

The extraordinary in the ordinary: the devil is in the (sometimes unexpected) details of section 34 of the Insolvency Act 24 of 1936 and the *actio Pauliana*

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SUMMARY

A recent case offers an opportunity to consider two types of impeachable dispositions in insolvency law. One is the transfer of a trader's business under section 34(1) of the Insolvency Act, and the other is the common-law *actio Pauliana* from which the entire law of impeachable dispositions derives. In the first place, the nature of the application is characterised as an attempt to reverse the transfer of the business and assets. A common feature of section 34(1) and the *actio Pauliana* is spotted: they straddle sequestration or winding-up. Compliance with sections 34(1) and (2) of the Insolvency Act is discussed, and the trader's celebration of doing so is then ruined by the pervasive menace of the *actio Pauliana*, the defence of necessity supplying a sword to cut the Gordian knot. The central insight of the judgment about section 34(1) – the relative meaning of the word “void” – is shown to be well-articulated by a widely followed juristic insight into administrative validity. Some of the finer details of the ambit of the word “void” are then teased out. The uneasy relationship between section 34(1) and sections 26, 29, 30, and 31 of the Insolvency Act and the *actio Pauliana* is explored, and an answer to a dilemma over the application of section 34(1) ventured. As for applying the requirements of the *actio Pauliana* to the facts, a comprehensive, nuanced approach considering both the two relevant possibilities is proposed, rather than the single choice plumped for in the judgment apparently because it is the more usual one. The closing remarks underline the wisdom of thoroughly planning, discussing, and creating a Plan B for the client in the pleadings and executing the procedural requirements and administration.

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1 Introduction

“[E]ven the most familiar things or concepts”, said Van Warmelo, “are never the worse for renewed scrutiny and for being, figuratively speaking, dusted and tidied.”¹ Here I consider section 34 of the Insolvency Act 24 of 1936 as applied to *CJ Pharmaceutical Enterprises (Pty) Ltd v Main Road Centurion 30201 CC t/a Main Road Pharmacy (Main Road)*.² A seller sold a pharmacy business to a buyer without advertising the sale as section 34 required. Three creditors of the seller applied for a court order declaring the sale void under section 34 or else setting the sale aside under the *actio Pauliana*. With a nod to GK Chesterton,³ I consider the extraordinary in the ordinary provisions of section 34 and the *actio Pauliana*.

2 Section 34(1) of the Insolvency Act

The first, main provision of section 34 of the Insolvency Act applies if a trader,⁴ without giving the notice prescribed in the Act, transfers (under a contract) a business belonging to him, or its goodwill, or any goods or property forming part of it.⁵ The exceptions are if the transfer is in the ordinary course of that business or for securing the payment of a debt.⁶

If the general rule applies, the transfer is void against the trader’s creditors for six months after the transfer.⁷ The transfer is also void against the trader’s trustee if the trader’s estate is sequestrated at any time during those six months following the transfer.⁸

1 Van Warmelo “Real rights” 1959 *Acta Juridica* 84.

2 2021 5 SA 246 (GJ).

3 See Jermann “Chesterton: extraordinary in the ordinary” 2020 <https://clarifyingcatholicism.org/2020/07/09/chesterton-and-extraordinary-ordinary/> (last accessed 2021-11-19).

4 As defined in s 2 of the Insolvency Act.

5 S 34(1).

6 As above.

7 As above.

8 As above. The trader is also guilty of an offence and liable to imprisonment for a period not exceeding two years if, before his estate is sequestrated, he alienated any business belonging to him, or the goodwill of such business or any goods or property forming part thereof not in the ordinary course of that business, without publishing a notification of his intention to so alienate in the *Gazette* and in a newspaper, in terms of the provisions of s 34(1) (s 135(3)(b) of the Insolvency Act); Bertelsmann et al *The Law of Insolvency in South Africa* (2019) para 28.6; Kunst, Boraine and Burdette *Meskin’s Insolvency Law* (2022) para 16.1.4.8.

3 Summary of the *Main Road* judgment about section 34

Main Road Centurion 30201 CC (Main Road) transferred its retail pharmacy business to the Arrie Nel Group (Nel). Nel conducted that business from 30 November 2019.

The applicants requested the court (Boltar AJ) to declare this transfer “null and void” under section 34(1) and set it aside so that the business would be “transferred back” to Main Road.⁹ The issue was whether the transfer was void as the applicants alleged and, if it was, what would be the effect. Because no notices were published, the transfer of Main Road’s assets was void against its creditors for six months after the transfer had occurred by 30 November 2019.¹⁰ So the six-month period expired on 30 May 2020. From then on, the transfer was no longer void as against any Main Road creditor under section 34(1). But it was still void only against any Main Road creditor under section 34(3) and for the purpose specified by section 34(3). The applicants did not argue that they were Main Road’s creditors under section 34(3) or that the business transfer was void under section 34(3), but they did argue that the wording of section 34(3) pertained to interpreting the word “void” in the phrase “void as against ... creditors” in section 34(1).¹¹

The word “void” may have an absolute meaning or a relative one.¹² In *Oudekraal Estates (Pty) Ltd v City of Cape Town*,¹³ Howie P and Nugent JA approved Wade and Forsyth’s opinion about an administrative order,¹⁴ that this order “may be void for one purpose and valid for another” and “may be void against one person but valid against another”.¹⁵

If the word “void” has an absolute meaning in the context of section 34(1), the transfer is void against everyone and for all purposes during the six months.¹⁶ But if “void” has a relative meaning, the transfer is void only as against the persons specified in section 34(1) and for their purposes only, and it is otherwise valid.¹⁷ So if “void” has a relative meaning, the transfer is void only against the transferor’s creditors and for their purposes.¹⁸ Although there is a valid transfer, the creditors may treat it as void for the purpose of recovering payment of their debts¹⁹ and

9 *Main Road* para 2.

10 This point was common cause among the litigants.

11 *Main Road* para 9.

12 *Main Road* para 10, referring in fn 1 to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) (*Oudekraal*) para 28.

13 *Oudekraal* para 28.

14 Wade and Forsyth *Wade Administrative Law* (1988) 342-344.

15 As above, as quoted in *Main Road* para 10 fn 1.

16 *Main Road* para 10.

17 As above.

18 *Main Road* para 11.

19 As above.

may then, for example, levy execution on assets in the business transferred, whoever holds those assets.²⁰

Interpreting section 34(1) is a “unitary endeavour requiring the consideration of text, context and purpose”.²¹ The purpose of section 34(1) is to protect the creditors of a trader who wishes to dispose of property without paying the trader’s debts or wishes to benefit some creditors of the trader to the prejudice of other creditors.²² This purpose is advanced by the word “void”, whether absolute or relative in meaning.²³

The applicant creditors in *Main Road* argued for the absolute meaning of the word “void” in section 34(1).²⁴ Both section 34(1) and section 34(3) state that a transfer is “void as against” creditors, but only section 34(3) says that it is “for the purpose of ... enforcement” of a creditor’s claim.

