THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 874/2010

In the matter between:

GAVIN CECIL GAINSFORD NO	**First Appellant**
ENVER MOHAMED MOTALA NO	**Second Appellant**
MADELAINE ABRAHAMS NO	**Third Appellant**

and

TIFFSKI PROPERTY INVESTMENTS	**First Respondent**
NITROCHRON INVESTMENTS	**Second Respondent**
STATE BANK OF INDIA LIMITED	**Third Respondent**
REGISTRAR OF DEEDS, CAPE TOWN	**Fourth Respondent**
THE MASTER OF THE HIGH COURT, JOHANNESBURG	**Fifth Respondent**
AFRICAN DAWN PROPERTY TRANSFER	**Sixth Respondent**

Neutral citation: *Gavin Cecil Gainsford NO v Tiffski Property Investments (Pty) Ltd* (874/2010) [2011] ZASCA 187 (30 September 2011)

Coram: HARMS AP, CLOETE, MHLANTLA, LEACH JJA and PETSE AJA

Heard: 15 September 2011

Delivered: 30 September 2011

Summary: Insolvency – Insolvency Act 24 of 1924 – s 34(1) – void disposition of assets of business otherwise than in the ordinary course of that business or for securing the payment of a debt – non-compliance with requirements – consequences thereof.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Victor J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and substituted as follows:

‘a The application succeeds and an order is granted in terms of prayers 1, 2, 3 and 4 of applicants’ notice of motion.

b The first and third respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application.

c The first respondent is further ordered to pay the costs of the proceedings instituted under case number 38361/09.’

3 The cross-appeal is dismissed with costs.

JUDGMENT

PETSE AJA (HARMS AP, CLOETE, MHLANTLA and LEACH JJA CONCURRING):

[1] This appeal is against a judgment of Victor J sitting in the South Gauteng High Court in terms of which the learned judge dismissed with costs an application launched by the appellants against the respondents.

[2] The appellants are the joint liquidators of Tiffindell Ski Limited (the company) which was placed under final liquidation by order of the South Gauteng High Court granted on 31 March 2009 pursuant to an application launched on 23 October 2008.

[3] In the court below the appellants sought an order in the following terms:

'1. That the Applicants are authorised in terms of section 386(5) of the Companies Act, 1973 read with section 387(3) of the Companies Act, 1973, as well as section 386(4)(a) and/or 386 (4)(i) of the Companies Act, 1973, to make application to the Honourable Court for the relief set out in the notice of motion, and for this purpose to engage attorneys and counsel.

2. That the transfer of the business of Tiffindell Ski Limited (in liquidation) to the First Respondent on 16 September 2008 in terms of the agreement of sale entered into between Tiffindell Ski Limited (in liquidation), as seller, and the First Respondent, as purchaser, on 12 July 2007 be declared void in terms of section 34(1) of the Insolvency Act No 24 of 1936, and that the transfer of the following assets to the First Respondent accordingly be declared void:

2.1 the transfer to the First Respondent of Erf 1 Tiffindell in Senqu Municipality, Division of Barkly East, Eastern Cape Province, in extent 101,8593 hectares ("the immovable property") in terms of deed of transfer T061149/08;

2.2 the transfer to the First Respondent of all moveable assets of Tiffendell Ski Limited (in liquidation) including the moveable assets listed in annexure "X" hereto.

3. That the registration of the following mortgage bonds be declared void:

3.1 mortgage bond B057375/08 registered over the immovable property in favour of Tiffindell Ski Limited (in liquidation);

3.2 mortgage bond B057376/08 registered over the immovable property in favour of the Third Respondent.

4. That the Third Respondent be directed to effect the relevant endorsements necessary to give effect to 2 and 3 above.

5. That the First Respondent be ordered to pay the costs of suit, including the costs reserved in the proceedings in the above Honourable Court under case number 38361/09, save that in the event of any other Respondent(s) opposing any of the relief claimed in the notice of motion, that such Respondent(s) be ordered, jointly and

severally with the First Respondent, to pay the aforesaid costs.

6. Granting to the Applicants further and/or alternative relief.'

[4] The application was opposed by Tiffski Property Investments (Pty) Limited (Tiffski) who had taken 'transfer' of the disputed property and the State Bank of India Limited (the Bank) in whose favour the disputed mortgage bonds were registered.

