THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 510/2008

CONSOLIDATED NEWS AGENCIES (PTY) LTD (IN LIQUIDATION) Appellant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD 1st

Respondent

MTN SERVICE PROVIDER (PTY) LTD 2nd

Respondent

Neutral citation: *Consolidated News Agencies v Mobile Telephone Networks* (510/08) [2009] ZASCA 130 (29 September 2009)

Coram: NAVSA, NUGENT, HEHER, MHLANTLA JJA and HURT AJA

Heard: 24 August 2009

Delivered: 29 September 2009

Updated:

Summary: Insolvency – Act 24 of 1936 s 33(1) – disposition – restoration against indemnification – 'in return for any disposition' – 'good faith' – meaning - contemplation of sequestration – when present.
Company – contract – or state of mind in concluding same – 'directing mind and will' – where located.

ORDER

In an appeal from the High Court, Johannesburg (Madam Justice SALDULKER sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

HEHER JA:

[1] The issue in this appeal concerns the entitlement of the respondents to rely on the indemnity provisions of s 33(1) of the Insolvency Act 24 of 1936 ('the Act')[1].

[2] This is an appeal from a judgment of the then Witwatersrand Local Division of the High Court (Saldulker J), with leave of the learned judge, who had found for the present first and second respondents in respect of an issue separated under Rule 33(4). The court made the following order in those proceedings:

'1. The MTN parties are not obliged to restore any property or any other benefit received under the (alleged) dispositions (on the assumptions recorded in the order of Court in terms of Rule 33(4)) unless the liquidators have indemnified them for parting with such property and for losing such rights.

2. The liquidators are ordered to pay the costs of suit up until the present time, including the costs consequent upon the employment of three counsel.'

1 Sec 33(1) provides:
'A person who, in return for any disposition which is liable to be set aside under section *twenty-six*, *twenty-nine*, *thirty*, or *thirty-one*, has parted with any property or security which he held or who has lost any right against another person, shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition, unless the trustee has indemnified him for parting with such property or security or for losing such right.'

[3] The parties to the appeal are referred to in the agreements to which the litigation relates as 'CNA' (the appellant)[2] 'MTN' (the first respondent) and 'M-Tel' (the second respondent) and I shall continue to use those abbreviations save that, where it is unnecessary to distinguish between the respondents, I shall use the expression 'the MTN parties'[3].

The background to the litigation

[4] Until February 2001 CNA formed part of the Wooltru stable of companies. Wooltru Ltd ('Wooltru') held all the shares in Consolidated News Agencies Holdings Ltd ('CNA Holdings') which in turn held all the shares in CNA. Wooltru provided finance to CNA through a subsidiary, Wooltru Finance (Pty) Ltd.

[5] MTN and M-Tel fell within the Johnnic group of companies. Several of the group companies traded with CNA including M-Tel, Johnnic Entertainment, Times Media and Caxton.

[6] The trading relationship between M-Tel and CNA arose out of the highly competitive nature of the mobile phone industry and, in particular, M-Tel's need to find a retail outlet through which its products could be marketed country-wide to the exclusion of its competitors. With 300 or more stores and an established reputation, CNA seemed to provide an ideal solution.

[7] Accordingly, on 19 April 1999 M-Tel and CNA concluded an agreement to govern their trading relationship which they called the 'Retailer Agreement' (abbreviated in the proceedings to 'RA'), the material aspects of which were the following:

(i) It created a relationship of exclusivity between the parties to it. For the duration of the agreement CNA was obliged to stock and promote M-Tel's products and was not entitled to stock or promote competitive products.

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2 In fact the joint liquidators of CNA are the appellants but unless it is necessary to do so I shall not distinguish between them and the company.

3 Broadly, MTN is a cellular service provider while M-Tel markets cell-phones and related products.

(ii) It governed three trading years, 30 June 1999 to 30 June 2000, 1 July 2000 to 30 June 2001, and 1 July 2001 to 30 June 2002.

(iii) M-Tel warranted in favour of CNA that in respect of each of the three years CNA would accrue discounts, commissions and incentives arising from the agreement equal to or exceeding R65 million for the first year, R77 million for the second year and R84.7 million for the third year.

(iv) In the event of an audit certificate being issued that certified that an income warranty had not been met, M-Tel would be obliged within 14 days to pay to CNA the amount of the shortfall reflected in the certificate.

(v) CNA undertook to use its best endeavours to achieve the minimum targets and to that end furnished certain warranties. Clause 25.4 provided as follows:

'The parties wish to record that the warranties . . . are necessary to ensure that the minimum targets . . . are achieved and accordingly, any material or persistent breach of the warranties . . . which materially prejudices the achievement of any of the minimum targets shall constitute a material breach of this agreement and the service provider shall be entitled to call upon the Retailer to rectify such breach within forty-eight hours of receiving such notice to rectify, failing which the Service Provider shall be entitled to immediately terminate the Agreement upon written notice to the Retailer.'

[8] In the first trading year there was a deficit of about R9.4 million in the warranted amounts of discounts, commissions and incentives accruing to CNA which M-Tel made good.

[9] On 15 February 2001 (during the second warranty period) Wooltru sold its interests in CNA Holdings and CNA to Gordon Kay & Associates (Pty) Ltd ('GKA'), a company with few resources of its own. It was controlled by Mark Lawrence Gordon ('Gordon') and Hobart Anthony Kay ('Kay'). According to the sale agreement:

(i) the purchase price, subject to adjustments, was R150 million;

(ii) Gordon and Kay were required to provide personal suretyships in the sum of R30 million, which were to be replaced, on or before the effective date, by commercial bank guarantees for the same amount;

(iii) On or before the closing date GKA was required to provide a further bank guarantee for R54.6 million, bringing the total of such guarantees to R84.6 million;

(iv) the balance of the purchase price was to be secured by the suretyships, pledge and cession for which the agreement made provision;

(v) CNA Holdings was required to give a suretyship for the payment by GKA of the balance of the purchase price in an amount of R134.6 million and to pledge certain of its shares in CNA as security for its obligations as surety. In addition, CNA was required to bind itself as surety for the payment by GKA of its obligations to Wooltru under the sale agreement.

[10] At about the same time it was becoming clear to M-Tel that CNA's income in respect of M-Tel products would not satisfy the warranty for the second year and that the shortfall would probably exceed R40 million.

[11] GKA and Gordon and Kay defaulted on their obligations to provide guarantees.

[12] GKA approached the MTN group to provide the guarantees to Wooltru in lieu of the guarantees owed by GKA. In a letter of comfort of 9 March 2001 MTN recorded its willingness to do so.

[13] On 26 March 2001 a further agreement (the 'Amended Retailer Agreement', abbreviated to 'ARA') was concluded between M-Tel, MTN, CNA, CNA Holdings, GKA, Wooltru, Johnnic Communications Ltd and Biotrace Trading 89 (Pty) Ltd. (Biotrace was a vehicle created to hold all but the top 50 CNA stores.) The agreement was signed by Buckley McGrath, a director of M-Tel, on its behalf, and by Sifiso Dabengwa, a director of MTN, for that company.