The court analysed the two subsections. The statement in section 34(3) that the transfer is void against a creditor “for the purpose of ... enforcement” of the creditor’s claim does not mean that the word “void” has a relative meaning in section 34(3) but an absolute meaning in section 34(1). Section 34(3) only applies to a creditor who, before the transfer, had instituted proceedings against the trader “for the purpose of enforcing his claim”. This creditor is protected only as far as the amount this creditor has claimed in those proceedings.²⁵

Section 34(3) states that for the purpose of this enforcement, the transfer is void as against a creditor. The court held that

the reason s 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.²⁶

By contrast, section 34(1) does not limit the amount that the creditor may recover.²⁷ “In this sense, a transfer that is ‘void as against’ a creditor in

20 As above.

21 *Betterbridge (Pty) Ltd v Masilo* 2015 2 SA 396 (GNP) para 8 (per Unterhalter AJ), citing *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (*Endumeni*).

22 *Galaxie Melodies (Pty) Ltd v Dally* 1975 4 SA 736 (A) 744A-745A (per Botha JA) (*Galaxie*).

23 *Main Road* para 12.

24 *Main Road* para 13.

25 *Main Road* para 14, quoting *Weltmans Custom Office Furniture (Pty) Ltd (in Liquidation) v Whistlers CC* 1999 3 SA 1116 (SCA) (*Weltmans*) para 7 (per Nienaber JA).

26 *Main Road* para 15.

27 As above.

terms of [section] 34(1) is, to use the words of Nienaber JA,²⁸ ‘void in its entirety’.”²⁹

A transfer void under section 34(1) “is not ‘void in any absolute sense’ and is only ‘void as against’ the person specified in [section] 34(1)”.³⁰ Broadly, the voidness of the business transfer against creditors under section 34(1) means that the transfer is void for six months for the purpose of creditors’ recovering against the business assets. This principle was confirmed in *Rustenburg Kloof Kiosk v Friedland, Hart, Cooper & Novis*,³¹ and *Vermaak v Joubert and May*,³² and the latter decision was upheld on appeal.³³

For these reasons, if the text, context, and purpose of “void” in section 34(1) are considered, a transfer void as against creditors under section 34(1) is not void absolutely, that is, “against all persons and for all purposes”.³⁴ Instead, this transfer is void relatively so that creditors may for six months regard the transfer as void for them to recover the payment of debts. The transfer’s voidness against Main Road’s creditors during the six months does not imply its invalidity. It means that Main Road’s creditors could have treated the transfer as void for recovering payment of their debts, and these creditors could have levied execution on the business assets transferred to Nel.

Then came the clincher. The six-month period had expired before any applicant brought proceedings against Main Road to recover payment of the debt or seek a declaratory order in this regard. The period for an applicant to treat the transfer as void had expired, and an applicant might do so no longer.³⁵

This application was not for recovering a debt payment, nor was it for a declaratory order about creditors’ rights in such a proceeding.³⁶ Granting the declaratory order as the applicants sought it “would treat the transfer ... as being ‘void’ against all persons, for all purposes and for an unlimited time”.³⁷ That absolute meaning did not apply in section 34(1). The application for a declaratory order under this subsection failed.

28 *Weltmans* para 6.

29 *Main Road* para 15.

30 *Main Road* para 16, quoting *Galaxie* 743B-743C.

31 1973 2 SA 130 (T) (*Rustenburg*) 132D-132E (per Boshoff J).

32 1988 4 SA 115 (T) 121B-121D (per Hartzenberg J).

33 *Vermaak v Joubert & May* 1990 3 SA 866 (A).

34 *Main Road* para 17.

35 *Main Road* para 19.

36 *Main Road* para 20.

37 *Main Road* para 21.

4 Summary of the judgment about the *actio Pauliana*

Next, the applicants alleged that the transfer was void under the common law. Main Road and Nel had fraudulently colluded to harm the rights of the applicants and others as creditors of Main Road by intentionally diminishing its asset base.

To succeed under the *actio Pauliana*, the applicants had to show that

- a the transfer diminished Main Road's assets;
- b the transfer by Main Road was intended to defraud its creditors; and
- c Main Road and Nel had colluded, Nel being party to that fraud.³⁸

Fraud on the creditors in the context of the *actio Pauliana* means that the “object of the transaction is to give one creditor an unfair advantage over other creditors in case of insolvency”.³⁹ People facing insolvency and those whom they wish to advantage may act openly “if bold or merely naïve”,⁴⁰ but more usually they try to hide their true purpose.⁴¹

The court examined the history of the transfer. Main Road proposed to the first applicant (CJ Pharmaceutical Enterprises (CJPE)) and a company in the same group as the second applicant (Dis-Chem) that they should buy the pharmacy business. Main Road then told CJPE and Dis-Chem that Nel was interested in buying the business, and Main Road gave CJPE and Dis-Chem the “first option” to do so.⁴² For a while, CJPE

38 *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 1 SA 205 (N) (Bank of Lisbon) 209C-210C (per Thirion J). For many more authorities on the *actio Pauliana*, see Blackman et al *Commentary on the Companies Act* (2002) Ch 14, 26, n174. A little more detail about the requirements of the *actio Pauliana* may be helpful here. The property alienation must have diminished the debtor's assets. The recipient must not have received the recipient's own property: property to which the recipient had a right, such as property in settlement of a debt that was due. The alienating debtor must have intended to defraud the creditors. If the debtor received inadequate value in return, the recipient must have been aware of the debtor's intention to defraud the creditors. And the fraud must have caused the creditors' harmful consequences: the alienation must have led to the lack of available assets to pay debts (*Hockey v Rixom and Smith* 1939 SR 107 (*Hockey*) 118 (per Russell CJ); *Scharff's Trustee v Scharff* 1915 TPD 476; *Trustees Estate Chin v National Bank of South Africa Ltd* 1915 AD 353 (*Chin*) 363 (per Solomon JA)).

39 *Chin* 363. Fraud can also consist of putting one's creditors out of pocket by alienating property for no value or an inadequate value in return, thus causing factual insolvency, and diminishing the creditors' prospects of being paid because of the fewer assets or the insufficient assets available for payment.

40 *Beddy v Van der Westhuizen* 1999 3 SA 913 (SCA) (*Beddy*) 916I-917B (per Schutz JA).

41 *Beddy* 916I-917B, as quoted in *Main Road* para 25.

42 *Main Road* para 26.2. An anonymous reviewer of this article suggested that, for the sake of completeness, it should be explained what a first option entails in contract law, which may provide the reader with a better

and Dis-Chem considered whether to buy the business, but on about 20 September 2019, CJPE informed Main Road that it would not be doing so. Main Road soon sold the business to Nel. The applicants did not argue that Main Road had donated the business to Nel or sold it for a price less than the business's value.