[5] The Bank also filed a counter-application conditional upon the success of the appellants' claim, in terms of which it sought an order directing the appellants to pay to it a sum of R19 878 422.70 representing the amount 'secured' by the disputed mortgage bonds and costs of the counter-application.

[6] In the event the court below dismissed the appellants' application with costs. Concerning the counter-application, it held that the conclusion reached by it in relation to the main application rendered it unnecessary to deal with the counter-application. Thus it dismissed it and made no order as to costs. The appeal and the conditional cross-appeal are with the leave of the court below.

[7] The application launched by the appellants in the court below arose against the following factual background. On 12 July 2007 the company represented by Ivan van Eck concluded a written contract of sale with Tiffski represented by Andre P Le Roux in terms of which the company sold to Tiffski the immovable property on which it conducted the hotel and resort enterprise, together with all its fixed and movable assets necessary for the operation of its business enterprise, for a sum of R22 686 020.

[8] The written contract of the parties contained, inter alia, the following terms that are relevant for present purposes:

a. That possession, occupation and control of the enterprise and the immovable property would be given by the company to Tiffski on the 'date of transfer' which was defined as 'the date on which the transfer of the property is registered at the applicable Deeds Office in the name of the purchaser'.

b. That the agreement of sale would not be published as contemplated in s 34 of the Insolvency Act 24 of 1936.

c. That the company would, pending transfer, continue to conduct the business of the enterprise 'in the normal and regular manner' as it had been doing before the conclusion of the written contract.

d. That the signed written contract represented the entire agreement between the parties and that no variation of or addition to or consensual cancellation thereof nor waiver by the company of any of its rights thereunder would be of any force or effect unless reduced to writing and signed on behalf of the parties.

[9] It is common cause that registration of transfer of the property into the name of Tiffski was effected on 16 September 2008 and that the disputed mortgage bonds were registered in favour of the Bank simultaneously with transfer.

[10] The appellants assailed the validity of the transfer of the property of the company to Tiffski on the grounds that it was void in terms of s 34(1) of the Insolvency Act 24 of 1936 (the Act) as against them qua liquidators because: (a) the winding-up of the company was deemed to have commenced on 23 October 2008; (b) the transfer was not in the ordinary course of business of the company which was to conduct a ski resort business; (c) the transfer of the business was not for the purpose of securing the payment by the company of its debts; and (d) notice of the sale had not been published as required by s 34.

[11] The registration of the disputed mortgage bonds was assailed on the grounds that: (a) Tiffski did not acquire valid title to the immovable property on the purported transfer to it; and (b) thus could not validly grant the Bank a real right thereon by hypothecating or encumbering the immovable property. Thus the mortgage bonds registered simultaneously with registration of transfer of the immovable property to Tiffski were void.

[12] In this court both Tiffski and the Bank, as they did in the court below, made common cause in opposing the grant of the relief sought by the appellants. Tiffski asserted that the immovable property and the movable assets of the company which were the subject of the application were acquired by it in the ordinary course of business, in good faith and for value as it paid a purchase price of R22 686 020 therefor. It also denied that the company was a trader as defined in the Act and put the appellants to the proof of their assertion in that regard. Tiffski went on to assert further that despite the fact that registration of transfer of the property to it was effected on 16 September 2008 it had taken de facto control of the immovable property and delivery of the enterprise's movable assets 'with the full blessing, consent and knowledge of the company' in January 2008. As more fully set out below Tiffski relied on this to argue that the six months period in s 34 had already expired by the time the appellants launched proceedings against it.

[13] The Bank moreover asserted that it had granted a loan to Tiffski subject to Tiffski providing security, which it did by registering a first mortgage bond over the company's immovable property for a sum of R14 million and a surety mortgage bond for a sum of R5 million. The Bank stated that it had been involved in the negotiations between the company and Tiffski that cultimated in the conclusion of the written contract between the company and Tiffski and in so doing had acted 'in a bona fide manner and concluded all the agreements as a reasonable banker would have done' in the prevailing circumstances. Nor had it been at any stage aware of possible financial difficulties facing the company. The Bank further asserted that it had been advised at

the material time that the registration of mortgage bonds over the immovable property would afford it real security that would avail it against the world.

[14] In the alternative the Bank submitted that the grant of the relief sought by the appellants would constitute a deprivation of its real rights and thus property in breach of its constitutional rights enshrined in s 25(1) of the Constitution.