[14] In summary, the ARA provided that-

(a) the terms of the RA would remain in force except to the extent that those of the ARA were inconsistent with them;

(b) (as a recordal) M-Tel's income warranty for the year ended 30 June 2000 had been fully discharged;

(c) CNA waived its rights in respect of the income warranty for the year ended 30 June 2001 and that warranty was deleted from the RA;

(d) the income warranty for the year ended 30 June 2002 was replaced by an arrangement that-

(i) extended the warranty period within which the minimum income was to be earned to 15 months, i e from 1 April 2001 to 30 June 2002;

(ii) required that any shortfall that M-Tel would have to pay under the new warranty arrangement be paid into a trust account to be opened by attorneys Webber Wentzel Bowens for the purpose of enabling MTN to meet its guarantee liability to Wooltru out of that account;

(iii) required CNA and Biotrace to pay all income[4] accruing to them between 1 April 2001 and 30 June 2002, to a maximum of the sums payable in terms of the guarantees, into the trust account, save that they would be entitled to withhold and to retain for their own purposes 50% of their income from existing business to an aggregate maximum of R1 500 000 per month, and subject further to a maximum total withholding by CNA and Biotrace collectively of R20 million.

(iv) MTN undertook to furnish two guarantees, for amounts of R30 million and R54.6 million respectively to Wooltru, which in turn agreed that Gordon and Kay would

4 Defined as 'all income, discounts, incentives and commissions earned by CNA from its cellular telephony business, whether from M-Tel or third parties, and whether pursuant to the Retailer Agreement or other agreements'.

thereby be released from the sureties furnished by them under the agreement of sale. If MTN should be called upon to make payment under either guarantee it would be entitled to recover the amounts paid by it from GKA, CNA and Biotrace 'it being the intention of the parties that MTN will in fact be reimbursed by CNA and Newco [i e Biotrace], such reimbursement being effected from the monies held in the Trust Account.';

(v) CNA ceded to MTN, as security, its rights in respect of the trust account.

[15] On the strength of the ARA and the implementation of the mechanisms created under it, the sale of CNA was implemented from April 2001.

[16] On 30 June 2002 MTN duly performed under the guarantees and paid Wooltru the sum of about R86 million.

[17] On 27 July 2002 CNA was provisionally wound up.

The three actions

[18] The three actions in the court below concerned, inter alia, the moneys that remain in the trust account, M-Tel's obligation to top up those moneys, and dispositions that the liquidators of CNA allege are voidable at their instance.

[19] In the action under case no 05/13586, MTN sued the liquidators of CNA on the basis of an allegation that the latter is liable as a co-principal debtor with GKA to refund MTN in respect of MTN's payment under the guarantees issued in favour of Wooltru.

[20] The liquidators defended that action on the ground that the provisions of the ARA relied upon by MTN constitute voidable dispositions in terms of s 26 of the Act.

[21] To that defence MTN replicated that:

'2.1 In return for one or more of the dispositions, the plaintiff in good faith paid to Wooltru an amount of R85,976,778.08 pursuant to the guarantees as pleaded in paragraph 8 of the particulars of claim;

2.2 The first defendant's liquidators have not indemnified the plaintiff in respect of the above;

2.3 Accordingly, in terms of section 33(1) of the Insolvency Act 24 of 1936, the plaintiff is not liable to restore any benefits received under the amend ing agreement.'

[22] In the second action, under case no 05/13890, the liquidators instituted action against, inter alia, MTN and M-Tel alleging that five particular provisions of the ARA constitute dispositions not for value in terms of s 26 of the Act. The dispositions are identified as (1) the waiver of the second income warranty, (2) the undertaking to pay monies into the trust account, (3) the undertaking to reimburse MTN, (4) the issuing of the undertaking as surety and co-principal debtor in favour of MTN, and (5) the cession of the funds in the trust account in favour of MTN. MTN and M-Tel raised in their pleas to that action, as one of their defences, the following:

'14.2 Alternatively and in the event of it being found that dispositions were made and are liable to be set aside as alleged (which is denied) then in such event the defendants aver:

14.2.1 in return for one or more or all of the alleged dispositions the first defendant [MTN], acting in good faith made payment to Wooltru Limited in amounts aggregating R85 976 778,08 pursuant to the aforesaid guarantees;

14.2.2 further in return for one or more of the aforesaid dispositions the second defendant [M-Tel], acting in good faith lost its right against Consolidated [CNA] to terminate the retailer agreement consequent upon the breaches by Consolidated pleaded in paragraph 6.2.3 above;

14.2.3 the plaintiffs have not indemnified the first or second defendants in respect of the aforegoing;

14.2.4 accordingly, in terms of section 33(1) of Act 24 of 1936 the first and/or second defendants are not liable to restore any property or other benefits received under the alleged dispositions unless they are indemnified for parting with the aforesaid monies and/or benefits and for losing such right, in accordance with section 33(1).'

[23] In the third action under case no 05/13893 the liquidators sued to enforce the obligation of M-Tel, under clause 5.3 of the ARA, to top up the trust account. M-Tel's plea did not raise a s 33(1) defence to this claim.

The issue

[24] The parties' agreement regarding the separate determination of an issue under rule 33(4) was embodied in a minute which provided:

'Assuming that the dispositions referred to at paragraph 15.4 of the particulars of claim under case number 05/13890[5] constitute dispositions within the meaning of section 2 of the Insolvency Act, No 24 of 1936, and were not made for value within a period of two years prior to the liquidation of Consolidated and would accordingly be liable to be set aside (as alleged in paragraph 15.5.2.1 of the particulars of claim), the Court is requested to determine the merits of the defence pleaded in paragraphs 14.2.1 to 14.2.4 of the plea under case number 05/13890, read with paragraphs 2.1 to 2.3 of the replication under case number 05/13586 ("the section 33(1) defence").'

[25] Accordingly, for the purposes of the hearing in the court below, only the merits of the s 33 point raised in MTN's replication under case no 05/13586 and MTN and M-Tel's plea under case no 05/13890, arose for determination.

[26] As agreed by the parties, and as directed in its order, the court was requested and required to assume for the purposes of the determination that the five identified provisions of the ARA did indeed constitute dispositions for the purposes of s 26 of the Act and that such dispositions were not made for value (that is, that CNA did not receive value for making such dispositions).

[27] A party relying on s 33(1) to avoid restoration of property or other benefit received without indemnification must, according to its terms, prove that

(i) it acted in good faith,

(ii) in parting with property or security or in losing a right, and

(iii) such parting or loss took place in return for the impugned disposition.

As appears from the separated case, MTN and M-Tel were put to the proof of all three elements.

