REPORTABLE
Case number: 558/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

KELVIN PARK PROPERTIES CC **APPELLANT**

and

A S PATERSON NO **RESPONDENT**

CORAM: **SMALBERGER, GROSSKOPF, SCOTT JJA, FARLAM and MTHIYANE AJJA**

DATE OF HEARING: 21 SEPTEMBER 2000

DELIVERY DATE: 29 SEPTEMBER 2000

Insolvency - s 34(1), Insolvency Act 24 of 1936 - whether insolvent "trader" as envisaged by s 34 - whether property on which business conducted by insolvent formed part of business.

JUDGMENT

MTHIYANE AJA

MTHIYANE AJA:

[1] One Schutte ("the insolvent") operated a butchery business for a number of years on his immovable property known as erf 3475, Stutterheim ("the property")in the Eastern Cape. On 12 - 13 March 1994 a fire broke out on the premises and the butchery was extensively damaged. On 26 April 1994 the insolvent and the appellant concluded two written agreements in terms of which the insolvent sold the property and a substantial number of movable assets which were used in the butchery ("the movables") to the appellant for the sum of R175 000. The tax invoice annexure "L" issued by the insolvent to the appellant records the sale as the "Sale of business". The transfer of the property into the name of the appellant was registered on 9 May 1994 and the movables were transferred to the appellant before 9 June 1994, when the insolvent's estate was provisionally sequestrated. A final sequestration order followed

on 17 July 1994.

[2] At the time of the fire the building on the property housed a butchery, a dwelling and a general dealer's shop, the said portions occupying 45%, 45% and 10% respectively of the total building area. The dwelling was occupied by the insolvent's brother, who worked in the butchery, free of rent or as a fringe benefit. The portion from which the general dealer's shop was operated was leased to a third party.

[3] At the time of the fire and as at the date of his sequestration, the insolvent owed his trade creditors the sum of R470 000,00.

[4] The transfer of the property and the movables from the insolvent to the appellant was not preceded by the publication of a notice in terms of s 34(1) of the Insolvency Act 24 of 1936 ("the Act").

[5] After taking transfer of the property and the movables, the appellant restored the

damaged butchery and proceeded to conduct a business on the premises as Amatola Butchery. The insolvent had previously operated as Model Butchery. Accordingly, the tax invoice annexure "L" records that it was issued by Model Butchery to Amatola Butchery.

[6] The third party who had leased the general dealer's shop from the insolvent continued the lease with the appellant after the sale, and the insolvent's brother continued to be employed in the butchery until December 1994. The appellant allowed the insolvent's brother to continue to occupy the dwelling over that period on the same conditions as before.

[7] The respondent, the trustee of the insolvent estate, instituted action in the Eastern Cape Division in which he sued the appellant for the return of the property and the movables, failing which payment of their value in the sum of R175 000,00. He claimed that the property and the movables formed part of the insolvent's business as

contemplated in s 34(1). The respondent contended that because the insolvent was a trader at the time of the sale and the property and the movables were not transferred in the ordinary course of business, the insolvent should have caused a notice of their intended transfer to be published and complied with the time periods provided for in s 34(1), and that the insolvent's failure to comply with the section rendered the transactions void.

[8] The appellant admitted the insolvent's failure to comply with the provisions of s 34(1), but denied that the insolvent had been obliged to do so because (1) he was not a trader as envisaged in the section, and (2) the property and the movables did not form part of the insolvent's business as contemplated in s 34(1).

[9] Leach J rejected this argument and found that the insolvent was, at the time of the transfer, a trader as defined in s 2 and that the property and the movables formed part of the business of the insolvent. His judgment is reported: see 1998(2) SA 89 (E).

The learned judge granted the appellant leave to appeal to the Full Court but the appeal failed. The appellant now appeals to this Court with special leave.

[10] The issues for decision in this appeal are whether the insolvent was, at the time of the transfer of the property and the movables a "trader" as defined in s 2 and, in the event of that being established, whether the property formed part of the insolvent's business as contemplated in s 34(1).

[11] Section 34(1) reads as follows:

> "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 against the trustee of his estate, if his estate is sequestrated at any time within the said period."

[12] In terms of s 2:

> "'Trader' means 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 . . . and any person shall be deemed to be a trader for the purpose of this Act . . . unless it is proved that he is not a trader as hereinbefore defined. . ."

