transfer being "void as against ... creditors". Their contention is predicated on the fact that, while both subsections 34(1) and (3) of the Insolvency Act provide for a transfer to be "void as against" creditors, only subsection 34(3) states that it is "for the purpose of ... enforcement" of a creditor's claim.

The statement in subsection 34(3) that a relevant transfer is void as against a creditor "for the purpose of ... enforcement" of their claim does not mean that the word "void" (in the reference to a transfer being "void as against" creditors) bears a relative meaning in subsection 34(3), while bearing an absolute meaning in subsection 34(1).

Subsection 34(3) provides that a transfer is void “for the purpose of ... enforcement” because (in contrast to subsection 34(1)) subsection 34(3) only applies to a creditor who, before the relevant transfer, had “instituted proceedings” against the trader “for the purpose of enforcing [their] claim”. In addition, in contrast to subsection 34(1), the protection afforded to such a creditor in terms of subsection 34(3) is only to the extent of the amount claimed by them in such proceedings. As explained by Nienaber JA in *Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whistlers CC*:^[5]

“In terms of s 34(3), if a creditor has instituted proceedings ‘for the purpose of enforcing his claim’ the transfer shall be void ‘as against him for the purpose of such enforcement’. The transfer is void but only up to a point. That point is the amount of the claims for which proceedings had been instituted prior to the transfer of the business to the new purchaser.”

15. Therefore, the reason subsection 34(3) provides that “for the purpose of such enforcement” a relevant transfer is “void as against [a creditor]” is that the legislature intended a creditor, who before the transfer had instituted proceedings for the purpose of enforcing their claim, to have protection under that subsection only to the extent necessary to enable them to enforce that claim. In contrast, there is no limit on the amount of a creditor’s claim that may be recovered under subsection 34(1). In this sense, a transfer that is “void as against” a creditor in terms of subsection 34(1) is, to use the words of Nienaber JA,^[6] “void in its entirety”.
16. In *Galaxie Melodies (Pty) Ltd v Dally NO*^[7] Botha JA held that a transfer that is void under subsection 34(1) is not “void in any absolute sense” and is only “void as against” the person specified in subsection 34(1). This interpretation of subsection 34(1) accords with the findings of Boshoff J in *Rustenburg Kloof Kiosk v Friedland, Hart, Cooper & Novis*^[8] that the broad effect of a transfer of a business being “void as against ... creditors” in terms of subsection 34(1) is that for the purpose of any recovery that creditors have against business assets, the transfer is void for six months.^[9]
17. For the above reasons and having regard to the text, context and purpose of the word “void” in subsection 34(1), a transfer that is “void as against ... creditors” in terms of that subsection is not void in the absolute sense (ie against all persons and for all purposes). It is void in the relative sense and enables creditors, during the specified six month period, to treat the transfer as being void for the purpose of recovering payment of their debts
18. Therefore, the fact that Main Road’s transfer of its business was, during the specified six month period, “void as against [Main Road’s] creditors” in terms of subsection 34(1) does not mean that the transfer made by Main Road was or is invalid; it means that during that six month period (which had ended by 30 May 2020) Main Road’s creditors could have treated the transfer as being void for the purpose of recovering payment of their debts. During that period Main Road’s creditors could, for instance, have levied execution on an asset included in the business transferred by Main Road to Arrie Nel, irrespective of the fact that such asset was held by Arrie Nel.

19. The six month period specified in subsection 34(1) has expired without any Applicant having instituted proceedings against Main Road to recover payment of their debt or having sought a declaratory order in respect thereof. Therefore, the period during which an Applicant could have treated the transfer by Main Road to Arrie Nel as void has expired and an Applicant is no longer entitled to do so.
20. This application is not a proceeding instituted against Main Road to recover payment of any debt, nor is it for a declaratory order in respect of a creditor's rights in respect of any such a proceeding. Consequently, it is irrelevant that this application was launched by the Applicants within the six month period specified in subsection 34(1) and would (according to the Applicants) have been heard prior to the expiry of that period were it not for the COVID-19 pandemic.
21. Were the declaratory order sought by the Applicants setting aside the transfer of Main Road's business and ordering it to be "transferred back" to Main Road to be granted, it would treat the transfer of Main Road as being "void" against all persons, for all purposes and for an unlimited time (as opposed to only being "void as against ... creditors" for a six month period, as provided in subsection 34(1)). For the reasons given, the word "void" in this context does not bear that absolute meaning.
22. Consequently, the declaration sought by the Applicants cannot be granted under subsection 34(1).