The admissibility and sufficiency of the evidence

5 Those summarised in para [22] above.

[28] In attempting to discharge the onus the MTN parties relied on the evidence of two witnesses, Messrs Tredoux and Jenkins. Neither was a member of the board of either company in March 2001. Tredoux was employed by MTN, as group executive (sales) while Jenkins was a non-executive director of M-Cell, the holding company of MTN and M-Tel and Johnnic Holdings the listed company which held, directly, 15% of the shares in M-Cell and, indirectly, 35% of the shares in that company. Neither witness was a signatory to the RA or, more important, to the ARA. By contrast, MTN and M-Tel did not call McGrath to testify on their behalf, despite the fact that he attended the trial, was readily available, had been an executive director of M-Tel at all material times and had participated in the negotiation of the ARA and signed it on behalf of M-Tel[6]. (It was not disputed that Dabengwa, who signed on behalf of MTN was not available to testify.) CNA called no witnesses, but around these facts its counsel developed an argument that it had not been open to MTN and M-Tel to rely on their witnesses for the purpose of establishing 'the directing mind and will' of those companies in relation to either the presence of good faith
or the lack of intention to obtain a preference in insolvency to the prejudice of CNA's creditors. Counsel sought to supplement this submission by categorizing Jenkins as a poor and unreliable witness. According to Jenkins, McGrath was 'the person taking the most responsibility for the MTN side of things', and, so counsel submitted, an inference should have been drawn against the MTN parties because of the failure to call him to testify.

[29] Pursuing this line of attack, CNA's counsel submitted that, as a matter of law the persons who have the management and control in relation to the act in point are the directing mind and will of the company: *El Ajou v Dollar Holdings plc* [1994] 2 All ER 684 (CA) at 695g-696d, 697e, 699h-j, 705-706g, and that, on this matter, there is no difference between South African and English law: cf *Simon NO v Mitsui and Co Ltd* 1997 (2) SA 475 (W) at 526I-531A and Blackman, *Commentary on the Companies Act* 4-123-to 4-133. The
'directing mind' need not be one person or body; the knowledge of more than one can be combined to comprise a piece of information that is regarded as knowledge of the

6 Both MTN parties admitted in their trial particulars that McGrath was authorised to negotiate and conclude the ARA.

company: Blackman, *op cit*, at 4-131; *Brambles Holdings Ltd v Carey* (1976) 2 ACLR 176 SC (SA) at 181.30-182.20; *Chisum Services (Pty) Ltd and the Companies Act 1961* (1982)

7 ACLR 641 SC (NSW) at 298; *Entwells (Pty) Ltd v National and General Insurance Co Ltd* (1991) 5 ACLR 424 SC (WA) at 429.7-10.

[30] Counsel for the MTN parties sought, largely by reference to the same authorities, to place a different slant on the matter. They emphasized that not only a director of a company but any natural person who has management and control in relation to the act or omission in question can be said to be the directing mind of a company: *El Ajou v Dollar Holdings plc* supra at 696a-b, Blackman *op cit* at 4-123 to 4-133 and particular at 4-130 citing *Canadian Dredge & Dock Co. Ltd v R* (1985) 19 DLR (4th) 314 (SCC) at 330/1:

'The act will be considered to be that of the directing mind as long as it is performed by the person in question within the sector of the company operation assigned to him by the company, which sector may be functional or geographic, or be the entire undertaking of the company. No formal delegation is necessary, nor does it matter that the directors are unaware of the activity in question nor, in fact, that the conduct had been expressly prohibited by the company.'

In *El Ajou v Dollar Holdings plc* supra at 699h-j Rose LJ said:

'First, the directors of a company are, prima facie, likely to be regarded as its directing mind and will whereas particular circumstances may confer that status on non-directors. Secondly, a company's directing mind and will may be found in different persons for different activities of the company.'

See also Hoffman LJ *op cit* 706d-e to similar effect.

[31] The authorities relied upon by the parties are not in conflict. Each must of course be read in context. In each case the court strives to determine whether it is the company which has spoken or acted to a particular effect through the voice or conduct of a human agency and is thereby to be held to the consequences or whether that agency was engaged in an activity which cannot fairly be attributed to the company. Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own. Respondents' counsel referred us to the

following dictum from *Re Bank of Credit and Commerce International SA (in liquidation) (No 15)*: *Morris v Bank of India* [2005] 2 BCLC 328 (CA) as to the kind of factors that a court would look at in determining whether a particular natural person is the directing mind of the company for a particular act or state of mind. The rules of attribution would

'typically depend on factors such as these: the agent's importance or seniority in the hierarchy of the company: the more senior he is, the easier it is to attribute. His significance and freedom to act in the context of a particular transaction: the more it is "his" transaction, and the more he is effectively left to get on with it by the board, the easier it is to attribute. The degree to which the board is informed, and the extent to which it was, in the broadest sense, put upon enquiry: the greater the grounds for suspicion or even concern or questioning, the easier it is to attribute, if questions were not raised or answers were too readily accepted by the board.'

[32] The state of mind which is in question, and which MTN and M-Tel are seeking to negate is the intention of either to obtain a preference in insolvency and that which they seek positively to establish is good faith on the part of both or one, in each case at the time of concluding the ARA (which gave rise to the alleged parting with property or security and loss of rights). In that context I proceed to examine the position of Jenkins, and the company *viz-a-viz* each other with particular regard to the authority and role of McGrath.

[33] Before Jenkins became employed by the Johnnic group he had worked himself up to the position of senior commercial partner in one of South Africa's most prominent firms of attorneys where he specialised in media and entertainment law. MTN was a major client for whom Jenkins acted as lead commercial attorney. He joined Johnnic as executive director of media and entertainment and held as I have noted above, responsibilities in several companies which, as his evidence makes clear, transcended the strict confines of individual corporate interests. All of the group businesses were involved directly or indirectly with CNA.

[34] Although his area of responsibility took in a broad overview of group interests, until about the end of February 2001 Jenkins possessed no detailed knowledge of the involvement of MTN and M-Tel in the business of CNA. At that time he heard that

Wooltru had sold its interest in CNA to GKA, a company unknown to him. During a chance meeting Gordon, GKA's director, asked him to assist in establishing the health of the relationship between CNA and MTN.

[35] Jenkins acquainted himself with the terms of the RA and made enquiries. He found what he termed 'a seriously troubled and problematic relationship from an M-Tel perspective'. In consequence of a decline in CNA turnover M-Tel was likely to have to pay some R40 million to CNA at the end of June to satisfy its warranty obligation. But M-Tel employers were blaming CNA for not pulling its weight and Reynolds, the M-Tel executive directly concerned, was threatening to withhold payment and cancel the RA. It was apparent to Jenkins that the relationship was close to breaking, a rupture that would harm the financial welfare of the Johnnic group.

[36] Jenkins discussed the situation with Gordon whose attitude was that CNA needed the MTN products and that he preferred to do business rather than fight. They agreed that it was in both parties' interest to resolve the disputes. Gordon suggested that Jenkins work out a formulation that would change the relationship and obligations and be more acceptable to MTN. Jenkins reported to Edwards, the CEO of the Johnnic companies, and was instructed by him to solve the problem because of the overall importance to the group.

[37] As a result Jenkins held frequent discussions with 'the MTN people', particularly McGrath, trying to devise an acceptable compromise short of 'cancellation and a big fight'. As Jenkins phrased it (without challenge in cross-examination) the object was 'to draw a line under the past'. The important goal, he said, was to drive the common business of CNA and M-Tel to meet the targets. Gordon also wanted increased trading with the Johnnic Group.

[38] In devising and negotiating the ARA Jenkins had to be particularly sensitive to his situation as an 'outsider' to MTN and M-Tel. For this reason he went out of his way to ensure that the executives of both companies were consulted including McGrath.