[13] I propose to deal first with the issue of whether, at the time of the transfer of the property and the movables, the insolvent was a trader as defined in s 2. The appellant argues that because the insolvent ceased his daily trading activities of buying and selling meat, after the fire, he was no longer a trader when he sold the property and the movables to the appellant. Counsel for the appellant submitted that the legislature's use of the present tense in the phrase "carries on business" in the definition of "trader" was a strong indication that to fall within the definition in s 2 the person concerned must at the time of the sale be engaged in the daily trading activities of the business.

[14] I do not agree. To give the word "carries" the limited present tense meaning of someone actively engaged in the trade or business concerned, at the time of the relevant transfer, would have the effect of depriving a creditor of the protection of s 34(1) in those cases where a trader simply closes his doors and then sells his business or its assets. That would defeat the manifest object of the legislation.

[15] The purpose which the legislature wished to achieve in enacting s 34(1) was to prevent traders in financial difficulties from disposing of their businesses 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: *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 538; *Joosab v Ensor N.O.* 1966(1) SA 319 (A) at 324 H; *Galaxie Melodies (Pty) Ltd v Dally N.O.* 1975(4) SA 736 (A) at 744 A - 745 A; *Vermaak v Joubert & May* 1990(3) SA 866 (A) at 872 H - J;

Silverstream Investments (Kranskop) CC v Ronbo Automotive CC 1997(1) SA 107 (D) at 111 C-E; *Bank of Lisbon International Ltd v Western Province Cellars Ltd and Another* 1998(3) SA 899 (W) at 901 E - 902 B.

[16] Counsel for the appellant criticised the decisions in the courts below and in the *Bank of Lisbon* case (*supra*), to the extent that in those cases reliance was placed on the English decisions which, he submitted, were based on the English bankruptcy laws. The principle to be extracted from the cases in question is that trading or carrying on of a business does not cease when 'the shutters are put up', but continues until sums due are collected and debts paid: *In re Dagnall, Ex parte Soan and Morley* [1896] 2 QB 407 at 410 - 411 and *Theophile v Solicitor-General* [1950] 1 All ER 405 (HL). In my view the criticism against seeking support from the English authorities is not justified and ignores the fact that both English and South African legislation on the point is aimed at the protection of creditors. I cannot find fault with the approach

adopted by the courts below and in the *Bank of Lisbon* case (*supra*) with regard to the English Law on the point.

[17] *In casu* the insolvent still had trade debts in the sum of R470 000,00 when the sales were concluded and part of the purchase price was used to pay one of his creditors. In those circumstances, the approach adopted by the courts below to the interpretation and application of s 34(1) read with ss 1 and 2 was that a person who still had debts to discharge does not cease to be a trader merely because he has closed his shop.

[18] I agree with that approach. The *onus* of proving that the insolvent was not a trader at the time of the sales rested upon the appellant: *Scott-Hayward N.O. v Habibworths (Pty) Ltd* 1959(1) SA 202 (T) at 203 E. The respondent was assisted in this regard by the deeming provision in the definition of "trader". In my view the appellant failed to discharge the *onus.* In the result the insolvent was, at the time of the

transfer, a trader as defined in s 2.

[19] That brings me to the issue of whether, at the time of its transfer, the property formed part of the business of the insolvent as contemplated in s 34(1). It is unnecessary to consider whether the movables also formed part of the business. At the trial the appellant conceded that in the event of it being found that the insolvent was a trader at the time of the transfer the respondent would be entitled to an order in respect of the value of the movables. The *onus* to prove that the property formed part of the business of the insolvent rests on the respondent: *Joosab*'s case (*supra*) at 324 E. The consideration of this issue turns largely on the facts and upon inferences to be drawn from them. The difficulties in dealing with this aspect of the case stem largely from the inadequacies in the common cause facts agreed upon by the parties in the form of a stated case. They are lacking in clarity and detail and it is difficult to draw proper inferences from the limited factual data provided by the parties. A little more

clarity would have made our task easier.