The transfer to Nel matched Main Road's stated intention to sell and transfer its business. The transfer also matched Main Road's prior disclosure to CJPE and Dis-Chem that Nel was interested in buying the

understanding of the interplay between contract law and insolvency here. In response, the first point to note is that no winding-up order had been issued against Main Road Centurion 30201 CC t/a Main Road Pharmacy. To that extent, there was no "interplay between contract law and insolvency" in this case. To extend the discussion, though, it may be asked what the position would have been if a winding-up order had been granted against Main Road Centurion 30201 CC. This development would then raise the question of the effect of the winding-up of the close corporation upon the uncompleted contract concluded before winding-up (for an extensive discussion of this topic, see Kunst, Boraine and Burdette (2022) para 5.21 "Effect in general of sequestration or liquidation on contracts subsisting at commencement of *concursum creditorum*"; Bertelsmann (2019) Ch 12; Smith, Van der Linde and Calitz *Hockly's Law of Insolvency, Winding-up and Business Rescue* (2022) Ch 7). As explained by Bradfield *Christie's Law of Contract in South Africa* (2018) 72 para 2.2.10(a), n 340, it is a matter of interpretation whether an agreement to provide someone with a first option is an option or a right of pre-emption (see *Stewart v Breytenbach* 1986 3 SA 47 (A) 52-53 (per Galgut AJA); *Zerga v TT Empowerment CC* 2012 4 All SA 472 (GSJ) para 32 (per McNally AJ)). There is no obvious way of knowing from the terms of the judgment in *Main Road* which of the two rights – an option or a right of pre-emption – was intended by Main Road, CJPE, and Dis-Chem. It has been held that where the lease gives the lessee an option of renewal, this option is not severable from the lease and if, upon the insolvency of the lessor before the exercise of the option, his trustee accepts the lease and sells the property subject to the lease, the purchaser is bound by the option of renewal (*Uys v Sam Friedman Ltd* 1935 AD 165; Kunst, Boraine and Burdette (2022) para 5.21.6.1, n 4; Bertelsmann (2019) 259). Regarding the right of pre-emption, Reid and Hutchison ask whether the solvent party may use the mechanism in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A) (*Oryx*) to conclude a sale unilaterally when the trustee of the insolvent estate has breached the solvent party's pre-emptive right and sold the property to a third party (see Reid and Hutchison "The Exercise of Contractual Rights or Powers against an Insolvent Estate: Notes" 2003 *SALJ* 782). Some see this conduct as amounting to specific performance by way of self-help. This analysis would suggest that the solvent party is not allowed to take this decision. But Reid and Hutchison (2003 *SALJ* 782) point out that using the *Oryx* mechanism "does not in itself remove any asset from the estate nor exact performance from the trustee (clearly the claim for performance under the ensuing sale would not be enforceable against the trustee)". So it could be argued that the solvent party would be allowed to exercise the pre-emptive right, even after the sequestration. In addition, the anonymous reviewer of my article asked whether the Insolvency Act makes any reference to first options. The answer is that this Act does not refer to rights of pre-emption or to "first option" or "first options", and only refers to "option" six times, in the phrase "without the option of a fine", in ss 55(i), 58, 139, 141, 142(2), and 145, none of which is relevant to the present discussion.

business and that Main Road was giving CJPE and Dis-Chem the first option to do so. An advertisement on 30 November said that Main Road Pharmacy “is now part of the Arrie Nel family”.⁴³ And a letter from the attorney for CJPE and Dis-Chem dated 5 December 2019 mentioned the “new owners of the business of Main Road Pharmacy” as being the “Arrie Nel Pharmacy Group”.⁴⁴ This date, 5 December 2019, followed shortly after the date when, so the applicants claimed, the transfer occurred. This date also preceded the one in mid-January 2020, on which the applicants alleged that they first learned about the transfer. In the court’s view, 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.⁴⁵

The court then considered Nel’s role in these events. Nel’s participation in the alleged fraud had not been proved. The applicants claimed that Nel had acted fraudulently for two reasons. First, it “became a party to the transfer despite knowing Main Road was indebted to the applicants and had financial difficulties”.⁴⁶ Secondly, Main Road had not published the section 34(1) notices.

The court held that the buyer’s fraudulent intention was not proved by the buyer’s purchasing a business from a debtor that was known to have debts and financial troubles. Indeed, CJPE also considered buying the business even though it knew of Main Road’s debts and financial troubles. Had CJPE bought the business, that knowledge itself would not have proved that CJPE had acted fraudulently. The same applied to Nel.

Nor did that knowledge prove fraudulent intent when it was considered with Main Road’s failure to publish the section 34(1) notices. The facts showed that Main Road acted openly in the transfer when Main Road told CJPE and Dis-Chem that it intended to sell and transfer the business and that Nel was interested in buying the business.

So the applicants had not proved the requirements of the *actio Pauliana*, including Main Road’s transfer intending to defraud its creditors and Nel’s participation in that fraud. This part of the application therefore also failed.

5 Coda: the application for business rescue

The final aim of the application was that, once the business transfer had been declared void, the business and its fruits after the transfer date would be the assets of Main Road, not Nel. Main Road would have

43 *Main Road* para 28.

44 As above.

45 As above.

46 *Main Road* para 29.

enough assets to be rehabilitated under a business rescue practitioner's control. The applicants, therefore, sought business rescue by court order.⁴⁷

That aim failed too.⁴⁸ The application was based on assuming that Main Road owned the business and that the business transfer was absolutely void. But the transfer was not absolutely void. Nor had it been proved that Main Road had enough assets to be rehabilitated under a business rescue practitioner's control. It was impossible to grant an order placing Main Road "under supervision and commencing business rescue proceedings".⁴⁹

The present application was also not one for liquidating Main Road.⁵⁰ The notice of motion did not seek a winding-up order. For the first time during the argument, the applicants requested that if their business rescue application failed, the court should grant them an order placing Main Road in liquidation under section 131(4)(b) of the 2008 Act. The court considered section 131(4)(b). In an application for business rescue, a court may grant a liquidation order if it is "necessary and appropriate" to do so. But here the applicants had not explained why that order was "necessary". Nor would it be "appropriate" to grant that order without allowing the other creditors of Main Road (such as the South African Revenue Service (SARS) and Main Road's lessor) the opportunity of opposing an application for the liquidation order. Those creditors had not been allowed that opportunity in the present application. So the order for business rescue was refused. The entire application was thus dismissed with costs.

6 Comment

6.1 The characterisation of the application

The court characterised the nature of the application. It was

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 [section] 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.⁵¹

This passage of the judgment narrows the scope of the main provision in section 34(1) of the Insolvency Act. Within the six months set by section 34(1), the creditors must litigate to recover payment of their debts or at

47 See s 131 of the Companies Act 71 of 2008 (the 2008 Act); and *Main Road* para 3.

48 *Main Road* para 32.

49 See s 131(1) of the 2008 Act.

50 *Main Road* para 33.

51 *Main Road* para 20.

least obtain a declaratory order about their rights in respect of a proceeding for recovering their debts. Instead, what the present applicants had sought was an order declaring the transfer void and setting it aside, and ordering the business to be “transferred back” to Main Road.