[39] Jenkins and Gordon both saw the common future interest in 'a holistic trading

solution, a macro-vision of a new CNA . . . with the support of its suppliers' and the creation of a 'long-term and sustainable commercial substratum to the relationship'. None of this evidence, which was fundamental to why the ARA was constructed as it was, was challenged during the trial. Nor was Jenkins's explanation for the protection which that agreement afforded to the MTN parties by way, inter alia, of securities: 'Any agreement that does not deal with the ultimate risks would be a flawed agreement'.

[40] After much 'toing and froing' (thus Jenkins) a draft was produced. It was duly approved by the respective company boards and signed. Of no less importance, although it received little mention in argument, was the co-operation agreement for which Jenkins was also responsible. It was signed, also on 26 March, by Johnnic Communications Ltd, CNA Holdings, CNA and GKN. This contributed to the holistic solution by drawing group suppliers other than MTN and M-Tel into a closer relationship with CNA. It provided for joint investigation of opportunities for future business ventures with a view to concluding 'mutually beneficial agreements' and for the joint promotion of each other's businesses, goods and services. This agreement was only terminable after 30 June 2002 on three months' notice. In the context of the present appeal its importance is manifest: first, it demonstrated that the role played by Jenkins was recognised as serving the group interest; second, it corroborates his evidence that the main concern from the side of the MTN parties was securing and extending the trade footprint of their brand through the vehicle of the CNA stores; and third it confirmed that success was seen as bound up with the long-term viability of CNA.

[41] The scope of Jenkins's interest and involvement was much broader than the submission of CNA's counsel allows. In so far as his evidence was required to make the case for M-Tel and MTN the court *a quo* found him to be a satisfactory and reliable witness. I am not persuaded that it was wrong in so finding. The quality of Jenkins's evidence was, in my judgment, manifest in the record. Of course he had imperfect recall of the precise sequence of events, testifying, as he did, years afterwards. He also conceded that in the course of commercial negotiations it was sometimes expedient to gild the lily. Nevertheless I can find no reason to impugn the truth and reliability of the main thrust of his testimony: the primary intention throughout was to

provide a lasting solution which would unite the commercial prosperity of CNA with the need of the MTN parties (and their holding companies) to match and better the opposition by using CNA's many and widespread outlets.

[42] The objective probabilities which can be derived from the ARA and the related multi-party co-operation agreement are decisive in a determination of a contemplation of liquidation. Those probabilities reflect the best evidence as to the mindsets of the parties to the agreements. Their weight does not depend on the say-so of Jenkins, though his evidence provides confirmation of the intention behind the bare words. The result is that the failure to call McGrath, did not, on a holistic assessment of the evidence, tell against the validity of the conclusion. To do so would have been superfluous because the board of each of the MTN parties revealed its own unequivocal state of mind in the ARA and in entering into the agreement must be understood to have exercised the will of its company accordingly.

[43] Counsel for CNA submitted that McGrath as a witness would have provided insight into what motivated the boards of MTN and M-Tel, particularly in so far as the uncertain financial situation of CNA was concerned. But if the best evidence of their mindset resided in the agreements then such evidence was unnecessary. There was, at the end of the evidence, and despite the absence of testimony from any member of the boards, no reason to believe that Jenkins had not properly informed them of all relevant matters which might bear on the decision to conclude the agreement. As the trial judge pointed out the bona fides of the MTN parties should be tested through a prospective lens, rather than examining the state of CNA at the time the ARA was signed. The agreements reflected the importance placed on looking to the future on the strength of the foundation which they created. Nothing McGrath could have added would have changed that.

[44] For all these reasons I would dismiss the attack on the admissibility and reliability of Jenkins's evidence.

The alleged parting with property and loss of rights in return for the dispositions

[45] Before entering upon a discussion of this question it is necessary to consider precisely what was in issue between the parties in this connection. For reasons which will become obvious this question is of more importance to M-Tel than to MTN.

[46] The parties were represented in the court *a quo* by experienced senior and junior counsel. The formulation of the separation of issues was presented to the trial judge without dissent. Salduker J considered the application and must have determined that the issues as formulated could conveniently be decided separately from other questions arising on the pleadings. Her order fixed the specific content of the dispute and bound both the judge and the parties. A court on appeal would be slow to read into its scope something which the parties themselves forbore or omitted to include and which had not been drawn to the attention of the trial judge.

[47] The formulation was expressly made subject to certain assumptions: 1) that the dispositions in para 15.4 of the plea were 'dispositions' as defined in s 2 of the Act, 2) that the dispositions were not made for value within two years prior to the liquidation of CNA, and 3) the dispositions were accordingly liable to be set aside. It was on the foundation of these assumptions and no other that the evidence proceeded. The formulation confined the court *a quo* to the merits of the defence pleaded in specific paragraphs of the plea and replication. Within those confines the enquiry became one into proof of the elements necessary for successful reliance on s 33(1). For present purposes that meant that M-Tel elected to rely only on a single act in reciprocation for the disposition ie the loss of its right to cancel. That this was the approach of the parties and the understanding of the court below appears from the judgment in that court (paras 109, 111, 113-7, 118-9, 188 and 193-4).

[48] The absence of M-Tel's right to cancel was expressly raised in paras 28 and 42 of the application for leave to appeal; that right only had relevance in so far as it was the only loss of right or property relied on by M-Tel in substantiation of the s 33(1) defence.

[49] The respondents' failure to prove the reciprocal element of s 33(1) was

addressed in the appellant's heads of argument – at paras 137-40 in respect of MTN and at paras 141-3 in respect of M-Tel. The defences were addressed separately because MTN and M-Tel had pleaded in substantially different terms in paras 14.2.1 and 14.2.2 and raised independent defences; there was no intimation that either relied upon any factual allegation by the other.

[50] In the respondents' heads of argument (para 8) their counsel accepted as common cause that each respondent bore the onus of proving the requisite elements of its s 33(1) defence.

[51] But in paras 14 to 30 of those heads the suggestion was made, for the first time, somewhat obliquely, that M-Tel may shrug off its specific reliance (in para 14.2.2 of the plea) on the loss of a right to cancel, and, instead, broaden its case to rely on 'a holistic transaction' with interlinked terms in which 'the evidence established that *the rights given up by the MTN parties* [my emphasis] were given in return for all the hypothesised dispositions', because, according to counsel, 'the dispositions in the ARA were not severable'. The legal consequence, according to the submission, is that none of the dispositions can be set aside against either of the MTN parties unless and until MTN is indemnified in the amount of the guarantees.

[52] That was not the case pleaded and in terms of which the issues were put to the learned judge. It is not reflected in her separation order. Nor was it the case canvassed in evidence[7] – where attention was focussed on the unsatisfactory contractual performance of CNA giving rise to the supposed right of cancellation. Apparently this line was not argued because the court *a quo* only directed its attention to the pleaded case – and received no criticism for so doing. Finally, in argument before us Mr Kushke for the appellant did not think it necessary to address that aspect and Mr Subel neither referred to nor developed the argument.