[15] I consider it convenient at this stage to set out the provisions of the Act which are relevant to this appeal. Section 2 defines a trader as follows:

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

[16] Section 34(1) reads thus:

'If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the *Gazette,* and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void as against the trustees of his estate, if his estate is

sequestrated at any time within the said period.'

[17] The court below said that the issues that required determination were whether: (a) the applicants discharged the onus to prove their reliance on s 34(1); (b) the alienation (presumably it intended to say 'transfer') was not in the ordinary course of business; (c) the company was a trader as defined; (d) the insolvency took place within the six months' period; and (e) the appellants were legally required, as a pre-requisite for the setting aside of the transfer, to tender restitution to the Bank as an innocent third party that had in good faith and for value acquired a real right in the immovable property. With regard to all the foregoing issues the court below found against the appellants. In what follows these questions are dealt with in a different order.

Time of transfer

[18] The provisions of s 34(1) in their current formulation came about as a consequence of the amendment effected in terms of s 1(a) of the Insolvency Amendment Act 6 of 1991. The most notable change effected by this amendment was the substitution of the word 'transfer' for the words 'disposes of'.

[19] Transfer of the business of the company as envisaged in the agreement of sale concluded between the company and Tiffski took place on 16 September 2008 which is when registration of transfer of the property in the Deeds Office Cape Town was effected. In terms of clause 6 of the agreement of sale 'possession, occupation and control' of the business was given by the company to Tiffski and the latter assumed 'all the benefit and risk of ownership' of the business on that date.

[20] In this court, as in the court below, it was contended on behalf of the appellants that the transfer of the business comprising the immovable property and the other 'goods or property forming part of the business' – regard being had to the date of

registration of transfer in the Deeds Office – took place less than six months prior to the commencement of the proceedings for the winding-up of the company. That being the case, so it was argued, such transfer was, in terms of s 34(1) of the Act, void as against the company's liquidators. In support of this submission counsel for the appellants called into aid two judgments of this court, namely *Harrismith Board of Executors v Odendaal*[1] and *Galaxie Melodies (Pty) Ltd v Dally NO*[2] as also *Roos NO & 'n ander v Kevin & Lasia Property Investments BK & andere.*[3]

[21] In an attempt to place itself beyond the reach of s 34(1) of the Act Tiffski contended that the transfer of the business from the company to itself either took place on 12 July 2007 when the sale was approved by the company's shareholders or in January 2008 when it took de facto control of the immovable property and delivery of the movable assets of the ski resorts. This contention was upheld by the court below which went on to find that the transfer of the company's business therefore took place outside the six months period provided for in s 34(1) of the Act.

[22] In this court the finding of the court below was assailed on two grounds. First, it was contended that even assuming that Tiffski took delivery of the movable assets and took occupation of the immovable property in January 2008, the company was nonetheless not divested of its ownership of such assets, for the company did not have the requisite intention to transfer ownership to Tiffski nor did Tiffski have the intention to accept ownership. For this proposition counsel for the appellants relied on, inter alia: *Trust Bank van Afrika Bpk v Western Bank Bpk & andere NNO*;[4] *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein & 'n ander;*[5] *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd;*[6] and *Dreyer & another NNO v AXZS Industries (Pty) Ltd.*[7] Nor could

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[1] *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539.
[2] *Galaxie Melodies (Pty) Ltd v Dally* NO 1975 (4) SA 736 at 743B–H.
[3] *Roos NO & 'n ander v Kevin & Lasia Property Investments BK & andere* 2002 (6) SA 409 (T) at 421I–422B.
[4] *Trust Bank van Afrika Bpk v Western Bank Bpk & andere* NNO 1978 (4) SA 281 (A) at 301H–302A.
[5] *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein & 'n ander* 1980 (3) SA 917 (A) at 922E–F.
[6] *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) at 933A–H.
[7] *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 554F–H.

the company on the authority of *Legator McKenna Inc & another v Shea & others*[8] have acquired ownership of the immovable property prior to the registration of its transfer in the Deeds Registry.