Is there an answer to this characterisation? An argument might run as follows. The applicants were concerned that they would not receive payment of their debts from Main Road. They did not wish to buy the business: this conclusion is inferred from their failure to exercise their first option to do so. Instead, they wished to receive payment. They probably wished to ensure that they would continue to receive payment of their debts. Their method of achieving that aim was to have the business and its assets restored to the estate of the close corporation and then have the corporation placed in business rescue. That restoration would be achieved by voiding the “voidable sale of the business” (in the words of the heading of section 34). They applied to court within the required six month-period laid down by section 34(1) to have the voidable sale set aside. The court order they sought would have ensured that the business and its assets would have formed part of the estate of Main Road once more, and from that property the applicants would have been able to obtain payment of their debts, instead of being met by the buyer of the business, Nel, saying that it was not liable for the debts of the seller. Next, on the assumption that the Main Road close corporation was “financially distressed”,⁵² a successful business rescue would, among other things, enable the development and implementation of a business rescue plan to maximise the likelihood of the corporation’s continuing to exist on a solvent basis or, if that were impossible, that would result in a better return for the corporation’s creditors (such as the applicants) or shareholders than would result from the immediate liquidation of the corporation.⁵³ So the declaration in the present case did concern the applicants’ rights in respect of a proceeding brought within the required six months for recovering their debts as a result of the reversal of the business transfer followed by business rescue.

The response to this answer might be that the declaration in the present case did not directly concern the applicant creditors’ rights in respect of a proceeding for recovering their debts. The takeaway from the *Main Road* judgment is that the declaration must directly concern the applicant creditors’ rights in respect of a proceeding for recovering their debts. A declaration for the setting aside of a business and asset transfer as a prelude to an application for business rescue with a view to recovering payment is not a proceeding for recovering debts.

52 See s 128(1)(f) of the 2008 Act “financially distressed”.

53 See s 128(1)(b)(iii) of the 2008 Act “business rescue”. It should be noted that Ch 6 of the 2008 Act also governs close corporations (s 66(1A) of the Close Corporations Act 69 of 1984 (see Kunst *Henochsberg on the Close Corporations Act* (2019) para 66.1.2; Delpont *Henochsberg on the Companies Act 71 of 2008* (2022) 445 s 128 “Affected person” in relation to “Company”).

6 2 Section 34 and the *actio Pauliana* straddle sequestration and winding-up

Main Road neatly illustrates a feature that section 34 of the Insolvency Act shares with the common-law remedy of the *actio Pauliana*. Both may be relied on by the debtor's creditors *before* a sequestration or liquidation order is granted against the debtor.⁵⁴ This shared feature distinguishes section 34 and the *actio Pauliana* from the other four statutory impeachable dispositions:⁵⁵ all those statutory impeachable dispositions only apply if there is an insolvency or liquidation order in place. Section 34 and the *actio Pauliana* thus straddle the dividing line of the sequestration or winding-up of the debtor's estate. As a corollary, both may be instituted by creditors against a trader company shortly before it is placed in liquidation. Both may thus complicate an attempt at restructuring the company in pre-insolvency proceedings such as business rescue or a compromise with creditors under Chapter 6 of the Companies Act 71 of 2008.

6 3 The position further back in time, before winding-up

What about the position further back in time: in other words, a point where the trader company is not on a downward path into liquidation? If the prescribed notices are published under section 34(1), the consequences of doing so as stated in section 34(2) still follow. What happens if the company then manages to pay the liquidated liabilities that would otherwise become due at a future date? The company will not enter and need not enter winding up as an insolvent company on the ground of failure to pay those debts at least.⁵⁶ In *Simpson's Motors v Flamingo Motors*,⁵⁷ section 34(1) was interpreted as requiring that the trader's estate must be sequestered within six months after the disposition to be void against his creditors. This ruling was held to be incorrect because it conflicted with the express wording of section 34(1).⁵⁸

The trader's celebration about satisfying section 34(2) may still be spoilt. A party-crasher glowers in the corner – the *actio Pauliana* instituted by creditors complaining not necessarily of fraud in the criminal sense of the word but of the debtor's intention to give one

54 For this point about the *actio Pauliana* see Bertelsmann (2019) para 13.8, n 348; and *Fenhalls v Ebrahim* 1956 4 SA 723 (N) (*Fenhalls*) 727G-728H (per Holmes J). See also Martinek "Die südafrikanische *Actio Pauliana* vor deutschen Gerichten: Ein Beitrag zum internationalen Gläubiger- und Insolvenzanfechtungsrecht" 2017 *TSAR Lieber Amicorum – Essays in Honour of JC Sonnekus* 254, n 75. So the *actio Pauliana* is available before sequestration or liquidation (to be used by the creditors) or after sequestration or liquidation (to be used by the trustee or liquidator).

55 See ss 26 and 29-31 of the Insolvency Act.

56 See ss 344(f) and 345 read with s 340 of the Companies Act 61 of 1973; and s 224(3) and Item 9(1) of Sch 5 to the 2008 Act.

57 1989 4 SA 797 (W) 799F-799G (per Goldstein J).

58 *Vermaak* 1990 3 SA 866 (A) 873A (per Joubert JA).

creditor an unfair advantage over others in case of insolvency.⁵⁹ I focus on the latter aspect. The residual power of this line of authority on the

59 *Chin 363*; see also Bertelsmann (2019) para 13.8, n 350. The situation here would thus be that the alienation put the creditors out of pocket (cf n 38 above) because it diminished the assets and caused factual insolvency (the value of the liabilities thus exceeding the value of the assets). See also *Hockey*; *Fenhalls*; and *Bank of Lisbon*. By definition, this state of factual insolvency would still occur before a sequestration order or winding-up order had been granted against the debtor. Because no such order would have been granted, no *concursum creditorum* would thus have been created (see *Walker v Syfret* 1911 AD 141 at 161). If the company were still factually solvent, it is submitted that the *actio Pauliana* could not and would not apply. An anonymous reviewer asked how the preferred (or preferential creditors) might be involved here; would the *actio Pauliana* not also protect against fraudulent transactions intending to benefit one creditor above another; whether this acts as a safety net at all; and, with reference to s 8(c) of the Insolvency Act, whether this might constitute an act of insolvency. This string of questions raises many points to discuss, which are dealt with here in a numbered series in an extended footnote to save the main text above from going off in various directions.

(1) The preferred creditor would, in the circumstances, be the creditor who had actually received preferential treatment from the debtor. The preferent creditors in the wider sense are those who, in the *concursum creditorum* that follows the sequestration order or the winding-up order, are entitled to receive payment before other creditors (cf the definition of “preference” in s 2 of the Insolvency Act) (Smith, Van der Linde and Calitz (2022) para 16.1.3), and thus they include secured creditors holding security for their claims in the form of a special mortgage, landlord’s legal hypothec, pledge, or right of retention (s 2 “security” of the Insolvency Act). In the narrower, usual sense, however, preferent creditors are those whose claims are not secured but still rank above the claims of concurrent creditors (Smith, Van der Linde and Calitz (2022) para 16.1.3): creditors, in other words, who enjoy a statutory preference under ss 96-102 of the Insolvency Act, and who therefore receive payment in the appropriate order of preference and before the non-preferent, concurrent creditors (s 103). A preferred creditor (one who had been shown preferential treatment by the debtor) might conceivably become a preferent creditor in the wider sense of the word, in that, before the sequestration or winding-up order had been issued, the debtor had granted the preferred creditor a right of real security such as a mortgage bond. In this way, the preferred creditor would enjoy a real right and a secured claim if a sequestration order or a winding-up order were later to be granted against the debtor.