[53] Whether the provisions of the ARA were indivisible raises potentially complicated issues of interpretation: see *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) at 429A-430E. If the contract should be

7 In so far as evidence was admissible to aid interpretation of the ARA.

construed as indivisible, the impact of that construction on the s 33(1) defence, given the terms in which it was pleaded, is by no means obvious. The matter was not addressed by either counsel. I would be loth to embark on such an investigation without the benefit of their submissions. But, as I have already pointed out, the effect of separating the issues, in terms chosen by the parties themselves, was to treat the alleged reciprocal performances of MTN and M-Tel respectively as independent. That the respondents now find that election irksome or even impracticable is a risk inherent in committing one's client to a closely formulated issue.

[54] Even if the terms of an order of court are capable of tacit variation or extension by evidence in which an unpleaded issue is unequivocally raised and fully canvassed, as is on occasion allowed in relation to such an issue,[8] that did not happen in this trial. The appellant was not put upon notice of either the facts on which such reliance would be placed or the intention to depart from the pleaded case. When I raised the restriction inherent in para 14.2.2 Mr Subel conceded its existence but made no application for an amendment[9]. M-Tel is thus bound to the limits of the order of court and its pleadings.

[55] Assuming that my analysis of the issue is correct, does that matter? If two parties negotiate in their corporate interest, as members of a group of companies, for (what afterwards turns out to be) an impugnable disposition, but only one of them has parted with property or lost a right in return for that disposition, can the other rely on the parting or loss to invoke s 33(1)? I think the answer must be 'no'. The section is concerned with parting and losing in a material sense. It does not contemplate

8 The applicable principles have often been stated. In *Middleton v Carr* 1949 (2) SA 374 (A) at 385-6 Schreiner JA expressed them thus:
'. . . as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the Court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the Court. Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated.'

9 Perhaps he could not have done so successfully in view of the judgment in *David Hersch Organisation (Pty) Ltd v Absa Insurance Brokers (Pty) Ltd* 1998 (4) SA 783 (T) at 787C-H without first setting aside the judgment of the court *a quo*.

reliance on another's giving up of such interests, as if the parting or loss could occur vicariously. Any person who contends that he is not obliged to restore must bring himself strictly within its terms.

[56] Moreover, as pointed out in *Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in liquidation) and Another* 1985 (4) SA 407 (D) at 410 *in fine* there must be a causal connection between the making of the disposition and the parting with property, a connection described by Kumleben J as 'consideration ("vergoeding") or the *quid pro quo* for the dispositions' (at 411B). The proposition holds equally in relation to the loss of a right. I would carry the matter further in the circumstances of the present case: it is not sufficient for reliance on s 33(1) that there should be an incidental connection between the disposition and the loss. 'In return for' necessarily implies that M-Tel was willing to and did give up a right *because* CNA was willing to and did make the disposition. When, as here, the respective acts of the parties are said to have arisen in relation to the conclusion of an agreement (in this case, the ARA) examination of its terms is the first step in determining whether reciprocity in that sense is proved.

[57] Clause 2.2 of the ARA recorded that:

'MTN and M-Tel are both wholly-owned subsidiaries of MTN Holdings (Proprietary) Limited. M-Tel has furnished the Income Warranties to CNA, subject to conditions. M-Tel's liability in terms of the Income Warranty for the year ended 30 June 2001 is substantial, and further claims may be made in respect of the Income Warranty for the year ended 30 June 2002. The parties wish to renegotiate the terms of the Income Warranties.'

The absence of any assertion of a right in the hands of M-Tel arising from breaches by CNA is striking, if explicable in the background of 'drawing a line under the past' (to adopt an expression used by Jenkins to describe the negotiators' intentions). But the positive manner in which M-Tel's liability under the second income warranty is stated, is, to say the least, not only in conflict with the existence of such a right but excludes any unspoken reliance on it.

[58] Clauses 4.1 and 4.2 enhance that impression:

'CNA, Newco and M-Tel agree, with respect to the Income Warranties that:-

4.1 M-Tel has fully discharged its obligations to CNA in respect of the Income Warranty for the year ended 30 June 2000;

4.2 the Income Warranty for the year ended 30 June 2001 is hereby deleted from the Retailer Agreement. Accordingly neither CNA nor Newco shall have any claim against M-Tel arising from that Income Warranty, and each of CNA and Newco waives any claims which it may have against M-Tel arising from that Income Warranty.'

The existence and enforceability of claims by CNA arising from the second warranty of the RA are expressly excluded. But potential claims by M-Tel deriving from the same source are neither excluded nor preserved.

[59] Reading clauses 2.2 and 4 together creates a probable inference that M-Tel either did not regard such claims as extant or discounted them as possessing no value.

[60] In its plea to CNA's claim (para 6.2.3) M-Tel specified no fewer than six categories of alleged shortfalls in the performance of CNA's obligations under clause 25.3 of the RA[10]. It was upon such breaches that M-Tel relied (in para 14.2.2 of its plea) for the right to terminate the RA which it had lost in return for the dispositions by the CNA under the ARA. The evidence adduced by M-Tel did not, however, attempt to substantiate the pleaded breaches[11] or whether any loss was suffered in consequence. It remains pure speculation as to whether the opportunity to cancel possessed any value in M-Tel's hands before the conclusion of the ARA.

[61] In the circumstances, although the breaches relied on by M-Tel may in fact have taken place and given rise to a right to claim cancellation, I am satisfied that the loss of such a right was no more than incidental to the conclusion of the ARA and was not shown by M-Tel to have been reciprocal for the dispositions under that agreement. For that reason alone M-Tel failed to bring its case within the terms of s 33(1) and the learned judge should have answered the reserved question against it.

10 In terms of which CNA agreed to use its best endeavours to achieve the minimum annual targets, and, to that end furnished five warranties relating to kiosks, staff, stock and the number of operative trading stores.

11 The 'lacklustre performance' relied on in the judgment *a quo* fell far short of what was required to establish a breach, even though unchallenged. All the 'evidence' was pure hearsay as neither Jenkins nor Tredoux testified from personal knowledge.

[62] As far as MTN is concerned the position is different. It pleaded to CNA's claim in reliance upon s 33(1) that in return for one or more of the alleged dispositions, acting in good faith, it made payment to Wooltru of amounts aggregating R85 976 778.08 pursuant to the guarantees which the ARA had required it to furnish. Although the reciprocal nature of payments and the dispositions was put in issue in the pleadings. CNA formally admitted before the trial that 'in return for one or more of the dispositions MTN gave the guarantees under which payment was made to Wooltru'. But for the dispositive undertakings in the ARA, MTN would not have given the guarantees or made any part of the payment and that connection satisfied the element of reciprocality[12]. Counsel's submission that the obligation to pay flowed from the guarantees and not from the agreement relies on an artificial distinction. The appeal against this aspect of the judgment in favour of MTN cannot succeed.