THE COMMON LAW

23. In their founding affidavit, the Applicants contend that there was "fraudulent collusion between the respondents in order to detrimentally prejudice the rights of the applicants and others as creditors of [Main Road] by, inter alia, wilfully diminishing [Main Road's] asset base" and that the transfer is consequently void under the common law.
24. In order for the transfer to be set aside under the common law actio Pauliana on the ground set out in the Applicants' founding affidavit, the transfer must have diminished Main Road's assets and Main Road must have made the transfer with the intention of defrauding its creditors. In addition, there must have been collusion between Main Road and Arrie Nel, in the sense that Arrie Nel was a party to that fraud.[10]
25. As stated by Solomon JA in *Trustees Estate Chin v National Bank of South Africa Ltd*[11] if "the object of the transaction were to give one creditor an unfair advantage over other creditors in case of insolvency" that would "constitute a fraud upon the creditors". In *Beddy NO v Van der Westhuizen*,[12] Schutz JA pointed out that "[a] person facing insolvency and the person whom he wishes to advantage may act overtly, if bold or merely naive, but it is more usual that an attempt will be made to conceal their true purpose".
26. The facts that are common cause in respect of the transfer of Main Road's business include the following:

26.1 Prior to the transfer of the business to Arrie Nel, Main Road proposed to the First Applicant and a company in the same group as the Second Applicant (“Dis-Chem”) that they purchase the business.

26.2 At that time, Main Road told the First Applicant and Dis-Chem that Arrie Nel was interested in purchasing the business and that Main Road was giving the First Applicant and Dis-Chem the “first option” to do so.

26.3 This was followed by a period during which the First Applicant and Dis-Chem considered buying the business.

26.4 However, on or about 20 September 2019, the First Applicant notified Main Road that it would not be purchasing the business.

26.5 Shortly thereafter, Main Road sold its business to Arrie Nel.

27. The Applicants do not contend that Main Road acted gratuitously in selling its business to Arrie Nel or that such sale was for a

consideration that was less than the value of the business.

28. The transfer of Main Road’s business to Arrie Nel was in accordance with Main Road’s stated intention to sell and transfer its business and with the earlier disclosure made by Main Road to the First Applicant and Dis-Chem (that Arrie Nel was interested in purchasing the business and that Main Road was giving the First Applicant and Dis-Chem the “first option” to do so). Following an advertisement published on 30 November 2019 stating that “Albemarle (sic) Pharmacy is now part of the Arrie Nel family”, reference was made to the “new owners of the business of Albermarle Pharmacy” being the “Arrie Nel Pharmacy Group” in a letter from the First and Second Applicants’ attorney dated 5 December 2019. That date was shortly after the date on which (according to the Applicants) the transfer occurred and earlier than the date in mid-January 2020 on which the Applicants allege they first became aware of the transfer. It appears from these facts that Main Road did not act secretly or deceitfully in making the transfer to Arrie Nel and acted overtly in doing so. Therefore, an intention on the part of Main Road to defraud its creditors has not been established.

29. It has also not been established that Arrie Nel was a party to any fraud. The Applicants base their contention that Arrie Nel was fraudulent on the fact that Arrie Nel became a party to the transfer despite knowing Main Road was indebted to the Applicants and had financial

difficulties, and on the fact that Main Road did not publish the notice of intended transfer contemplated in subsection 34(1) of the Insolvency Act. The purchase of a business from a debtor, knowing that the debtor has debts and is in financial difficulties,

does not in itself establish fraudulent intent on the part of the purchaser. The First Applicant itself considered purchasing the

business from Main Road despite knowing Main Road had debts and was in financial difficulties. Had the First Applicant decided to do so, the existence of such knowledge would not in itself have established that it acted with fraudulent intent. Similarly,

the fact that Arrie Nel had such knowledge does not in itself establish that it acted with fraudulent intent in purchasing the

business from Main Road.