[20] Counsel for the appellant argued that the property did not form part of the insolvent's butchery business but was merely a place where the business was conducted. He further argued that a clear distinction should be drawn between goods which form part of the business of a trader and those which form part of the assets of the person concerned. He contended that the Courts below failed to make this distinction. Counsel sought support for his contention from the decision in *Bruyns N.O. v Aerogrande (Pty) Ltd* 1964(3) SA 554 (W) in which it was held that although an aircraft (in issue in that case) was an asset of the insolvent (company) it was not necessarily property forming part of its business.

[21] The decision in the *Bruyns* case (*supra*) does not assist. The case is distinguishable on the facts in that it dealt with an exception to the plaintiff's declaration in which the plaintiff had failed to allege that the aircraft in question formed

part of the goods of the trader's business.

[22] Counsel for the respondent argued that the portion of the building used as a butchery and the portion used for accommodating an employee of the butchery formed an integral part of the business. These portions of the building on the property were used for no other purpose. We were urged to view the matter on the following basis: the more indispensable an asset is to the business and the less it is used for some purpose unconnected with the business, the greater the argument to be made for its forming part of the assets of the business within the meaning of s 34(1). There is much to be said for this contention.

[23] It is however not too difficult to imagine hardships that could result from formulating the test as to the meaning of the words "forming part of" in s 34(1) too broadly. Nowadays it is not uncommon for traders to conduct business from their homes. While one may be tempted to formulate an all-encompassing test, I believe

that the proper approach when interpreting and applying the provisions of s 34(1) would be to consider each matter in the light of its particular facts.

[24] *In casu* the insolvent was the owner of the property on which the butchery business was conducted. The part of the building in which the butchery was situated was adapted for that purpose and the dwelling was occupied by an employee. It was not used for any other purpose.

[25] The facts in the stated case do not indicate how the property was treated in the books of account of the business. When the matter was debated during argument in this Court, counsel for the appellant endeavoured to suggest that there was some notional precarious tenancy between the business and the insolvent, in terms of which the business was allowed to occupy the property. However this was not the case made out by the appellant in the papers and in the stated case. I am therefore not disposed to deal with the matter on that basis.

[26] In my view, there is an overwhelming probability that, at the time of the transfer, the property formed part of the insolvent's business as contemplated in s 34(1). The salient features which point in that direction are the following:

(a) The portion of the building in which the butchery was situated was specifically adapted for that purpose and included a walk-in cold room and the electrical equipment required to operate it.

(b) The dwelling portion of the building was used for the sole purpose of accommodating an employee of the butchery. Although in the stated case it is said that the insolvent's brother occupied the dwelling either as a fringe benefit or rent free, it is more likely that it was occupied as a fringe benefit - a situation which continued after the appellant acquired the property.

(c) Although two separate agreements of sale were concluded in respect of the property and the movables, the invoice, annexure "L", which was issued by the insolvent to the appellant on 25 April 1995 pursuant to the sale, refers to the sale as the "Sale of business". This suggests that the insolvent treated the property as part of his business. It is unlikely that he would have done so if this was not in fact the case.

(d) In each of the agreements of sale in respect of the property and the movables there is a clause providing that the "sale is subject to Value-Added Tax in terms of section 8(7) of the Value-Added Tax

> Act" (Act 89 of 1991 - "the VAT Act"). That section provides for the "disposal of an enterprise as a going concern or a part thereof which is capable of separation, . . . which shall for the purposes of this Act be deemed to be a supply of goods made in the course or furtherance of such enterprise. In my view there would have been no reason for the parties to have agreed to s 8(7) of the VAT Act being made applicable to the sale of the property if they did not regard the property as part of the insolvent's business.

[27] Despite the difficulties occasioned by the inadequacies in the stated case, there are, as I have indicated, a number of cardinal considerations which justify the conclusion that the respondent has discharged the *onus* resting on him of establishing that the property formed part of the business of the insolvent when it was sold to the appellant. 90% of the total area of the building formed part of the butchery business and only a negligible portion of the building (10%) was used for another purpose. As the portion that was leased to the third party cannot be separated from the remainder of the property, the whole of the sale of the property had to be set aside for non-

compliance with s 34(1). In my view the appellant fails on both issues.

[29] The appeal is accordingly dismissed with costs.

K K MTHIYANE
ACTING JUDGE OF APPEAL

SMALBERGER JA)Concur
GROSSKOPF JA)
SCOTT JA)
FARLAM AJA)