



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 513/2020

In the matter between:

K2013046547/07 (SOUTH AFRICA) (PTY) LTD FIRST APPELLANT

INVESTEC BANK LIMITED

SECOND APPELLANT

BLUE CLOUD

INVESTMENTS 40 (PTY) LTD

THIRD APPELLANT

and

HYDE CONSTRUCTION CC

FIRST RESPONDENT

THE REGISTRAR OF DEEDS,

CAPE TOWN

SECOND RESPONDENT

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

Coram: PONNAN, MOCUMIE and DLODLO JJA and GORVEN and
ROGERS AJJA

Heard: 24 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 June 2021.

Summary: Contract – Property Law – applicability of s 34(3) of the Insolvency Act 24 of 1936 – whether transfer of property to purchaser and bond passed over property is void for the purpose of enforcing a claim – requirement that seller be a trader – onus to show that seller is not a trader discharged – s 34(3) not applicable – transfer and hypothecation not void.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kusevitsky J, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel, where so employed.

2 The order of the high court is set aside and replaced by the following order:

The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where so employed.

JUDGMENT

Gorven AJA (Ponnan, Mocumie & Dlodlo JJA & Rogers AJA concurring):

[1] The first respondent (Hyde Construction) applied in the Western Cape Division of the High Court, Cape Town 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 to the first appellant (K company) the property in question. The second appellant (Investec) had 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 (the Act) rendered the transfer and registration of the mortgage

bond void. The second respondent (the Registrar) did not enter the lists either in the court of first instance or on appeal.

[2] In the high court, Kusevitsky J allowed the application and set aside both the transfer and the mortgage bond as void. She held that they were hit by the provisions of s 34(3) of the Act. The relevant parts of the order were:

a) The transfer was ‘declared void in terms of s 34(3) of the Insolvency Act No. 24 of 1936 (as amended) in respect of Hyde Construction and that the transfer . . . to [K company] accordingly is declared void, limited to Hyde Construction’.

b) The registration of the mortgage bond was ‘declared void in respect of Hyde Construction’.

c) The property was ‘declared specially executable and the Sheriff of Knysna (or his/her Deputy) is authorised, upon a duly issued writ of execution, to attach the property, limited to the sum of Hyde Construction’s judgment’.

d) Costs against the three appellants were ordered.

The basis for this was a finding that, at the time of transfer, Blue Cloud was a trader as defined in s 2 of the Act. The present appeal is with the leave of the high court.

[3] The property in question, erf 2941 (the erf), is in Plettenberg Bay. It was purchased by Blue Cloud in 2003. Three mortgage bonds in favour of Investec were passed over the erf. I shall refer to these collectively as the old bonds. In 2007, the erf was subdivided into 12 sectional title units in a sectional title scheme called ‘SS The Square’ (the scheme). Section 1 is a retail shopping centre complex called ‘The Square’ (section 1) and sections 2 to 12 are residential units. The shopping centre existed prior to this subdivision. In

mid-2005, Hyde Construction was contracted by Blue Cloud to conduct renovations to the shopping centre on section 1. Disputes arose between Hyde Construction and Blue Cloud over the renovations. Arbitration proceedings followed in which Hyde Construction was largely successful. This did not resolve the issues between the parties.

[4] In 2010, Hyde Construction instituted action against Blue Cloud for payment of what it claimed was due and owing to it. By then, all of the sections in the scheme, other than section 1, had been sold. In addition, all of the other properties previously owned by Blue Cloud had been sold. This, Blue Cloud says, was as a result of the adverse effect of the 2008 financial crisis on the property market. An order was made separating the issues in the action in terms of Uniform rule 33(4). Judgment on these issues was handed down on 12 August 2015. Hyde Construction was substantially successful, and the court a quo and this Court refused applications for leave to appeal.

[5] Between 2013 and 2015, rental income from the shopping centre proved insufficient to service the old bonds and Blue Cloud had no alternative source of income. Shareholders were obliged to make contributions to service the old bonds, municipal charges and insurance premiums. In October 2013, a call was made on the shareholders to contribute R168 128.36. A further call for a contribution of R423 074.88 was made in November 2013. Other financial pressures mounted. It is fair to say that tensions arose between the two directors of Blue Cloud, who were also the guiding minds behind the respective shareholders.