Good faith

[63] Without proof of good faith reliance on s 33(1) must fail. Such probity must exist at the time of the reciprocation between the parties. As was pointed out by Williamson J in *Ruskin NO v Barclays Bank DCO* 1959 (1) SA 577 (W) at 584-5, the enquiry should not be limited to the narrow action of parting or losing if there is reason to believe, for example, that the party in question breached that standard in the course of the transaction which gives rise to that action. It is unnecessary to speculate on the unlimited breadth of circumstances which may justify a conclusion that good faith was absent. In the context of s 33(1) generally, and in the circumstances of this case in particular, 'good faith' necessarily implies absence of a contemplation of insolvency at the time of the transaction. This flows from the definition in s 2 of the Act.[13] Significantly there is no limitation to dispositions made by the insolvent or to the intention of the insolvent.[14] In so far as the definition sets a standard of moral culpability there is no reason to distinguish in this regard between an insolvent and his creditor.[15] As 33(1)

12 Clause 2.4 of the ARA recorded that 'in consideration for the concessions made by CNA, MTN will furnish the First Guarantee and the Second Guarantee to Wooltru'.
13 '"good faith", in relation to the disposition of property, means the absence of any intention to prejudice creditors in obtaining payment of their claims or to prefer one creditor above another'.
14 In so far as Catherine Smith, *The Law of Insolvency*, 3ed 142 suggests that the definition is irrelevant 'because it refers to the state of mind of the insolvent' I respectfully disagree.
15 Cf *National Bank of South Africa Ltd v Hoffman's Trustee* 1923 AD 247 at 254-5.

deals specifically with dispositions the definition of good faith properly measures the conduct of a party who invokes it.

[64] Whether actual contemplation of sequestration (or liquidation) exists has been

assessed by the courts at various levels of certainty[16] sometimes in expressions which assume that at the level of substantial inevitability little doubt can remain[17]. None of the cases was concerned with s 33 (1) (or an equivalent provision) where the state of mind in question is not that of the insolvent but of someone who may not even be a creditor (as MTN was not) and whose connection with the affairs of the insolvent may be tenuous but who nevertheless attracts an onus.[18] To pitch good faith on the basis of a high probability of sequestration would appear to accord with fairness to a person in such a position. But it is unnecessary to decide the question because, as I shall show on an analysis of the evidence, liquidation was certainly not present to the mind of either Jenkins or the board of MTN as a probability.

[65] Jenkins testified that he possessed no contemplation of liquidation as a real possibility. It was 'unthinkable' he said. By that I understood him to mean, not that he excluded the possibility, but rather that he regarded it as very unlikely. One does not have to rely on his unsubstantiated word. Every objective probability before and at the time of concluding the ARA bears him out.

[66] In the letter of 9 March 2001 to Wooltru in which Mr Dabengwa recorded MTN's preparedness to furnish guarantees – written at a time when dissimulation served no purpose – the following was stated:

'Given Wooltru's stated intention of disposing of the CNA Group, we are probably as keen to see a successful transaction concluded as yourselves. Furthermore it is in our business interest that CNA should re-establish itself as a successful retail chain.

With this in mind, we have had a number of discussions with the proposed buyers of the CNA

16 *Thorburn v Steward* 1871 LR 3 PC 478, *Malherbe's Trustee v Dinner and Others* 1922 OPD 18 at 24-5, *Pretorius' Trustee v Van Blommenstein* 1949 (1) SA 267 (O) at 278 and the cases there cited: 'knowledge that sequestration was substantially inevitable'; *Pretorius NO v Stock Owner's Co-operative Co Ltd* 1959 (4) SA 462 (A) at 472G-H (with reference to *Swanepoel NO v National Bank of South Africa* 1923 OPD 35: something less than inevitability 'might suffice'; *Gert de Jager (Edms) Bpk v Jones NO en McHardy NO* 1964 (3) SA 325 (A) at 331B: 'wanneer sekwestrasie oorweeg of verwag word'; *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 179E: 'a likely event'.

17 In *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para 30, Olivier JA said that 'there has developed a clearly defined point of departure in cases such as the present one [the application of s 29 of the Act]: once it is proved that the debtor made a payment to one creditor at a time when he knew that sequestration was substantially inevitable, there arises a presumption . . .'.

18 The definition of 'good faith' does not exclude the possibility of different emphasis according to the context of the section in which the expression is used.

Group and believe that it will be possible for us to re-frame our agreement with the CNA Group in a manner which takes into account the changing dynamics of the cellphone market.'

[67] The CNA had endured a long and successful existence. Jenkins, without contradiction, called it 'a South African icon' and described it as 'ingrained in the South African psyche'. It operated a large number of retail stores, was found in nearly every mall in the country, mainly as an anchor tenant, its turnover was vast; with the Johnnic group alone it amounted to about R100 million annually at the time that the ARA was negotiated. It represented, as Jenkins said 'a huge channel to market' which it was strongly in MTN's interest to exploit and enlarge.

[68] The difficulties that M-Tel experienced in its relationship with CNA had not involved non-payment of cheques, undue delays in payment, reduction in orders, all of which would have been signs of financial distress. Bills were paid as and when due.

[69] Wooltru had sold the company for R150 million very shortly before, on the strength of a positive report from an international bank, a fact which told strongly in the mind of an outsider such as MTN or M-Tel against the prospect of liquidation in the foreseeable future.

[70] Gordon had produced considered and persuasive plans for the reorganization and development of the business. There were afterwards reflected in the ARA and particular in the prominence given to the role of Biotrace.

[71] In concluding the ARA both parties manifested an unequivocal intention to maintain and improve the business, an attitude totally irreconcilable with a contemplation of liquidation as a real possibility at any time prior to the September 2002 deadline. The respondents' intentions and confidence were manifested by conduct and consequences:

(a) MTN, which had no obligations to the CNA under the RA, undertook a substantial new guarantee obligation, a risk which can only be rationalized by the overall benefits which the group expected to achieve from the implementation of the

ARA. The MTN parties had not seen and had no means of accessing CNA's current financial statements.

(b) Payment of the guarantee furnished to Wooltru for R85.6 million, was to be secured out of the future income of CNA from its cell phone business. Importantly, although the MTN parties considered it very likely that M-Tel would have to make good its guarantee for the second warranty year to the extent of R40 million, that liability could not materialize until 30 June 2001. Should insolvency have intervened either before that date or after it but before 30 June 2002, as counsel conceded, M-Tel would have been absolved from paying the second warranty or the third warranty as the case might be. So that, in undertaking the guarantee, MTN was committing itself unreservedly to pay R85.6 million as against, in the event of insolvency, either a non-existent liability of M-Tel to CNA or one which would be greatly reduced. In short, if insolvency was a real prospect at the time of concluding the ARA the MTN parties were likely to be materially worse off. In these circumstances the 'ring-fencing' of CNA's income in the trust account could hardly be said, to place the MTN parties in a more favourable position than they would have enjoyed if the obligations of the RA had remained in force, despite counsel's submission to that effect.

(c) Significantly, the moneys paid into the trust fund out of CNA's income could not be used until September 2002. The income from the cell phone business in the second year of the RA had been projected at about R45 million, leaving some R40 million to be made good by M-Tel under the RA guarantee, yet MTN and M-Tel were prepared to expose themselves to a risk which required the generation of turnover of R85.6 million over 15 months in order to balance the new guarantee obligation undertaken in the ARA. Such a willingness was commercially inexplicable unless the MTN parties expected to recoup that obligation out of the added benefits which the ARA would produce. Added to this, MTN was content with a pledge of shares in the CNA business rather than a balance sheet security. But if the business was not worth anything then neither was the pledge.