(2) The *actio Pauliana* does protect the debtor’s other creditors against fraudulent transactions by the debtor who intends to benefit one creditor above another. The test is “simply whether the object of the transaction was to give one creditor an unfair advantage over the others in insolvency” (Smith, Van der Linde and Calitz (2022) para 12.2.5, citing *Chin 363*; *Beddy 916G-916H*; *Al-Kharafi & Sons v Pema* 2010 2 SA 360 (W) 371A-371C para 15).

(3) The *actio Pauliana* does provide a safety net for the debtor’s other creditors who are not preferred by the debtor who bestows preferential treatment upon a creditor above those other creditors. One advantage is that those other creditors who have not been treated preferentially by the debtor can bring the *actio Pauliana* before a sequestration order or winding-up order has been issued and the *concursum creditorum* has arisen.

actio Pauliana is that, *ex hypothesi*, the debtor (every debtor in South Africa, not just debtors who are traders) is not yet the subject of a sequestration or liquidation order, nor may the debtor necessarily even be the subject of pre-insolvency proceedings or agreements. These proceedings or agreements might include business rescue or a compromise with creditors, under Chapter 6 of the 2008 Act, if the debtor is a company, a common-law compromise with creditors, or an informal workout in the shadows of the law. *Main Road* featured negotiations between Main Road and two of the applicants that went as far as Main Road's granting two of the applicants the "first option" to buy the business. But no binding sale and transfer of the business followed.

In defence, the trader may argue here as follows. He has fulfilled his payment obligations under section 34(2) that are triggered by publishing the section 34(1) notices. He had no choice whether to do so as the

(4) As regards s 8(c) of the Insolvency Act and whether this conduct by the debtor might constitute an act of insolvency, it is clear that under s 8(c), a debtor commits an act of insolvency if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another. In the situation preceding the issue of the sequestration order, the debtor's conduct in preferring one creditor above another or the others would seem to constitute the commission of this act of insolvency. The commission of such an act of insolvency would thus satisfy one of the requirements for the compulsory sequestration of a debtor's estate (ss 10(b) and 12(1)(b) of the Insolvency Act). Yet one must be careful to consider which type of debtor is being discussed here. The word "debtor" is defined in s 2 of the Insolvency Act, "in connection with the sequestration of the debtor's estate", as meaning "a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, *except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies*" (emphasis supplied). So, if the debtor is a human being (and thus a natural person), then the possible commission of the act of insolvency in terms of s 8(c) of the Insolvency Act would be relevant, and it would help to satisfy the requirements for obtaining a compulsory sequestration order. The problem, though, is that in the *Main Road* case, the debtor was a close corporation, and thus a juristic person. As the words that have been emphasised in the definition of "debtor" in s 2 of the Insolvency Act above provide, the estate of the close corporation is not sequestrated under the Insolvency Act, and so the act of insolvency in s 8(c) of that Act would not be applicable or relevant to the facts of *Main Road*. Instead, the close corporation would be wound up voluntarily or by the court. A corporation may be wound up by the court in terms of the laws mentioned or contemplated in Item 9 of Sch 5 to the 2008 Companies Act (see s 66(1) of the Close Corporations Act 69 of 1984). Item 9 of Sch 5 to the 2008 Companies Act provides for the continued application of Ch 14 of the Companies Act 61 of 1973 to winding-up and liquidation. Winding-up by the court is dealt with in ss 344-348 of the 1973 Act. The eight grounds for the court to wind up the company (s 344 of the 1973 Act) do not include a ground similar to s 8(c) of the Insolvency Act to wind up the company because it has disposed of its assets. However, every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition (s 340(1) of the 1973 Act).

creditors demanded payment: he had to satisfy section 34(2). He, therefore, raises the defence of necessity. In satisfying sections 34(1) and 34(2), he was compelled to infringe the requirements of the *actio Pauliana*. This defence removes the unlawfulness of his intention to advantage these creditors in case of insolvency. This cutting of the Gordian knot shields him from an outcome that would yield him the worst of both worlds: he published the section 34(1) notices, paid the liabilities as section 34(2) required, and as his reward for obeying these laws he now faces an *actio Pauliana*.

6 5 The court's reasoning and interpretation of section 34

I turn to consider the court's reasoning and interpretation of section 34 in *Main Road*. The hinge was the Supreme Court of Appeal's ruling on absolute versus relative voidness, the latter connoting direction and purpose.⁶⁰ For other South African mentions of this insight, see *Mgoqi v City of Cape Town; City of Cape Town v Mgoqi*,⁶¹ and *Van Der Merwe v The National Director of Public Prosecutions*.⁶² It is interesting to see Van Zyl J and Sven Olivier AJ, respectively, also quoting the further words from Wade and Forsyth that appear in *Oudekraal* but not *Main Road*:

'Void' is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the Court's willingness to grant relief in any particular situation.⁶³

Wade and Forsyth's opinion as quoted in *Main Road* also features in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*,⁶⁴ *Top Trailers (Pty) Ltd v Kotze*,⁶⁵ and now *The Black Eagle Project Roodekrans v The MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government*.⁶⁶

Further afield, as Lord Nicholls confirmed,

The consequence of invalidity may not be the same in all contexts and in respect of all persons. An order may be void for one purpose and valid for another: see the helpful discussions in Wade and Forsyth, *Administrative Law*, 7th ed. (1994), pp. 339-344, and Craig, *Administrative Law*, 3rd ed. (1994), pp. 451-466. Thus, when considering the consequences of different grounds of invalidity the purpose in hand is always important, as well as the particular statutory context.⁶⁷

60 *Oudekraal* para 28.

61 2006 4 SA 355 (C) (*Mgoqi*) para 120.

62 2009 JDR 0377 (WCC) para 153.

63 As quoted in *Mgoqi* para 120; and *Van Der Merwe* para 153.

64 (2008) 29 ILJ 2588 (LC) 2598 (per Basson J).

65 2018 JDR 0114 (GP) para 61 (Phiyega AJ). The decision was set aside on appeal (see *Top Trailers (Pty) Ltd v Kotze* 2019 JDR 1941 (SCA)).

66 2021 JDR 1208 (SCA) para 11 (per Carelse AJA).

67 *R v Wicks* 1998 AC 92 (HL) 108H-109A.

