INSOLVENCY LAW UPDATES JANUARY 2021[1]

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[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

CASES

CJ Pharmaceutical Enterprises (Pty) Ltd and others v Main Road Centurion 30201 CC t/a Albermarle Pharmacy and another [2020] JOL 49266 (GJ)

Section 34 (1) of the Insolvency Act-

Impeachable dispositions- Actio Pauliana-Not enough proof for the Actio Pauliana to work. B in business rescue. Also dismissed.

A bought business on 30 November 2019 from B. Applicants want to declare sale void based on section 34 alternatively fraud, the Actio Pauliana, that diminished asset base, common law. Applicants also seek to place seller B in business rescue. Common cause no notices published.

What is the meaning of "void"? Void for the purpose of recovering payment of their debts. In casu the six months had transpired. But the application was launched within 6 months, yet the court found that it is not a proceeding instituted against B nor was it a declarator concerning creditor's rights.

The court ruled that "void" does not mean "void against all persons" Section 34 (1) cannot work in casu.

Not enough proof for the Actio Pauliana to work. B in business rescue. Also dismissed.

'trader' means any person who carries on any trade,business, industry or undertaking in which property is sold, or is bought,exchanged or manufactured for purpose of sale or exchange, or in which building operations of whatever nature are performed, or an object whereof is public entertainment, or who carries on the business of an hotel keeper orboarding-house keeper, or who acts as a broker or agent of any person in thesale or purchase of any property or in the letting or hiring of immovableproperty; and any person shall be deemed to be a trader for the purpose of thisAct (except for the purposes of subsection (10) of section *twenty-one)* unlessit is proved that he is not a trader as hereinbefore defined: Provided that ifany person carries on the trade, business, industry or undertaking of sellingproperty which he produced (either personally or through any servant) by meansof farming operations, the provisions of this Act relating to traders onlyshall not apply to him in connection with his said trade, business, industry orundertaking;

Section 34 (3) of the Insolvency Act

34 Voidable sale of business

(1) If a trader transfers in terms of a contract anybusiness belonging to him, or the goodwill of such business, or any goods orproperty forming part thereof (except in the ordinary course of that businessor for securing the payment of a debt), and such trader has not published anotice of such intended transfer in the *Gazette* , and in two issues ofan Afrikaans and two issues of an English newspaper circulating in the

districtin which that business is carried on, within a period not less than thirty daysand not more than sixty days before the date of such transfer, the said transfershall be void as against his creditors for a period of six months after suchtransfer, and shall be void against the trustee of his estate, if his estate issequestrated at any time within the said period.
[Sub-s. (1)substituted by s. 12 of Act 32 of 1952, by s. 2 *(a)* of Act 27 of 1987and by s. 1 *(a)* of Act 6 of 1991.]

(2) As soon as any such notice is published, everyliquidated liability of the said trader in connection with the said business,which would become due at some future date, shall fall due forthwith, if thecreditor concerned demands payment of such liability: Provided that if suchliability bears no interest, the amount of such liability which would have beenpayable at such future date if such demand had not been made, shall be reducedat the rate of eight per cent per annum of that amount, over the period betweenthe date when payment is made and that future date.
[Sub-s. (2) amendedby s. 2 of Act 101 of 1983.]

(3) 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.
[Sub-s. (3)substituted by s. 2 *(b)* of Act 27 of 1987 and by s. 1 *(b)* of Act6 of 1991.]

(4) For the purposes of this section 'transfer', when used as a noun, includes actual or constructive transfer of possession, and, when used as a verb, has a corresponding meaning.

AIRPORTS CO SA LTD v SPAIN NO AND OTHERS 2021 (1) SA 97 (KZD)

Business rescue — Business rescue plan — Whether company no longer financially distressed — Court to have regard to actual financial statements of company, not projected income — Companies Act 71 of 2008, s 141(2)*(b)*(ii).

Business rescue — Business rescue plan — Whether plan substantially implemented — Court to adopt sensible interpretation of documents placed before it without attempting to analyse plan in such detail that scrutiny resulting in plan having no practical effect — Companies Act 71 of 2008, s 152(8).

The applicant, a state-owned entity as intended in the Public Finance Management Act 1 of 1999 (the PFMA), leased premises to the second respondent to carry on business as a restaurant in an airport. Later, following a resolution taken in September 2017 under the Companies Act 71 of 2008 (the Act), the applicant was placed in business rescue. The first respondent was appointed as the business

rescue practitioner. The applicant's claim against the second respondent was for more than R5 million.

The background facts were that the applicant and the second respondent had concluded the lease agreement (the original lease) in August 2009. The lease period was from May 2010 to April 2015. The second respondent fell into arrears and the applicant instituted an action which was not finalised. An application for the eviction of the second respondent was also not persisted in. Instead, the applicant continued trading and placed itself in business rescue.

In the present proceedings the applicant sought an order compelling the first respondent to end business rescue under s 141(2)*(b)*(ii) and to give notice that the applicant was no longer financially distressed under s 152(8) of the Act.
The business rescue plan put forward by the first respondent provided for the continued occupation of the business premises by the second respondent despite the institution of eviction proceedings by the applicant. Relying on correspondence between it and the applicant, the second respondent sought to show that the original lease had been extended almost a year after it had expired. The validity of this renewed lease agreement, for which fair tender procedures were not followed, was in issue before the court.