[6] On 11 April 2014, a sale agreement was concluded between Blue Cloud and K company. What was sold was a rental enterprise in respect of section 1 of the scheme. The purchase price of R36 million was funded by a loan from Investec of R30 million secured by a mortgage bond. The balance was contributed by other investors. One of the two directors of Blue Cloud and his family trusts were obliged to sign deeds of suretyship in favour of Investec before it would lend the R30 million to K company. That director then became a director of K company, but the other director of Blue Cloud did not. Transfer of section 1 to K company took place on 14 August 2014.

[7] Before advancing the loan and registering the bond, Investec required confirmation that Blue Cloud was not a trader or, if it was a trader, that the disposal of the property would be made in the ordinary course of its business. The auditors issued a certificate to the effect that Blue Cloud was not a trader. The purchase price was used to settle the balance outstanding on the loans to Blue Cloud and to cancel the old bonds.

[8] The balance of the issues in the action between Hyde Construction and Blue Cloud were set down for trial on 25 February 2019. On 22 February 2019, Alhock Properties CC, as well as creditors comprising family members and a trust controlled by the other director of Blue Cloud, applied to liquidate Blue Cloud. Hyde Construction intervened in this application in order to oppose it. On 25 February 2019, the trial on the balance of the issues proceeded in the absence of Blue Cloud. Hack AJ found for Hyde Construction ordering that Blue Cloud pay some R4 million, interest and costs on a punitive scale. By agreement, the liquidation application stood over to be determined once this litigation has been finalised.

[9] The provisions of s 34 of the Act are:

‘(1) 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.

(2) As soon as any such notice is published, every liquidated liability of the said trader in connection with the said business, which would become due at some future date, shall fall due forthwith, if the creditor concerned demands payment of such liability: Provided that if such liability bears no interest, the amount of such liability which would have been payable at such future date if such demand had not been made, shall be reduced at the rate of eight per cent per annum of that amount, over the period between the date when payment is made and that future date.

(3) If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader-

(a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or

(b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate's court of that district,

the transfer shall be void as against him for the purpose of such enforcement.

(4) For the purposes of this section “transfer”, when used as a noun, includes actual or constructive transfer of possession, and, when used as a verb, has a corresponding meaning.’

[10] It is clear that s 34(1), if applicable, results in a transfer which is void against all creditors for six months after transfer, and void against a trustee (or

liquidator) in insolvency. By contrast, s 34(3), if applicable, results in a transfer which is void against a particular creditor or creditors for the purpose of the enforcement of their claim against the debtor. Put differently, this means that, to the extent that the transfer affects the ability of the creditor to enforce its claim, the transfer is void. The form of the order of the court of first instance ought to have reflected this more clearly. However, this does not need to occupy our attention in this appeal, due to the view we take of the matter.

[11] Crucially, for s 34 to apply, the debtor must be a trader as defined. It is common cause that Hyde Construction had instituted proceedings to enforce its claim prior to transfer. It is also common cause that K company was aware of this. Of the requirements in s 34(3), accordingly, the only remaining issue was whether Blue Cloud was a trader as defined in s 2 of the Act. There is no dispute that the onus rested on Blue Cloud to prove that it was not a trader as defined.¹ There is likewise no dispute that the relevant date on which it must be determined whether Blue Cloud was a trader is the date of transfer of the property.²

[12] Section 2 of the Act defines ‘trader’ as:

‘[A]ny 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-house keeper, 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

¹ *Gainsford NNO v Tiffski Property Investments (Pty) Ltd and Others* [2011] ZASCA 187; [2011] 4 All SA 445; 2012 (3) SA 35 (SCA) para 31.

² *Ibid. Axal Properties 2 CC v Kotze* [2013] ZASCA 110 para 2.1.

to be a trader for the purpose of this Act (except for the purposes of subsection (10) of section 21) 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.’