[23] In elaboration it was contended that the finding of the court below as aforesaid – were it allowed to stand – would render s 34(1) of the Act ineffective and thus undermine the central purpose for which s 34(1) was enacted, which is to protect creditors by preventing traders who are in financial difficulty from disposing of their business assets to third parties who are not liable for the debts of the business without due advertisement as is required by s 34(1). See in this regard *McCarthy Ltd v Gore NO;*[9] and *Kelvin Park Properties CC v Paterson NO.*[10]

[24] Tiffski's argument that everyone including the company's creditors knew about the transfer and that it was therefore not necessary to advertise as required by s 34(1) of the Act cannot be sustained. The short answer to it is that it is only the advertisement as contemplated in s 34(1) that renders liquidated claims presently payable.[11] It is the giving of that notice – not knowledge that the sale is to take place – which gives rise to rights and obligations.

[25] In my view the finding of the court below cannot be defended. Transfer of the business of the company took place on 16 September 2008 which is within six months of the deemed liquidation date of the company, namely 23 October 2008.

Transfer in the ordinary course of business

[26] Tiffski asserted that the agreement of sale was entered into in the ordinary

[8] *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) at 44G–H.
[9] *McCarthy Ltd v Gore NO* 2007 (6) SA 366 (SCA) at 369E–F.
[10] *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA) para 15.
[11] See fn 1 above at 538.

course of business. The appellants argue that if this is taken to mean that the transfer of the business of the company in terms of the written contract of sale was effected in the ordinary course of the business of the company – for this is what is hit by s 34(1) of the Act – such a contention is manifestly untenable, because the disposal by the company of all its assets (being the immovable property and the movable assets employed by the company in conducting its ski resort business) can by no stretch of imagination be said to be in the ordinary course of business.

[27] The test to determine whether an activity was in the ordinary course of business of the seller was formulated as follows in *Joosab v Ensor NO.*[12]

'It will be observed that what is expected from the ambit of sec 34 (1) is not, as the case in some of the other sections of the Act (see eg sec 29 (1)), an alienation "in the ordinary course of business", but an alienation "in the ordinary course of that business". The test for determining whether a transaction was "in the ordinary course of business" is an objective one, namely whether, having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into by solvent business men. (*Hendriks NO v Swanepoel* 1962 (4) SA 338 (AD) at p 345). The word "that" in the expression "in the ordinary course of that business" in sec 34 (1) introduces the necessity of an enquiry into the kind of business in question, and the usual or ordinary business transaction of a business of that kind, in relation to which the above test is to be applied. It follows that the test to be applied, to determine whether an alienation by a trader of goods forming part of his business was in the ordinary course of that business, is whether, having regard to all the circumstances, the alienation was one which would normally have been transacted by a solvent business man carrying on a business of that kind.'

[28] In *Ensor NO v Rensco Motors (Pty) Ltd*[13] this court had occasion to remark that:

'[T]here are two elements in the critical phrase in s 34 (1): (i) "the ordinary course", and (ii) "of that business". Both are equally important in construing or applying the requirement; contrary to counsel's argument, neither should predominate over the other; and, according to the above *dicta* in *Joosab's* case, when these two elements are read together, they in substance and effect pose the objective test: "whether, having regard to all the circumstances, the alienation

[12] *Joosab v Ensor NO* 1966 (1) SA 319 (A) at 326D–G.
[13] *Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) at 824 H–825A.

was one which would normally have been transacted by a solvent business man carrying on a business of that kind".'

I would, however, point out that in terms of s 34(1) as it now reads, it is the 'transfer' and

not the 'agreement' pursuant to which the transfer takes place that is void against the creditors or the trader's trustee if his estate is sequestrated at any time within a period of six months after such transfer.

[29] In considering the provisions of s 34(1) of the Act sight should not be lost of the mischief that they seek to guard against. In *Kelvin Park Properties CC v Paterson NO*[14] this court had occasion to say the following:

'The purpose which the Legislature wished to achieve in enacting s 34(1) was to prevent traders in financial difficulties from disposing of their business to third parties who are not liable for the debts of the business, without due advertisement to all their creditors, and, in so doing, from dissipating the purchase price or using the purchase price to pay certain creditors regardless of the claims of others (citations omitted).'

[30] This court found in *Ensor NO v Rensco Motors (Pty) Ltd* at 821E–822E that the onus to prove that the transfer was not in the ordinary course of business of the company was on the applicant. Accepting that they bore the onus of establishing that the company's transfer of its business to Tiffski was not in the ordinary course of that business, counsel for the appellants contended that the appellants discharged such onus. I agree with this submission. The facts of this appeal to my mind amply demonstrate that in concluding the written contract with Tiffski on 12 July 2008 the company divested itself of its major asset base necessary to enable it to continue with its ski resort enterprise. Compare *Gore & another NNO v Saficon Industrial (Pty) Ltd* at 547E–G.[15]

Trader

[31] In its answering affidavit Tiffski denied that it was a trader and went on to say that the appellants were put to the proof of their allegation that it was such a trader. It is

[14] See fn 10 above.
[15] *Gore & another NNO v Saficon Industrial* (Pty) Ltd 1994 (4) SA 536 (W).