The first respondent argued that security of tenure was necessary for the survival of the business. Being a state-owned entity, the applicant was obliged under the PFMA to follow fair tender procedures before concluding any contract for goods or services. The applicant contended in the light of this that it was being held to an unlawful agreement. For its part the second respondent contended that even if the agreement was unlawful, it remained valid and binding until set aside on review, for which no application had been brought in the present case.

Held
As a state-owned enterprise, the applicant had a constitutional duty to follow a fair process in concluding a lease extension. Its conduct could not simply be ignored and had to be set aside in a direct or an indirect review (see [22]). Since the applicant never sought a review, it could not complain that it was being held to an unlawful agreement (see [25]).
The principal issue before court was whether the applicant made out a case that the second respondent was no longer in financial distress (see [27]). The applicant's case was based on assumptions drawn from the business rescue plan and the financial indications in it, the highwater mark being its allegation that, having regard to the projected cashflow surplus reflected in the business plan, it had to be concluded that the second respondent had generated sufficient cashflow to settle admitted debts as recorded in the business rescue plan. (See [27].) That was hardly a sufficient basis on which to conclude that the second respondent was no longer in financial distress, which had to be ascertained with reference to cashflow projections in its actual financial statements. The true test of the liquidity of a business could only be assessed by having regard to the 'actuals' in terms of cashflow statements and the ability of the business to meet its day-to-day expenses. (See [28].)

In determining whether the business rescue plan had been substantially implemented as intended in s 152(8), the court had to adopt a sensible interpretation

of the documents before it, without attempting to analyse the plan in such detail that the scrutiny under which it was placed resulted in the plan having no practical effect. There was, however, nothing before the court to indicate how far the process had gone and neither was there anything before the court in terms of the negotiations towards the conclusion of a lease between the applicant and the second respondent, as directed in terms of the plan. The applicant accordingly failed to discharge the onus of establishing that the first respondent had achieved substantial implementation of the business rescue plan. (See [31] – [33].) Application accordingly dismissed (see [34]).

Knoop NO and another v Gupta (Tayob as intervening party) [2021] 1 All SA 17 (SCA)

Appeal – Suspension of order pending appeal – Application for execution order – Section 18(3) of the Superior Courts Act 10 of 2013 – Requirements – Applicant for execution order must prove exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.

The respondent, together with her husband and his two brothers (collectively referred to as the "Guptas"), were shareholders in equal shares of two companies ("Islandsite" and "Confident Concept") which were controlled by a holding company ("Oakbay"). The two companies were placed under supervision and went into voluntary business rescue on 16 February 2018 after major South African banks ceased to offer them banking facilities due to allegations made about the Guptas.

The appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners ("BRPs") of the companies. Disputes between the BRPs and Oakbay's Chief Executive Officer and other employees led to the respondent applying to the High Court for the removal of the BRPs in terms of section 139(2) of the Companies Act 71 of 2008. The granting of the order saw the appellants lodging an application for leave to appeal against the removal order. In turn, the respondent brought an application for leave to execute. The BRPs' application or leave to appeal was granted and an execution order was also granted to the respondent in terms of sections 18(1) and (3) of the Superior Courts Act 10 of 2013. That led to the present urgent appeal by the BRPs.

Pending the hearing of the urgent appeal, the execution order was suspended in terms of section 18(1) of the Superior Courts Act. The Full Court, however, granted an order that the urgent appeal would not suspend the operation of the execution order and new BRPs were appointed. The intervening party in the present appeal ("Mr Tayob") was the new BRP of Islandsite. The actions taken by the new BRPs included withdrawal of the appellants' appeals against the removal order and purported termination of the business rescue.

Held – The first question to be addressed was whether the execution order was appealable. Section 18(1) of the Superior Courts Act provides for automatic suspension of an order pending the outcome of an appeal against it. As a safeguard against irreparable prejudice caused by a court granting an execution order when it should not have done, so the aggrieved party has an automatic urgent right of appeal. An appeal against an execution order is one of right and the party that obtained the execution order cannot object to it. If they wish to sustain the execution order, they

must oppose the appeal. Section 18(4)(iv) states that an execution order is suspended pending an urgent appeal by the aggrieved party. The suspension of the original order in terms of section 18(1) of the Superior Courts Act continues until the disposal of the urgent appeal. The Full Court's order was held to be invalid for flying directly in the face of the provision that pending an urgent appeal under section 18(4) the operation of an execution order is suspended.

The nullity of the Full Court order meant that the execution order was suspended pending the present appeal. No lawful steps could be taken to remove the appellants as BRPs until the urgent appeal had been finalised. Substitute BRPs could not be appointed to take their place, because the order for their removal was not yet effective.

On the merits of the appeal against the execution order, the court stated that an applicant for an execution order must prove three things, namely, exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made. Those requirements were not satisfied by the respondent.

The appeal was accordingly upheld.