THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

CASE NO: 3731 / 2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

17 December 2021 .....
DATE SIGNATURE

In the matter between:

FIRM-O-SEAL CC **PLAINTIFF**

and

WYNAND PRINSLOO & VAN EEDEN INC **FIRST DEFENDANT**

DERRICK VAN WYK **SECOND DEFENDANT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10H00 on 17 December 2021.

[1] This matter came before court on a trial roll. The Plaintiff issued summons in which four claims are set out against the Defendants. The Plaintiff, a former client of the Defendants claims repayments over alleged overreach at the hands of its legal representatives in respect of the first two claims. The remaining claims are damages it suffered as a result of professional negligence by the Defendants in the manner in which they executed their mandate as its legal representatives. Six special pleas were pleaded by the Defendant against all these claims. At the time of hearing, one of the special pleas was abandoned, leaving just five. Four of the special pleas relate to prescription whereas the fifth one questions the Plaintiff's *locus standi* to litigate in this case.

[2] At the onset, both parties agreed that the special pleas be decided separately from the facts of the case in terms of Rule 33(4) of the Uniform Rules, and requested the court to make that order. An order was consequently made by the court to that effect. For that reason, I will elaborate no further on the nature and details of the claims. The trial focused therefore on the five special pleas.

[3] The Defendants accepted the onus to begin and proceeded to hand in a number of exhibits as evidence. All these were accepted with no contestation from the Plaintiff. Case for the Defendants was closed with no oral evidence. The Plaintiff also handed in a number of exhibits which were received without any contestation from the Defendants. Mr. DPA Schutte also gave evidence for the Plaintiff. Mr. Schutte is the Plaintiff's legal

representative. His evidence was mainly to direct the court to various documents and exhibits which already formed part of the evidence before the court. Essentially, he gave evidence on various dates on which he interacted with the Defendants and his clients with a view to suggest that the Plaintiff could not have been aware of the existence of the debt prior to his unearthing of certain evidence or his communication with them about it. Case for the Plaintiff was closed with no further evidence.

Issues for determination.

[4] In respect of the four special pleas on prescription, the court is called upon to determine if the Plaintiff's claims have prescribed in terms of the Prescription Act no. 68 of 1969. This would include the question on when is it that the debt became due and payable and when is it that the Plaintiff or its directors became aware of the existence of the debt. As for the special plea challenging the Plaintiff's *locus standi*, the court is to determine if the decision to litigate by the Plaintiff was with the requisite approval of the Business Rescue Practitioner (the Practitioner) since it was under business rescue proceedings when the summons was issued. There is consensus that a determination in favour of the Defendants on the special plea challenging the Plaintiff's *locus standi* disposes of the claims as a whole. The special pleas on prescription would therefore only be considered in case of a court's finding in favour of the Plaintiff in respect of the special plea challenging its *locus standi*. For this reason, it is apposite to consider the special pleas in that order.

Plaintiff's Locus Standi.

[5] Following are the common cause facts leading to this special plea. Mr Deon Cornelius & Mrs. Susan Cornelius are the members and directors of the Plaintiff. On 05 June 2019, the Plaintiff was placed under business

rescue and Mr. Mahier Tayob was appointed as the Practitioner. At the instructions of Plaintiff's directors, summons commencing this action was issued on 02 December 2020. The issuing of summons was not only unauthorised by the Practitioner; he also did not know about it. In an email from the Practitioner's legal representative Mr. Essop of Aphane Attorneys, dated 27 January 2021, the following was confirmed as the instructions from him:

a) He did not instruct or consent to the institution of the action.
b) He had no knowledge of the matter.
c) He had no discussion in respect of the matter with the members of Firm-O-Seal or their attorneys.
d) He was not informed of the possible asset to recover.
e) He did not wish to proceed with the action.
f) He has instructed his legal representative to forward a letter to the Plaintiff's attorneys instructing them to withdraw the action.[1]

[6] On 03 March 2021, the Practitioner signed a power of attorney in which he authorised the Plaintiff's attorneys to proceed with the action, "ratifying" any steps and/or actions already undertaken by the attorney in this matter. The argument before the court centred around the interpretation of a section in the Companies Act, no 71 of 2008 (the Act) that requires the Practitioner to approve a decision to litigate by a company or a close corporation placed under business rescue. Can a ratification of a decision taken without the knowledge of a Practitioner be regarded as an approval in terms of the Act? If so, can a Practitioner change his earlier decision to withdraw an action and substitute it with a decision to proceed with it.