Wade and Forsyth's opinion was also quoted approvingly in New Zealand and India, in *Rawlinson v Oliver*;⁶⁸ *State of Punjab v Gurdev Singh, Ashok Kumar*,⁶⁹ and *Tayabhai M Bagasarwalla v Hind Rubber Industries Pvt Ltd*.⁷⁰

Next, the *Oudekraal* insight was connected to section 34(1) of the Insolvency Act by Botha JA's ruling that voidness under the subsection was not voidness "in any absolute sense" but only as against persons there specified.⁷¹ The significance of this connection does not emerge from *Main Road* (no doubt because there was no sequestration or liquidation and thus no trustee or liquidator in this case), but Botha JA's ruling should still be remembered:

The alienation is not declared void in any absolute sense, but only as against the trustee. That means that it is within the discretion of the trustee whether to treat such an alienation as void or not. He may, as INNES, C.J., pointed out in *Harrismith Board of Executors v. Odendaal*, 1925 AD 530 at p. 539, waive or determine not to exercise his powers under the section. If he waives his rights, the alienation remains standing. If he exercises his powers under the section and treats the alienation as void, he in effect avoids or annuls it, and, therefore, sets it aside in that sense.⁷²

It is submitted that, in principle, each creditor of the trader may similarly exercise discretion whether to treat the transfer as void: they "may treat the transfer as void",⁷³ they "may treat a relevant transfer by the trader as being void",⁷⁴ section 34(1) "enables creditors ... to treat the transfer as void",⁷⁵ and they "could have treated the transfer as being void" if they had acted within the specified six months.⁷⁶ The appellants' argument in *Main Road* for the absolute meaning of "void" in section 34(1) implicitly ignored this aspect of the case. Instead, the argument can be revealed as requiring and producing a binary result that would, in effect, exclude the trustee's – and each creditor's – choice of whether to treat the transfer as void. The transfer would simply have been void. The trustee's choice is explored in the next paragraph of the *Galaxie* judgment.⁷⁷ It is too long to quote here but is mentioned for readers' edification. The references to authority in that exposition should also be

68 1995 2 LRC 390 (Court of Appeal of New Zealand) 396c-396e (per Richardson J).

69 1991 4 SCC 1 (Supreme Court of India) 6 (per Shetty J), available at Indiankanoon "State of Punjab vs Gurdev Singh, Ashok Kumar on 21 August, 1991" <https://indiankanoon.org/doc/1221809/> (last accessed 2021-11-19).

70 1997 2 LRC 332 (Supreme Court of India) (per Jeevan Reddy and Sen JJ), available at Indiankanoon "Tayabhai M. Bagasarwalla & ... vs Hind Rubber Industries Private ... on 19 February, 1997" <https://indiankanoon.org/doc/1216722/> (last accessed 2023-02-19).

71 *Galaxie* 743B-743C; *Main Road* para 16.

72 *Galaxie* 743B-743C.

73 *Main Road* para 11.

74 *Main Road* para 12.

75 *Main Road* para 17.

76 *Main Road* para 18.

77 *Galaxie* 743D-743H.

noted, including three decisions of the Appellate Division. It is also submitted that using the word “void” is unhelpful in the circumstances of section 34(1). The word that should be used is “voidable”, as the heading of section 34 itself states.⁷⁸ This word “voidable” immediately presumes that someone must be doing the voiding and that until the relevant transaction is voided, it remains valid.

The relevant passage from *Galaxie* on the operation of section 34(1) was also quoted approvingly in *Roos v Kevin & Lasia Property Investments BK*⁷⁹ and *Motala v Moller*.⁸⁰ In *Motala*, GS Myburgh AJ quoted the relevant part of section 34(1) and added: “This does not however connote invalidity in the ordinary sense”,⁸¹ before quoting the relevant passage from *Galaxie*. The *Galaxie* passage was also relied on in argument by the successful appellants in *Gainsford v Tiffski Property Investments (Pty) Ltd*.⁸² This piling up of authority drives home the conclusion that the appellants arguing for an absolute meaning of the word “void” in *Main Road* were arguing in the teeth of established authority for its relative meaning in section 34(1).

The better view is that the transfer was void. So what? Are the creditors just supposed to sit there, inert? No; they have the discretion to exercise (as seen above), and the purpose of section 34(1) is for them to enforce their claims against the debtor, as the buttressing authority of *Rustenburgh*⁸³ and the *Vermaak* cases⁸⁴ bears out. *Wellman* clarifies that the amount the creditors may claim under section 34(1) is unlimited. The added feature worth stating here is that nearly all the creditors may enforce their claims against the trader during the six months: “against his creditors”, so the wording of section 34(1) runs. The only exceptions are if the transfer takes place in the ordinary course of that business or is for securing the payment of a debt.⁸⁵ Nor is the group of creditors limited to those in relation to the business. The group comprises the creditors of the trader in general, for as Joubert JA pointed out:

*Onder skuldeisers in die algemeen moet ook verstaan word skuldeisers wie se skuldvorderings teen die handelaar nie beperk is tot skuld wat in verband met die besigheid staan nie.*⁸⁶

This group would include the trader’s *personal* creditors too.

A final comment on section 34(1) concerns the interplay between the voidness against the creditors and the voidness against the trustee during

78 Compare Kunst, Boraine and Burdette (2022) “5.31.18 Voidable sale of business”.

79 2002 6 SA 409 (T) 421A-421H (per Southwood J)

80 2014 6 SA 223 (GJ) para 16.

81 As above.

82 2012 3 SA 35 (SCA) para 20, n 2 (per Petse AJA).

83 See *Rustenburgh* 1973 2 130 (T) 132D-132E.

84 See *Vermaak* 1988 4 SA 115 (T) 121B-121D; and *Vermaak* 1990 3 SA 866 (A).

85 S 34(1).

86 *Vermaak* 1990 3 SA 866 (A) 872H.

the six months that follow the transfer. What happens if the creditors institute proceedings against the trader and take execution on the assets before the sequestration order is granted and a trustee is appointed? As this activity by the creditors *follows* the transfer, it is not hit by section 34(3), which applies to proceedings instituted *before* the transfer. Does section 34(1) thus provide creditors with protection to change their relationships with the debtor in the run-up to sequestration or winding-up so that, under cover of this subsection, they are immune from challenge under any of the other impeachable dispositions (sections 26, 29, 30, and 31 of the Insolvency Act and the *actio Pauliana* at common law)? Is this, then, also a window of opportunity for creditors to create or improve upon various types of real security over the debtor's assets to strengthen their positions in the order of preference should sequestration or winding-up ensue? If no such protection and opportunity arise, what purpose does declaring the transfer void against the creditors serve?

The decision in *Main Road* clarifies that the litigation by the creditors under section 34(1) must be for payment of the debts or for a declaration in relation to the payment of those debts: see paragraph 6 1 above. The creditors' attempts to improve their real security meet this requirement because these efforts concern the payment of their debts by the debtor concerned.

What the law giveth in section 34(1), the law taketh away under sections 26, 29, 30, and 31 and the *actio Pauliana*. This season is not for the creditors of all debtors in South Africa. It is only for the creditors of a trader defined in section 2 of the Insolvency Act. Nor does it last forever. It is limited to six months at most. In principle, it may not even last that long: sequestration or winding-up may supervene. Then, in the classic words of Innes J, the hand of the law is laid upon the estate.⁸⁷ At that point, there is no longer any opportunity for individual debt collection or strengthening of the position of a creditor. If the protection and opportunity in terms of section 34(1) can be undermined by sections 26, 29, 30, and 31 of the Insolvency Act and the *actio Pauliana* as described above, the outcome would seem to be that when sequestration or winding-up supervenes, the preceding portion of the six months is rendered meaningless for the creditors who have acted according to its terms. Indeed, they have worsened their position before they acted in terms of section 34(1): they have since put their necks into the nooses of sections 26, 29, 30, and 31 and the *actio Pauliana* by their behaviour. With help like this in section 34(1), who needs hindrances? And as has recently been held in another case in a different context,⁸⁸ when it comes to interpretation, a sensible meaning should be preferred to one

87 *Walker v Syfret* 1911 AD 141 at 161.