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course common cause on the papers that the company conducted a ski resort business at the immovable property which, inter alia, comprised the following: conducting a business of an hotel keeper; operating a ski resort which encompassed the operation of ski lifts and hiring of ski equipment to guests; and the sale of ski clothing and equipment – which was also conducted at its Fourways outlet in Gauteng. Thus the short answer to Tiffski's denial that the company was a trader at the time of transfer lies in the definition of a 'trader' in s 2 of the Act which, after providing in terms what a trader is, continues to provide that 'and any person shall be deemed to be a trader for the purposes of this Act . . . unless it is proved that he is not a trader as hereinbefore defined'. To my mind the deeming provisions of s 2 clearly contemplate that the onus of establishing that someone who is alleged to be a trader is not one would be on the person alleging the contrary. Tiffski in its answering affidavit merely contented itself with making a bald denial to the appellant's averment that the company was a trader at the material time. On the authority of *Kelvin Park Properties CC* para 18 it therefore failed to discharge the onus resting on it.

[32] Before I proceed to consider the contentions advanced by the Bank I should for the sake of completeness mention that in this court counsel for Tiffski soon appreciated the futility of defending what was manifestly indefensible and conceded, rightly so, that the company was a trader within the meaning of that term as defined in s 2 of the Act and that the transfer of the company's business to Tiffski was void as against the appellants.

Validity of the mortgage bonds

[33] I come now to the case of the Bank. Its contentions are the following. In lending moneys to Tiffski it acted bona fide and reasonably as it was unaware of the possible financial difficulties that the company faced. Consequently the mortgage bonds passed

by Tiffski over the immovable property transferred from the company constituted real rights in the said immovable property that serve as its only 'real security' for the moneys lent and advanced by it to Tiffski. Thus any order declaring such mortgage bonds void would cause it irreparable financial harm as it would not have granted a loan to Tiffski without the security of the mortgage bonds.

[34] To my mind the arguments advanced by the Bank turn primarily upon the proper examination of the factual matrix and the effect of s 34(1) of the Act. In *Galaxie Melodies* this court held at 743B–C that:

'An alienation referred to in sec 34 (1) of the Insolvency Act shall, in the circumstances therein set out, "be void as against the trustee". 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 CJ pointed out in *Harrismith Board of Executors v Odendaal*, 1923 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.'

[35] The Bank sought to rely on a number of decisions of this and other courts notably *Frye's (Pty) Ltd v Ries;*[16] *Petersen & another NNO v Claassen & others*[17] for the proposition that the validity of a mortgage bond duly registered in the Deeds Office is not dependent on the validity of the antecedent contract. Whilst those cases correctly reflect the state of the law on their facts, however, they do not assist the Bank on the facts of this appeal for the dicta in the cases upon which the Bank pins its hopes were made in entirely different contexts.

[36] The fundamental fallacy in the submissions advanced on behalf of the Bank in this regard lies in the fact that these contentions wrongly assume that s 34(1) of the Act caters for the same situation relating to impeachable dispositions dealt with, for

[16] *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 583E–F.
[17] *Petersen & another NNO v Claassen & others* 2006 (5) SA 191 (C).

example, in ss 26, 29, 30 and 31 of the Act whereas in fact it does not. In *Galaxie Melodies* this court held at 743G–H that:

'An order made by the Court in declaring void an alienation made in conflict with the provisions of

sec 34 (1), does not differ in substance from an order setting aside or declaring void a voidable disposition under secs 26, 29, 30 and 31 of the Act, as such an order is also an order "declaratory of a right". (Gunn and Another NNO v Barclays Bank DCO, 1962 (3) SA 678 (A) at p 684). It is only in the effect of an order under sec 34 (1), and an order under secs 26, 29, 30 or 31, respectively, that there may be some difference, in that the effect of an order under sec 34 (1) is that the alienation in question is declared void *ab initio* (Harrismith Board of Executors v Odendaal, at p 538), whereas the effect of an order under secs 26, 29, 30 or 31 is that the disposition in question is, subject to the provisions of secs 32 (3) and 33, not invalidated *ab initio*, except perhaps as between the insolvent and the person to whom the disposition was made' (emphasis added).