[1] See p. 92 of Pleadings Bundle.

The Law

[7] Section 137 of the Act provides,

> "137. **Effect on shareholders and directors**
>
> (1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent-
>
> (a) that the court otherwise directs; or
>
> (b) contemplated in an approved business rescue plan.
>
> (2) During a company's business rescue proceedings, each director of the company-
>
> (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
>
> (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;
>
> (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
>
> (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).
>
> (3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.
>
> (4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the

company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has-

(a) failed to comply with a requirement of this Chapter; or
(b) …" [My emphasis].

[8] In *Neugarten and Others v Standard Bank of South Africa Ltd,*[2] the Appellate Division held the following,

"As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute. (See also the numerous authorities cited after the quoted passage in support of this proposition.) Whether in a particular case a statutory prohibition falls within this general rule depends upon the construction of the enactment concerned. In the instant case, though there is no express declaration of nullity, it is acknowledged all round that in the absence of consent the guarantee is void. It is therefore unnecessary at this stage to refer to the principles and *indicia* usually invoked to decide this question. (See *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-830C and *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885E-G.) Since the guarantee at the time it was signed was a nullity, it follows that it 'is not only of no effect, but must be regarded as never having been done.' (*Schierhout v Minister of Justice* 1926 AD 99 at 109.)

It is well-settled law that there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded (I shall refer to such as a "void agreement"). In *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167, cattle were purchased in contravention of Law 28 of 1896 (T) which made it an offence to sell cattle or other livestock on a Sunday.

[2] 1989 (1) SA 797 (A) at 808D-809E

> The sale was held to be an unlawful and invalid transaction. The Court *a quo* held that "there cannot be ratification of a bargain which is prohibited by statute." - (See at 169 of the Appellate Division report of this case.) On appeal Innes CJ at 170, in reference to this point, confirmed that "ratification relates back to the original transaction, and there can be no ratification of a contract which is prohibited and made illegal by statute". Similarly in *Re Townsend, Ex parte Parsons* (1886) 16 QBD 532 (CA) at 546 Lindley LJ said that: "If the Act of 1882 makes the instrument void, all the rest follows easily enough. It follows that the parties cannot ratify or confirm a void agreement."”

[9] I quote the above passage because of its appositeness to the issues in this matter. As rightly observed by Nicholson J in *SAI Investments v Van der Schyff NO and Others*,[3] *Neugarten's* case concerned the prohibition in section 226(1) of the Companies Act 61 of 1973 against a company providing loan or security for another company controlled by one or more of its directors. This prohibition is not applicable where the security has been given with consent of the members of the company in terms of section 226(2). The Court held that the said consent is required before or at the time the loan is made or security provided and if consent is not given at that stage, the loan or security is invalid. The court held that when consent was required in terms of section 226(1), the lack thereof before or at the time the loan was made or the security provided was fatal to the validity of the transaction and because one person had not consented at that stage the guarantee was invalid and the appeal should be upheld.

[10] The dictum in *Neugarten* was applied by Goldblatt J in *Simplex (Pty) Ltd v Van der Merwe and Others NNO*[4] when he concluded,

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[3] 1999 (3) SA 340 (N) at 349F-J

[4] 1996 (1) SA 111 (W)

> "[T]o hold that the agreement had a 'latent validity' which could at the option of the respondents be ratified would mean in effect that the agreement was not an agreement of sale but an option given to the respondents. This could never have been the intention of the parties. Either there was an immediate valid and binding agreement of sale or there was no agreement at all. It was never the intention of the parties to have a limping contract which would only become whole on approval by a duly authorised trustee or the Master or the beneficiaries or the Court."

[11] *Neugarten* was again referred to with approval on *Gihwala and Others v Grancy Property Ltd and Others*,[5] when the SCA had to consider *inter alia* whether a loan to a director of a company granted without a prior approval could be ratified at a later stage by the members. In following the dictum in *Neugarten*, the court concluded that Under section 226 of the Companies Act, no. 61 of 1973, an unauthorised loan to a director could not be authorised after it had been made as it was void *ab initio* and incapable of *ex post facto* ratification.[6]

[12] In *SAI Investments v Van der Schyff NO and Others*,[7] Nicholson J had to decide whether an agreement to sell the property by a trustee without the requisite authorisation by the Court or the Master, was capable of being ratified *ex post facto*. Nicholson J seemed to prefer the approach adopted in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman*[8] *where* the court summarised the principles to be applied in deciding whether a contract made in conflict with a statutory provision is null and void as follows:

> "1. The validity of a contract in such circumstances depends upon the intention of the Legislature. Generally the consequence of such conflict is

[5] 2017 (2) SA 337 (SCA)
[6] See *Gihwala* (*supra*) at para 115.
[7] *Supra.*
[8] 1984 (2) SA 157 (T) at 159 - 160

> nullity of the contract, but that is not an inflexible rule. A careful consideration of the wording of the statute and its objects may lead to the conclusion that the Legislature did not intend invalidity to result.
>
> 2. *Indiciae* that point to an intention that invalidity of the contract should result include the following:
>
> *(a)* The use of the words "shall" or "moet" in the relevant section.
>
> *(b)* The fact that the provision is expressed in negative terms.
>
> *(c)* The provision of a penal sanction for contravention of the relevant provision, but in that case the question remains whether or not the Legislature was satisfied that the criminal punishment was to be sufficient sanction without the contract itself being rendered void.
>
> 3. A further consideration is whether or not visiting the contract with nullity will cause more inconvenience or lead to more undesirable results than if the wrongdoer is merely punished criminally."

[13] After applying the criteria above, Nicholson J concluded that the contract concluded by a trustee without the prior consent of the Master or the Court was a nullity. This criteria was also applied by the Appellate Division in *Neugarten*.[9] Applying the same principles to facts at hand, it is necessary to consider the intention of the Legislature from the wording of the statute. Section 137(2) of the Act provides that a company director must continue to exercise the functions of director, subject to the authority of the practitioner. Further to this, a director has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so. [My emphasis].

[14] Two forms of sanctions in case of directors who fail to perform their function under the authority of the Practitioner or his/her express instructions are provided under section 137(4) and 137(5) in that firstly, the

[9] *Supra*.

Practitioner can approach the court and request the removal of such director. Secondly, the section provides that an action that requires an approval of the Practitioner is void unless it is so approved by him/her. I therefore conclude that it could not have been the intention of the Legislature to allow the directors to run the show without the Practitioner's knowledge, participation or approval with the hope that he/she would ratify their deeds. The seriousness at which the Legislature frowns at directors who refuse and/or neglect to operate under the authority and express instructions of the Practitioner manifests itself in the sanction of their removal and that what they do is void *ab initio*. I agree with the approach in *Neugarten*, that an act that is void is incapable of being ratified as it is regarded as having not taken place. The best that could be done by the Practitioner *in casu* was to start a fresh action as whatever was done without his approval was void and could only be withdrawn.

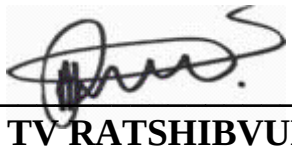
[15] What is compelling *in casu* is that about two months after the summons was issued, the Practitioner wrote in an email that the directors had not discussed the litigation with him or sought his approval notwithstanding their obligation to operate under his supervision and express instructions. He even indicated that he instructed his legal representative to inform the Plaintiff's legal representative to withdraw the action. It seems this was not acted upon. To interpret the requirement for the approval by the Practitioner as allowing approval *ex post facto* negates the *prima facie* purpose of the legislation in respect of the powers granted to the Practitioners regarding the decisions taken after they have been appointed as such and the companies are already placed under business rescue. That interpretation would also undermine the Practitioners and has the potential to defeat the whole purpose of business rescue proceedings.

[16] For the reasons set out above, I find that the Plaintiff did not have the approval of the Practitioner when issuing the summons against the Defendants. I also find the action by the directors of the Plaintiff in instructing Mr. Schutte to issue summons was void for not having been approved by the Practitioner and that their decision is incapable of being ratified *ex post facto*. For the reason that the court upholds the special plea on this special plea, the special pleas raised on prescription will not be considered as they have become moot and academic.

[17] In the result, the following order is made.

[17.1] The Defendants' special plea on *locus standi* is upheld.

[17.1] The Plaintiff's claims are dismissed with costs.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF	**: ADV GREYLING**
INSTRUCTED BY	**: KARIEN SCHUTTE ATTORNEYS MIDDELBURG**
FOR THE DEFENDANT	**: ADV MYBURG**
INSTRUCTED BY	**: NGWANE MAMOD INC**

C/O: GIFT PISTORIUS INC

MIDDELBURG

DATE HEARD : 02 & 09 DEC 2021

JUDGMENT DELIVERED : 17 DECEMBER 2021