(d) M-Tel put Reynolds on the board of CNA to ensure that CNA put its weight behind the implementation of the ARA.

(e) The ARA made provision for R1.5 million per month to be excluded from the payments into the trust and to be used in the CNA business. That arrangement too was consistent with a viable going concern rather than a business whose demise was only a matter of time.

(f) The ARA introduced new Johnnic parties to the contractual relationship with CNA, with the undoubted purpose of strengthening the commercial support for the overall business of CNA (and not merely the cell phone side).

[72] The cumulative weight of the aforegoing considerations together with the thrust of Jenkins's testimony persuades me that:-

1. The main concern of the MTN parties was the retention of their market share in the cell phone sector by means of their presence in the CNA outlets.
2. The purpose of the ARA and the related Johnnic group agreement were to stabilize and promote the CNA business so as to tighten their grasp on that share.
3. The 'concessions' extracted from CNA by MTN and M-Tel were motivated by genuine commercial considerations and the benefits which all parties would derive from an ongoing and flourishing trading relationship.
4. Such concerns as may have exercised the minds of the executives of the Johnnic group concerning the financial stability of CNA were laid aside in the conclusion of the ARA except in so far as commercial prudence dictated.

[73] In an attempt to offset the inherent probabilities in favour of MTN, counsel for CNA relied in particular upon two documents exhibited in the trial. The first was notes made by Graham Bird of Cazenove South Africa (Pty) Ltd[19] of a conversation with Jenkins on 9 March 2001 in the context of GKN's inability to provide guarantees to Wooltru as required by the sale agreement.

It was during the course of this meeting that Jenkins agreed in principle that MTN would instead undertake that liability. The conclusion to the note reads:

'The conversation was extremely friendly, and Paul Jenkins was clearly anxious to allay any fears that Willow [Wooltru] might have. He emphasised two key points several times:

19 Cazenove was the merchant banker which advised Wooltru in the sale of the CNA and, was, it appears, responsible for fixing the price of R150 million.

* The proposed deal makes sound commercial sense for both MTN and Johnnic, and hence there is a strong commercial incentive for them to complete the project.
* Johnnic has a strong incentive to see Crocus [CNA] survive. Consequently, he has put considerable resources into the project to ensure that the timing requirements are met.

If required, Paul Jenkins will call Barry Adams, of Mallinicks, to provide additional comfort.

The conversation was such that Graham was left with a very positive feeling regarding MTN and Johnnic's intentions and their desire to see closure of the Crocus sale and purchase agreement.'

Counsel submitted that the reference to 'Crocus' surviving was a clear indication that Jenkins regarded its viability as doubtful. But that ignores the positive thrust of the remainder of the quoted passage (even allowing for 'gilding' by Jenkins) in the context of what the proposed deal was intended to achieve.

The second document was the so-called 'board circular' of 12 March 2001 which was prepared by Jenkins, inter alia, to explain to the directors of M-Tel and MTN what the content of the proposed ARA would be and what the thinking was that underlay the transaction. Under the heading 'Evaluation' the circular (in its draft form[20]) stated:

'Legal opinion obtained indicates that M-Tel is liable for an amount of up to R45m in September 2001 and an amount of up to R85m in September 2002. The suggested arrangement significantly reduced this exposure, and the remaining exposure, being liquidation on the short term can be secured by the pledge of the 20% shares in the "Top 50 ' stores.

The agreed mechanism of securitisation of the discounts, commissions and incentives, further allow the commercial risk to be reduced.'

Counsel emphasised the repeated reference to 'exposure' and 'risk' and especially the identification of the harm resulting from 'liquidation on the short term' and its avoidance by the taking of securities. Here, they submitted, the truth emerged that Jenkins recognised liquidation as a real prospect; in the absence of resulting evidence from McGrath it must be assumed that he viewed the prospects in a similar light and should

20 Subsequent amendments before being issued in support of a round robin resolution do not affect the point.

and would have communicated those concerns to the board. There might be some merit in this submission if the statement is read in isolation and not as merely one incident in the longer train of events. Once again the objective conduct embodied in the agreements carries far more

weight.

[74] The cumulative weight of all the considerations to which I have alluded identifies the ARA as a genuine commercial transaction directed to the long-term benefit of all its parties, benefit that could only be derived from the future prosperity of the CNA. As such it excludes the possibility that MTN contemplated the liquidation of that company whether according to a standard of inevitability or even as a real prospect.

[75] The learned judge *a quo* was therefore right to conclude that MTN had discharged the onus to show good faith and in answering the separated issue in its favour.

[76] I would dismiss the appeal in respect of the order made in favour of MTN, with costs of two counsel but uphold it in respect of M-Tel.

J A HEHER
JUDGE OF APPEAL

NAVSA JA and HURT AJA (NUGENT and MHLANTLA JJA concurring):

[77] We have had the benefit of reading the judgment of our colleague Heher JA. We agree with his analysis of the evidence presented by Jenkins and the inferences which he said were to be drawn from the agreements themselves, in particular the ARA. We agree also with his conclusions concerning the bona fides of MTN, its entitlement to invoke the provisions of s 33 of the Insolvency Act 24 of 1936 ('the Act') and the order which he proposes concerning MTN. We respectfully disagree with his conclusions in relation to M-Tel and his proposed order to the effect that it could not

avail itself of the claim to an indemnity under s 33.

[78] The finding that M-Tel is not entitled to invoke the provisions of s 33(1) of the Act is based upon the conclusion that M-Tel itself did not part with any property or security or lose any right in return for the waiver by CNA of its claim under the second income warranty. In this connection reference was made to the judgment of Kumleben J in *Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in Liquidation) and Another* 1985 (4) SA 407 (D) at 410I.

[79] We cannot agree with our colleague's finding that, in the light of the evidence adduced, the 'right' which M-Tel claimed to have relinquished for the purpose of paving the way for the conclusion of the ARA was more illusory than real or that its loss was 'no more than incidental to the conclusion of the ARA and was not shown by M-Tel to have been reciprocal for the dispositions under that agreement'. We do not agree that the 'right' can correctly be dismissed as illusory. The evidence was that there was substantial dissatisfaction with the way in which CNA had gone about administering the RA. In our view it was established that, if it had not been possible to reach a solution by amending the RA, litigation between M-Tel and CNA would most probably have ensued. There is nothing to suggest that M-Tel's complaints about CNA were trumped-up or otherwise spurious. Although it is not possible, on the evidence, to attribute a value to M-Tel's possible claim in this regard, if it is accepted (as we consider it must be) that there was some basis for a contention that CNA had failed to comply with its obligations, that would have entitled M-Tel to contest its liability under the income warranty and possibly to claim damages for the breach. The fact that the relinquishment of such a right was 'incidental to the conclusion of the ARA' by no means negates it as 'parting with property'. It in fact emphasizes that the relinquishment was designed to clear the way for the conclusion of the amending agreement. We cannot therefore agree with the conclusion that, because it did not make a substantial contribution of "property" to the ARA, M-Tel should be non-suited in regard to s 33.