[37] To contend that the trustee cannot acquire more rights than those held by the insolvent in the context of s 34(1) is to overlook the fundamental distinction manifest in the provisions of ss 26, 29, 30 and 31 that deal with voidable dispositions by the insolvent and s 34(1), which explicitly provides that a transfer in terms of a contract of a business, or any goods or property forming part thereof, otherwise than in the ordinary course of that business and which is not published as required, is void as against the creditors for a period of six months after such transfer; and also void against the trustee of the trader's estate if his estate is sequestrated at any time within the said period.[18]

[38] It is trite that no legal consequences flow from a void jural act. Moreover the well entrenched principle of our law expressed in the maxim *nemo plus iuris ad alium transferre potest quam ipse haberet*[19] reinforces this very point. As Tiffski did not acquire ownership of the company's immovable property – on account of the voidness of the transfer – it must logically follow that Tiffski could not in turn grant any rights, let alone real rights, in the immovable property to the Bank.

[39] The fact that the mortgage bonds upon which the Bank relies for its contentions were registered in the Deeds Office also does not in itself assist the Bank either. This is

[18] See: Mars *The Law of Insolvency in South Africa* 9th ed (2008) at 290.
[19] No one can transfer more rights to another than he himself has.

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because the transfer of the company's property to Tiffski has, as a consequence of the company being wound up within six months after such transfer, become void ab initio. Given the fact that our system of deeds registration is the negative system of registration the true owner of the property – the company in this case – did not lose its right of ownership in the property notwithstanding the transfer thereof to Tiffski on 16 September 2008. According to our law any information in the Deeds Office that is inaccurate may be corrected[20] and such correction in the context of this case will result in the transfer and registration of the mortgage bonds being cancelled on account of the voidness ab initio of the transfer.

[40] With respect to the argument that the Bank acted bona fide and reasonably, the appellants contended that in view of the fact that the Bank had admitted that it 'was involved in the negotiations which took place between the company and Tiffski' it should have been on its guard and insisted upon publication of a notice as is required by s 34(1). Not only has the Bank failed to do so it has also not explained why it did not do so nor has any explanation been proffered as to why it was expressly agreed between the company and Tiffski that there would be no publication of a notice in terms of s 34(1).

[41] The Bank granted loans to Tiffski 'with its eyes open' and on the facts of this appeal it cannot be said that it was oblivious to the consequences of the decision of the company and Tiffski – apparently taken with its approval or acquiescence – not to publish a notice of sale of the business as required by s 34(1). To uphold the Bank's argument would defeat the very purpose which the Legislature wished to achieve in enacting s 34(1) and benefit the Bank at the expense of the creditors of the company.

[20] C G van der Merwe *Sakeveg 2nd ed* (1989) at 342; *Barclays Nasionale Bank Bpk v Registrateur van Aktes*, *Transvaal & 'n ander* 1975 (4) SA 936 (T) at 940B–941C; *Standard Bank van SA Bpk v Breitenbach* 1977 (1) SA 151 (T); *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 (SCA) 753B–C in which the following is stated: '. . . according to our system of registration it can no longer be said that a person in whose name land is registered is necessarily the owner of that land. Someone else could, for example, have become the owner of the property by way of prescription without being reflected as the owner in the Deeds Office. He would then, on proof of prescription be able to assail the registration in the name of he original owner and have it amended. This system is sometimes classified as the 'negative system' in contrast to the 'positive system' where registration serves as irrefutable proof of ownership'. (My translation)

The Bank must be taken to have consciously assumed the risk of the transfer of the company's business to Tiffski falling foul of s 34(1) and nevertheless agreed to advance moneys to Tiffski fully aware of the attendant risk in doing so. In any event even if the Bank acted *bona fide* and reasonably this would not avail it in the context of s 34(1) of the Act.

