



**SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF THE JUDGMENT DELIVERED**

FROM: The Registrar, Supreme Court of Appeal

DATE: 17 June 2021

STATUS: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***K2013046547/07 (South Africa) (Pty) Ltd and Others v Hyde Construction CC
and Another*** (Case no 513/2020) [2021] ZASCA 82 (17 June 2021)

Today the Supreme Court of Appeal upheld an appeal from the Western Cape Division of the High Court, Cape Town (per Kusevitsky J). The first respondent (Hyde Construction) applied to set aside a transfer of immovable property and a mortgage bond hypothecating the property in question. By way of an agreement, the third appellant (Blue Cloud) had sold the property to the first appellant (K company) and the transfer took place on 14 August 2014. The second appellant (Investec) provided K company with finance against the registration of a mortgage bond. Hyde Construction contended that the provisions of s 34(3) of the Insolvency Act 24 of 1936 rendered the transfer and the registration of the mortgage bond void. Kusevitsky J declared both the transfer and the registration of the mortgage bond void for the purposes of Hyde Construction enforcing its claim against Blue Cloud.

Section 34(3) provides that a transfer is void for the purpose of a particular creditor enforcing a claim against the debtor. For s 34(3) to apply, there are three issues to determine. Of these, it was common cause that Hyde Construction had instituted proceedings to enforce its claim prior to transfer and that K company was aware of this. The only remaining issue was whether Blue Cloud was a trader as defined in s 2 of the Act. This requires that the entity concerned 'carries on . . . business . . . in which property is sold, or is bought . . . for purpose of sale'. The onus rested on Blue Cloud to prove that it was not a trader as at date of transfer. The cases require that, in order to be a trader, the entity must buy property for the purpose of sale as its core business.

Blue Cloud contended that its core business was holding property for investment purposes and earning rental income. Blue Cloud was registered in 2002. Between then and 2014, it acquired a total of 7 properties, the last being in 2005. One of these, in Plettenberg Bay, was subdivided by Blue Cloud into 12 sections under a sectional title scheme. Eleven sections were, by law, required to be residential and the twelfth held a shopping centre called The Square. In 2005, Hyde Construction was contracted to renovate the shopping centre. Disputes arose between it and Blue Cloud which resulted in Hyde Construction suing Blue Cloud in 2010 and obtaining judgment in February 2019 for some R4 million plus interest and costs.

By 2009, Blue Cloud had disposed of all its properties other than the shopping centre. In August 2014, that property was transferred to K Company. The annual financial statements of Blue Cloud stated that the 'principal activity is that of acquisition and rental of immovable property'. They reflected the immovable property as 'investment property' under non-current assets. Revenue was reflected as rent received against the property expenses incurred. The sale of properties over the years had been reflected as capital gains events and not sale of stock of a property trading company. The shareholders had to contribute in increasing measure due to Blue Cloud's income being inadequate. The sale took place for this reason. In the light of these facts, including that no sale of a property had taken place for over 5 years prior to the transfer, it was held that Blue Cloud had shown that it was not a

trader and that, accordingly, s 34(3) of the Act did not apply to it. As a result, the mortgage bond could also not be impugned. For these reasons, the appeal was upheld with costs, including those of two counsel, where employed.