88 *AJVH Holdings (Pty) Ltd v Steinhoff International Holdings NV* (7978/2020) High Court of South Africa (Western Cape Division, Cape Town) (5 October 2021) (unreported) para 38 (per Slingers J).

leading to results that are not sensible or businesslike or that undermine the document's apparent purpose.⁸⁹ Courts should be slow to conclude that words are tautologous or superfluous.⁹⁰ In *Wellworths Bazaars Ltd v Chandler's Ltd*,⁹¹ Davis AJA quoted Knight Bruce LJ in *Ditcher v Denison*:⁹²

It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use.

On the other hand, though, if section 34(1) does provide the protection and opportunities that the bare wording of the section seems to allow and enable, then it amounts to an open season for the creditors of the trader to act quickly to put themselves in the best position they can be in before sequestration or winding-up supervenes, safe in the knowledge that their actions in this brief time cannot be impeached under sections 26, 29, 30, and 31 and the *actio Pauliana*. In effect, then, the law of impeachable dispositions breaks down completely in respect of these activities in these six months: the law of impeachable dispositions simply does not apply to them. Again, was this really what the legislature intended either when it passed the Insolvency Act in 1936?

A court faced with this scenario would thus be sitting on the horns of a dilemma, with the parties requiring an answer more decisive than, "it's all uncertain, I don't know, and I can't decide: it's too hard." Perhaps a solution may be ventured along these lines. The outcome in which the entire law of impeachable dispositions (sections 26, 29, 30, and 31 and the *actio Pauliana*) is suspended or excluded in relation to the creditors' activities under section 34(1) is extreme. This outcome is, therefore, less desirable for the observance of the law and the maintenance of public

89 *Endumeni* para 18 (per Wallis JA).

90 *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 2 SA 37 (A) 43 (per Davis AJA); *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) para 57, n 94 (per Mokgoro J); *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) para 84, n 83 (per Van der Westhuizen J, mentioning "the interpretive presumption that no provision in a statute is superfluous").

91 *Wellworths Bazaars Ltd* 43.

92 1857 14 ER 718 at 723. This ruling is mentioned in cases such as *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* 1984 1 SA 61 (A) 70C-70D (per Smuts AJA); *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 4 SA 110 (A) 116I (per Nicholas AJA); *The Attorney-General v Dow* 1994 6 BCLR 1 (Appeal Court, Botswana) 52I-53A (per Bizos JA); *Zellco Cellular (Pvt) Ltd v Post & Telecommunications Corp Trading as Net* One* 1998 2 ZLR 106 (H) 98E-98F (per Smith J); *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA) para 10 (per Heher AJA); *Hollard Life Assurance Company Ltd v Van der Merwe* 2007 4 All SA 684 (SCA) para 15, n 11 (per Van Heerden JA); *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 3 SA 473 (SCA) para 13 (per Mpati J); *Egerer v Executrust (Pty) Ltd* 2018 1 NR 230 (SC) para 39 (per Damaseb DCJ); *Legal Aid SA v Theunissen* (2020) 41 ILJ 625 (LAC) para 23, n 6 (per Kathree-Setiloane AJA); *Eksteen v Road Accident Fund* 2021 3 All SA 46 (SCA) para 43 (per Poyo-Dlwati AJA).

order than the outcome in which creditors are deprived of their protection and entitlement under section 34(1). On this basis, it is preferable that section 34(1) should be rendered meaningless for creditors than that it should render the entire law of impeachable dispositions meaningless in the circumstances of section 34(1).

6 6 The *actio Pauliana* applied in *Main Road*

Now I move away from section 34 and on to more about the *actio Pauliana*. Fraud on the creditors, it was held, is perpetrated overtly or covertly – overtly by the bold or naive, but more usually covertly to hide the real purpose.⁹³ As *Main Road* had proceeded overtly, so the reasoning in *Main Road* ran, it had committed no fraud.⁹⁴ Nor had Nel committed fraud by buying the financially troubled pharmacy. CJPE had similarly known of the financial troubles; that knowledge would not have been laid at its door had it gone ahead and bought the pharmacy business, so it should not be laid at Nel’s door either.

This last finding ignores what was done with that knowledge. It is also an incomplete analysis of the facts. What is missing from this reasoning is considering the other, less usual possibility. Put another way: if there are two possibilities, and only one is considered and applied, how does one know when the other possibility may, and perhaps should, be the one that is chosen? If the answer is that the one is considered and applied because it is the more usual, how does one know when to identify the unusual one? And does the danger not arise that if only one possibility is considered because it is the more usual, this may be a foregone conclusion that removes the fact that there were ever two possibilities at the outset?

The other possibility was that the fraud was perpetrated by the bold or naive.⁹⁵ *Main Road* played open cards with the first and second applicants but still went ahead with the sale to Nel. Similarly, despite knowing about *Main Road*’s financial troubles, Nel still purchased it when CJPE refrained. Tarring CJPE with the same brush as Nel was misplaced: one bought the pharmacy, and the other did not. The facts fit the possibility that the *Main Road* owners and the Nel owners did not know and understand the details and requirements of the *actio Pauliana*. Realistically, which pharmacist can reasonably be expected to be familiar with these intricacies of insolvency law?⁹⁶

93 *Beddy* 9161-917B.

94 Fraud here would entail putting the creditors out of pocket (cf fn 38 above).

95 *Beddy* 9161-917B.

96 As an Irish barrister once answered a lord justice in the Court of Appeal in England: “‘Serjeant Sullivan, hasn’t your client ever heard of *in pari delicto potior est conditio defendentis*?’ – ‘My Lord, in the hills and dales of Killarney where my client plies his trade as a shepherd, they talk of little else!’” (see Snape and Watt *How to Moot: A Student Guide to Mooting* (2010) 95-96).

In other words, the pharmacists may have possibly been naive here about intending to confer an advantage on the prospective buyers in case of insolvency. Alternatively, if it were shown that the pharmacists did know their way around insolvency law – as polymathic masters of mixing medicines, then, also familiar with the *actio Pauliana* – the inference would seem to point to their being bold in intending to confer an advantage on the purchasing creditor in the event of insolvency. To bring this aspect of the discussion to a close: it would have strengthened the reasoning if the court had explained why it chose the second possibility rather than the second other than for the sole reason that the second is more usual than the first.

If the pharmacists had been shown to have acted boldly or naively here, then on the authority of *Beddy*, some people might argue that the requirements of the *actio Pauliana* were satisfied. The idea that a person who naively infringes insolvency law should still be held liable for the consequences of doing so may be troubling to other people. Yet it does not negate the fact of the infringement if the maxim that ignorance of the law is no excuse is applied.⁹⁷ This result would have enabled the applicants to recover the assets disposed of by Main Road to Nel and any benefits accruing from the debtor's fraud. Those benefits would have included the proceeds of trading with the proceeds of the alienated assets and any property acquired with it (or its value or its proceeds).⁹⁸ Depending on the amounts involved, this recovery might have opened the way for the business rescue by a court order that the applicants desired.