30. Such knowledge also does not establish fraudulent intent when considered together with the fact that Main Road failed to publish the notice of intended transfer contemplated in subsection 34(1). As mentioned previously, the facts indicate that Main Road acted overtly in making the transfer and did so in circumstances where Main Road had told the First Applicant and Dis-Chem that it intended to sell and transfer its business and that Arrie Nel was an interested purchaser.
31. Therefore, the requirements that would have to be satisfied in order for the transfer of the business to Arrie Nel to be void under the actio Pauliana (which include that Main Road made the transfer with the intention of defrauding its creditors and that Arrie Nel was a party to that fraud) have not been established. Consequently, the declaration sought by the Applicants setting aside the transfer of Main Road's business and ordering it to be "transferred back" to Main Road cannot be granted under the common law actio Pauliana.

BUSINESS RESCUE

32. The Applicants' contention that Main Road should be placed under business rescue is predicated on the business being owned by Main Road (as opposed to the purchaser, Arrie Nel) and therefore on the transfer of such business to Arrie Nel being void in the absolute sense. As such transfer is not void in the absolute sense and it has not been established that Main Road would have sufficient assets to be rehabilitated under the control of a business rescue practitioner, an order placing Main Road under

supervision and commencing business rescue proceedings cannot be granted.

33. The application brought by the Applicants is not an application for the liquidation of Main Road and no order is sought in the Applicants' notice of motion placing Main Road under liquidation. However, during argument, for the first time a contention was made on behalf of the Applicants that if their application for an order placing Main Road under supervision and commencing business rescue proceedings is dismissed, this Court should grant an order placing Main Road under liquidation in terms of subsection 131(4)(b) of the Companies Act, 71 of 2008.

34. In terms of subsection 131(4)(b), where there is an application for an order placing a company under supervision and commencing business rescue proceedings, a liquidation order can be granted if it is “necessary and appropriate” to do so. The Applicants have not given reasons as to why such an order is “necessary”. In addition, it would not be “appropriate” to grant such an order without giving the other creditors of Main Road (including The South African Revenue Service and Main Road’s

landlord) the opportunity of opposing an application for that order. Such other creditors have not been given that opportunity in the current proceedings. Accordingly, no order placing Main Road under liquidation is granted.

CONCLUSION

35. The orders sought by the Applicants are consequently not granted.

36. In the circumstances, the application is dismissed with costs (on a party to party scale).

JT BOLTAR AJ

21 December 2020

Date of Hearing: 26 October 2020

Judgment

Delivered: 21 December 2020

APPEARANCES;

On behalf of the Applicants:

JK Berlowitz

Instructed by:

Saltzman Attorneys

On behalf of the First Respondent:

F van Wyk

Instructed by:

Wolhuter Attorneys

[1] See the approval by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA) at para [28] of the view taken in *Wade: Administrative Law* 7th Ed at 342-4 that an administrative order “may be void for one purpose and valid for another” and “may be void against one person but valid against another”.

- [2] Similarly, if the word “void” in the phrase “void against the trustee of [the trader’s] estate” in subsection 34(1) has a relative meaning, the transfer is void only as against the trustee and for their purposes. The effect is that despite there being a valid transfer, the trustee may treat the transfer as being void for the purpose of (amongst other things) taking control of the estate’s property.
- [3] As stated by Unterhalter AJ in *Betterbridge (Pty) Ltd v Masilo & Others* NNO 2015
- (2) SA 396 (GP) at para [8] (referring to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012
- (4) SA 593 (SCA)).
- [4] See *Galaxie Melodies (Pty) Ltd v Dally* NO 1975 (4) SA 736 (A) at 744A-745A.
- [5] 1999
- (3) SA 1116 (SCA) at para [7].
- [6] At para [7].
- [7] 1975
- (4) SA 736 (A) at 743B-C.
- [8] 1973
- (2) SA 130 (T) at 132D-E.
- [9] That finding was quoted with approval by Hartzenberg J in *Vermaak v Joubert* and May 1988
- (4) SA 115 (T) at 121B-D (confirmed on appeal: 1990 (3) SA 866 (A)).
- [10]
- See *Commissioner of Customs & Excise v Bank of Lisbon International Ltd and Another* 1994
- (1) SA 205 (N) at 209C-210C.
- [11] 1915 AD 353 at 363.
- [12] 1999
- (3) SA 913 (SCA) at 916I-917B.

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