Section 25(1) of the Constitution

[42] I come now to deal with the alternative and last leg of the Bank's opposition to the grant of the relief sought by the appellants. This ground of opposition has its foundation in the provisions of s 25(1) of the Constitution. Section 25(1) reads as follows:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

[43] It was argued on behalf of the Bank with reference to various judgments of the Constitutional Court[21] that the real rights created as a result of the registration of the mortgage bonds over the immovable property reclaimed by the appellants constitute property as envisaged in s 25(1) of the Constitution. For this reason, so went the argument, to grant the relief sought by the appellants would result in the Bank being deprived of its property under circumstances that would render the deprivation arbitrary. In elaboration it was submitted that there was, on the facts of this case, no sufficient reason to deprive the Bank of its right because: the Bank had advanced in excess of R19 million to Tiffski on the strength of the security provided by Tiffski; the object of s 34(1) of the Act which is to protect creditors and to prevent traders in financial difficulties from disposing their businesses to third parties or dissipating the purchase price, would be defeated.

[21] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA v Minister of Finance* 2002 (4) SA 768 (CC).

[44] In countering these submissions counsel for the appellants contended, in the first place, that whilst a mortgage bond properly drawn up and registered in the Deeds Office ordinarily confers a limited right of security in the immovable property over which the bond is registered,[22] the disputed mortgage bonds in this case do not enjoy protection from s 25(1) of the Constitution because the Bank has not been deprived of property. This is so because, so went the argument, any transfer of business hit by s 34(1) of the Act is rendered void ab initio which means that Tiffski did not acquire any right of ownership in the company's immovable property and thus could not in turn pass any real right in the property to the Bank.

[45] In the second place counsel for the appellants argued that to the extent that s 25(1) sets its face against any one being deprived of property 'except in terms of a law of general application', s 34(1) of the Act is evidently a law of general application as contemplated in s 25(1) of the Constitution. For this submission counsel placed much reliance on a passage appearing in Woolmann et al[23] where the following statement appears:

'As it occurs in s 25(1), the requirement that any deprivation of property must occur "in terms of law of general application" is intended to protect individuals from being deprived of property by bills of attainder or other laws that single them out for "discriminatory treatment", or which "capriciously interfere with [their] property rights".'

[46] In the third place it was argued on behalf of the appellants with reference to judgments of the Constitutional Court[24] that even assuming that granting the relief sought by the appellants would result in the Bank being deprived of its property, such deprivation would not be arbitrary. This is so, so went the argument, because there is a rational connection between the voidness of a transfer hit by s 34(1) of the Act and the ends sought to be achieved, namely to protect the creditors of a trader who transfers

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[22] 17 Lawsa 2 ed paras 325 and 352; *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 265B–C.
[23] *Constitutional Law of South Africa* 2 ed Vol 3 para 46.5(a).
[24] *First National Bank of SA Limited t/a Wesbank v Commissioner*, *South African Revenue Service & another* 2002 (4) SA 768 (CC) paras 54 and 61; *Mkontwana v Nelson Mandela Metropolitan Municipality & another* 2005 (1) SA 530 (CC) para 89; *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & others* 2009 (6) SA 391 (CC) para 36.

his business at a time when he is in financial difficulties.

[47] The counter arguments advanced on behalf of the appellants are, to my mind, sound. I therefore reject the argument advanced on behalf of the Bank, partly for the reasons already stated above in relation to Tiffski and partly for the reason that to uphold the Bank's contentions would subvert the purpose of s 34(1) of the Act and thus run counter to sound and binding authority[25] that has stood the test of time for decades.

Conclusion

[48] For all the aforegoing reasons therefore it is my conclusion that both Tiffski and the Bank failed to establish valid defences to the appellants' application on any of the grounds relied upon by them. Thus the application in the court below should have succeeded.

[49] It remains to deal with the question of the costs relating to the proceedings instituted by the appellants in the South Gauteng High Court under case number 38361/09 in which the appellants obtained an interdict against Tiffski restraining Tiffski from, inter alia, selling, alienating, encumbering and disposing the property which the company transferred to Tiffski on 16 September 2008 pursuant to the agreement of sale between the parties. The costs attendant on those proceedings were made costs in the cause in the main application which was subsequently instituted in the court below and is now on appeal before us.

[50] In the result the following order is made:

1 The appeal is upheld with costs.
2 The order of the court below is set aside and substituted as follows:

[25] See fn 1 at 538.

‘a The application succeeds and an order is granted in terms of prayers 1, 2, 3 and 4 of applicants’ notice of motion.

b The first and third respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application.

c The first respondent is further ordered to pay the costs of the proceedings instituted under case number 38361/09.’

3 The cross-appeal is dismissed with costs.

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X M Petse

Acting Judge of Appeal

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