[80] Furthermore, we take the view, for the reasons set out below, that the contributions by the MTN parties, which cumulatively made the conclusion of the ARA

possible, cannot be separated and examined on an individual basis. It is important to bear in mind what was repeatedly emphasised by the MTN parties and what was ultimately borne out by the evidence and the documentation, namely that the ARA was seen by all parties involved as a holistic solution. It served the interest of all the Johnnic parties; its purpose was to ensure CNA's viability and, in so doing, it was promoting the interests of all its participants.

[81] MTN, which was not a party to the RA, became involved in the ARA for the purpose of protecting M-Tel's, and the Johnnic Group's position. Johnnic became involved because a significant negative impact on M-Tel's position would affect the financial health of the group as a whole.

[82] Seen in the composite manner described above, the questions whether property was parted with or rights lost, and the issue as to whether this was done in good faith, raised by the stated case, must, in our view, be examined from the point of view of the MTN parties as a group, and not from the point of view of the individual actors. We are in respectful agreement with the finding of our colleague that, in so far as MTN is concerned, it was entitled to rely upon s 33(1) on the following basis: in return for one or more of the dispositions in question and acting in good faith it had made payments to Wooltru of amounts aggregating R85 976 778.08 pursuant to the guarantee which the ARA had required it to furnish. As he himself emphasized in para 60(c), the willingness of MTN and M-Tel to expose themselves to a risk which required the generation of a turnover of approximately R85 million over 15 months is 'commercially inexplicable unless the MTN parties expected to recoup that obligation out of the added benefits which the ARA would produce'.

[83] The stated case required the court to assume that the dispositions by CNA were liable to be impugned under s 26 of the Act. On this assumption the court was asked
'. . . to determine the merits of the defence pleaded in paragraphs 14.2.1 to 14.2.4 of the plea under case number 05/13890, read with paragraphs 2.1 to 2.3 of the replication under case number 05/13586 ("the section 33(1) defence").'
The MTN parties accepted that they bore the onus to show that they had parted with property or security or had lost rights against CNA and in so doing had acted in good

faith. It was on this basis that the MTN parties contended that they were not obliged to restore any of the dispositions unless indemnified. Clause 2.4 of the ARA stipulates that 'in consideration for the concessions made by CNA, MTN will furnish the first and second guarantee to Wooltru'. In its particulars of claim MTN alleged that it paid Wooltru, pursuant to the guarantee, in return for the dispositions. CNA admitted that the guarantees were in return for one or more of the dispositions.

[84] In para 27 of their heads of argument the MTN parties submit that the terms or obligations under the ARA were not 'materially severable from the holistic multiparty agreement the terms of which were interlinked'. The last sentence of para 27, followed by para 28, with reference, inter alia, to *Umbogintwini*, reads as follows:
'The ARA is in its terms an indivisible transaction.
'(28) This latter insight is important when it comes to considering the question of setting aside dispositions vis-à-vis M-Tel and their being set aside vis-à-vis MTN. The dispositions in the ARA are not severable, and no suggestion was put forward by CNA as to any such severance. Indeed, the action for setting aside the dispositions also treats them holistically and seeks an order as against all defendants for their being set aside.'

[85] In the judgment of the court below (para 152) the following is recorded:
'It is unchallenged that the purpose of the ARA was to secure a viable CNA group going forward which was mutually beneficial to everyone.'

[86] There can, in our view, be no doubt that CNA knew what case it had to meet. The ARA was at the very centre of the dispute between the parties. The pleadings and the evidence should not be viewed microscopically. It is necessary to step back to see the bigger picture. In case No 05/13586 (instituted on 24th June 2005), MTN claimed a return of the money it paid pursuant to the guarantee provided for in the ARA. CNA resisted the claim on the basis that certain provisions of the ARA constituted dispositions liable to be set aside in terms of s 26 of the Insolvency Act. MTN replicated to the effect that it had made the substantial guarantee payments in terms of the ARA in good faith and was entitled to an indemnification under s 33 if the dispositions under the ARA were to be set aside. In case No 05/13890 (instituted on

29th June 2005), the liquidators of CNA claimed, primarily against MTN and M-Tel, the setting aside of the dispositions by CNA under the ARA. The riposte by MTN and M-Tel was that they had parted with property in good faith under the ARA and that the dispositions could not be impugned unless the liquidators indemnified them. The stated case was plainly framed with the consolidation of the two actions in mind, and the evidence adduced was clearly intended to be the basis on which the court was required to rule on the applicability of s 33 (1). That is how the court below treated the problem before it. We do not consider that it erred in this regard.

[87] It was not incumbent on M-Tel to prove that what it sacrificed for the purpose of achieving the beneficial arrangement embodied in the ARA was, in itself, a substantial 'parting with property' in comparison with the value of the waiver by CNA of the first income warranty. Even if this aspect of the evidence relied upon by the MTN parties may have been open to doubt, the 'reciprocity' referred to in *Barclays Bank* at p 410[21] is clearly to be found in the contribution to the ARA by MTN, without which the ARA would never have been concluded and the dispositions would never have been made. On our view of the evidence, though, the 'parting with property' in this case must be taken to encompass both the relinquishment of M-Tel's possible claim under the RA and the substantial payment made by MTN in terms of the guarantees. The two cannot be separated, nor can they be individually assessed for the purpose of determining whether they both match the extent of the dispositions by CNA.

[88] For the reasons set out above, it cannot be said (and, indeed, we do not think that this was the view of Heher JA) that the ARA - the transaction in question- was concluded in good faith by one of the MTN parties and not by the other.

[89] Before concluding, we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first.[22]

21 *Per* Kumleben J (as he then was) : 'The essence of the requirement in the subsection is that there must be reciprocity between the disposition and the passing of property.'
22 *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A).

[90] This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.[23]

[91] In the present case counsel for both parties informed us that notwithstanding a decision in this matter a number of issues would still be outstanding. Not all of the remaining issues were identified, nor do they appear to have occupied the mind of the court below.

[92] A further complicating factor is that the anterior question ─ whether the dispositions in question were made for value ─ was an assumption (without a concession) ─ on which the court below and this court were asked to decide the posterior question of the indemnification in terms of s 33(1) of the Insolvency Act. The true nature and effect of the indemnification does not appear to have been thoroughly considered.

[93] The decision by this court on the question of the indemnification and the reasoning leading up to it, including an analysis of the impugned transaction, namely the ARA, might well affect the outstanding issues, including the question of a disposition without value, which counsel for both parties informed us was one of the outstanding issues. The wisdom of the stated case might well unravel. The difficulty, as identified above, is that neither counsel nor the court below gave sufficient consideration to the practical effect of a decision on the stated case. Perhaps more importantly, they did not consider whether a separation of issues was indeed desirable.

[94] Much effort and costs were expended on the litigation leading up to this point. In the light thereof it appears to us that a decision on the separated issue should ensue.

[95] The appeal is dismissed with costs including the costs occasioned by the

23 Per Nugent JA in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

employment of two counsel.

M S NAVSA
JUDGE OF APPEAL

N HURT
ACTING JUDGE OF APPEAL

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