The paragraphs above have presented a different view of applying the law to the facts. If their reasoning is incorrect and is therefore rejected, it is submitted that the court's view on the non-availability of the liquidation order under the 2008 Act was correct. It should still be mentioned, though, that this presupposes that liquidation was really what the applicants wanted. Maybe they did not include the prayer for liquidation because they never wanted it. What, then, does one make of the switch of attitude at the end of the case? Perhaps by then, the applicants, their dreams of business rescue by court order shattered, were simply scrambling to take something positive away from this litigation, if only the second-best choice of liquidation. Of course, the answer that one would love to know is why they sought business rescue in the first place. That would shed some light on why they were prepared to ask for liquidation. As a way of resolving the two, it may have been that the plan the applicants sought from the outset was not the primary goal of maximising the likelihood of the company continuing in existence

97 However, it was held that in statutory offences requiring *mens rea* there was no ground for the existence of the cliché that “every person is presumed to know the law” and this was no longer applicable (see *S v De Blom* 1977 3 SA 513 (A)). So it may be argued that the maxim should not be applied in the present circumstances either.

98 *Kerbyn 178 (Pty) Ltd v Van den Heever* 2000 4 SA 804 (W) 818B-820E (per Nugent J).

on a solvent basis. Instead, it was the consolation prize, “if it is not possible for the company to so continue in existence”, that would result “in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company”.⁹⁹

Again, the lesson is to foresee, discuss with the client, receive clear instructions, and plan accordingly for the possibility that the application’s primary goal may fail and to provide for a secondary or alternative goal (here, liquidation) properly set out in the court papers from the outset and with notice given to all the relevant creditors such as SARS. The unsuccessful applicants learned a similar lesson in a different context in *Cooperativa Muratori & Cementisti v Companies and Intellectual Property Commission*.¹⁰⁰ Among other things, they wanted to lead further evidence before the Supreme Court of Appeal even though they had not cited or served the local South African creditors and allowed them the opportunity of submitting evidence and arguments against recognising the final Italian judgment and order in South Africa.¹⁰¹ Wallis JA held that this step would breach those local creditors’ rights of access to courts under section 34 of the Constitution of the Republic of South Africa, 1996 and that it could not be countenanced.¹⁰² Arguably, if the applicants in *Main Road* did not involve the debtor’s other creditors properly in this way, they might face liability for common-law remedies such as damages.¹⁰³ The Constitution is the supreme law of the Republic, and its obligations must be fulfilled.¹⁰⁴ So it governs the law on seeking liquidation of the trader company under section 131(4)(b) of the 2008 Act.¹⁰⁵

7 Conclusion

Main Road interestingly illustrates the creditors’, not a trustee or liquidator’s, attempted impeachment of a transfer under section 34(1). Rather than bringing an application to recover the payment of their debts or for a declaration of their rights in respect of debt recovery, they had sought to set aside the transfer of the business and its assets as a prelude to an order for business rescue in respect of the close corporation. Even had they sought payment or the appropriate declaration, they would still have been left trying to persuade the court that the mountain of authority against them somehow did not exist or should be departed from by a single judge sitting at first instance.

99 S 128(1)(b)(iii) of the 2008 Act; see para 6 1 above.

100 2021 3 SA 393 (SCA) (*Cooperativa Muratori & Cementisti*).

101 *Cooperativa Muratori & Cementisti* para 26.

102 As above.

103 Boggenpoel “Revisiting the *Tswelopele* Remedy: A Critical Analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*” 2020 SALJ 424.

104 See s 2 of the Constitution.

105 An anonymous reviewer of this article suggested that it might be appropriate to mention that although the Constitution does apply, it does not apply directly – there is the subsidiarity principle or doctrine of adjudicative subsidiarity (see s 8 of the Constitution).

Along the way, the shared feature of section 34(1) and the *actio Pauliana* was observed: they straddle sequestration or winding-up.¹⁰⁶ The unexpected happy outcome of successful compliance with sections 34(1) and 34(2) was celebrated, a rarity in an insolvency statute. The pervasive menace of the *actio Pauliana* with its insolvency tentacles was then revealed, and the criminal defence of necessity was invoked to cut a Gordian knot of unfairness for the trader who has surmounted the difficulties of sections 34(1) and 34(2).

Passing on to consider the details of section 34(1), the discussion turned to the absolute/relative meaning of the word “void”, an established feature of the relevant judicial interpretation of this provision and well-articulated by a widely followed juristic commentary on validity in administrative law. Just as implications for the trustee’s exercise of discretion were explored, so they were confirmed for the existence and exercise of discretion by the creditors.

Next, some of the finer details of the ambit of the word “void” in section 34(1) were teased out. The amount claimable is unlimited and absolute in that sense. And the extent of the group of creditors was revealed as being almost all the creditors: not the section 34(1) exceptions (where the transfer is in the ordinary course of business or for securing a debt) but including the general creditors (and thus the personal ones) of the trader.

The uneasy relationship between section 34(1) and sections 26, 29, 30, and 31 of the Insolvency Act and the *actio Pauliana* was explored. This analysis generated questions about the purpose of section 34(1) for creditors’ rights.¹⁰⁷ For these creditors of the trader, it may be revealed in practice that section 34(1) does not protect and advantage them as may appear at first blush. Or, to the contrary, section 34(1) gives them a safe but short-lived open season to improve their positions in relation to the trader to the best of their ability before sequestration or winding-up supervenes. An answer to this dilemma was ventured: it is better that the creditors should have no protection under section 34(1) than that the entire law of impeachable dispositions should be excluded from the circumstances of section 34(1).

106 Without holding a liquidation order and if the company was unable to pay its debts, the creditors’ only other remedy was perhaps the *actio Pauliana*, and so they tried to claim it. Success would have enabled them to retrieve the pharmacy business and its assets and goodwill into the estate of Main Road and enable the creditors to levy execution on those assets to satisfy their (judgment) claims against Main Road.

107 It should also be remembered that more than two decades ago, the South African Law Commission recommended repealing s 34 of the Insolvency Act (see Project 63: *Report on review of the Law of Insolvency* (April 2000) Explanatory Memorandum 45 cl 3 para 2.6) as unjustifiable, impracticable, and disruptive in modern commerce powered by contemporary technology: dispositions without value, voidable preferences, and collusive dealings should be applied instead (ss 26, 29, and 31 of the Insolvency Act, respectively).

The first part of the comment reflected on the interplay of section 34 and the *actio Pauliana*. The second part presented a different view of applying the established requirements to the facts – the less usual of the two instances of infringing the *actio Pauliana*. By contrast, the court's reasoning seems to prefer only the more usual and did not consider the less usual at all. It is submitted that a theme of the reasoning and the authorities mentioned in the first part of the judgment was the avoidance of glib declarations based on absolute meanings yielding binary results. Nuanced interpretations of statutes and administrative decisions were preferred, and they prevailed. In the interests of nuance and comprehensiveness, might considering both possibilities be a more convincing way of analysing facts, rather than choosing one simply because it is the more usual?

The final lesson of this case is obvious. Thoroughly plan, discuss, and create a Plan B for the client in the pleadings and execute the procedural requirements and administration. Failing to apply these techniques may leave the client stranded without a case. As Warren Buffett said, only when the tide goes out do you discover who's been swimming naked.