[13] Hyde Construction contended that the category of s 2 applicable to Blue Cloud was that it ‘[carried] on . . . business . . . in which property is sold, or is bought . . . for purpose of sale’. In *McCarthy Ltd v Gore NO*,³ this Court set out the approach to be adopted to determine this issue:

‘The question whether the company is a trader is answered by having regard to the nature of the undertaking . . . and determining whether such undertaking is part of the core business of the company . . . or incidental thereto.’⁴

And:

‘In my judgment, the definition of a trader must be linked to the primary business activities of the enterprise concerned and not be extended to activities incidental thereto.’⁵

[14] In *McCarthy*, it was clear that the primary business of the company concerned was the use of trucks to transport goods. From time to time, it was necessary to renew the fleet, which required the sale of vehicles which had outlived their usefulness. It was held that these sales were not part of the core business of the company. They were incidental thereto. As such, this Court held that the company was not a trader as contemplated in s 2 of the Act.

³ *McCarthy Ltd v Gore NO* [2007] ZASCA 32; [2007] 4 All SA 1212; 2007 (6) SA 366 (SCA).

⁴ *McCarthy* para 11.

⁵ *McCarthy* para 13.

[15] Clearly each case must be judged on its own facts. The facts in the present matter resolve themselves into the question of whether, at the time of transfer, the core business of Blue Cloud was the sale and purchase of property, or whether this was incidental to the business of holding property for investment purposes and earning rental income. In order to answer this question, the facts must be carefully scrutinised.

[16] Blue Cloud was registered on 22 March 2002. Over the years it owned a total of 18 properties. Twelve of these comprised the sections in the scheme. In other words, prior to the subdivision and registration of the scheme, it had owned seven properties, one of which was the erf prior to subdivision. The 18 properties were purchased and sold as follows:

- a) Erf 2771 La Lucia was purchased in May 2002 and sold in September 2003.
- b) Erf 2746 La Lucia was purchased in May 2002 and sold in October 2003.
- c) Erf 143 Mount Edgecombe was purchased in May 2002 and sold in March 2004.
- d) Erf 4599 Pinetown was purchased in April 2003 and sold in July 2006.
- e) Erf 2833 La Lucia was purchased in September 2003 and sold in July 2006.
- f) Erf 7502 Pinetown extension was purchased in July 2005 and sold in March 2009.
- g) The position with the scheme is as follows. As mentioned above, the erf was purchased in 2003. After subdivision, nine of the residential sections were sold, the last such sale being in 2007. Pursuant to a 2004 agreement, the other two residential sections were transferred to the Bitou Municipality to

pay for the lease of the land on which the parking area adjacent to the shopping complex on section 1 is located.

[17] As such, apart from section 1, all of the sales of all of the properties ever owned by Blue Cloud had taken place by March 2009. By the time Hyde Construction instituted action in 2010, the only remaining property in the portfolio of Blue Cloud was section 1. Nor were any further properties purchased by Blue Cloud after 2009.

[18] On 10 December 2003, a document termed a ‘Board Paper’ motivated the sale of three of Blue Cloud’s properties. It indicated that Blue Cloud had attempted to sell its entire portfolio, but that this had not eventuated. The investors in question had been interested in only three properties. The calculations were provided. Under the rationale for disposal, it was indicated that the rapid drop in interest rates had resulted in an increase in capitalisation rates of fixed and listed property. It was then said that:

‘The investment profile for this portfolio was always based on a medium term investment horizon (ie three to five years) depending on the prevailing market conditions and the enhancement of underlying value.’

As a result, the Board Paper motivated that it should ‘dispose of those properties in its portfolio where additional value has already been created’. This document is relied on by Hyde Construction to contend that Blue Cloud did not have rental as its core business, but rather the buying and selling of property, and that, as a result, it was a trader. It claims that this contention is buttressed by the number of sales of properties made by Blue Cloud over the years.

[19] As against this, Blue Cloud says that the objective of its acquisitions of property was the creation of rental enterprises. All the properties it bought were tenanted, and when they were disposed of they were sold as rental enterprises. Its auditors, and the South African Revenue Service, had over the years recognised rentals as income and the sale of properties, including the sale of section 1, as capital gains events. In addition, the annual financial statements of 2010 were put up. These state that the ‘principal activity is that of acquisition and rental of immovable property’. They reflect the immovable property as ‘investment property’ under non-current assets. Revenue is reflected as rent received against the property expenses incurred. Blue Cloud alleged that all its other annual financial statements were prepared on this basis as well, and Hyde Construction did not invoke rule 35(12) with a view to a potential challenge to the accuracy of this statement. Blue Cloud also points to the certificate issued by its auditors at the instance of Investec, stating that it was not a trader. Of course, this is an opinion and must be treated as such. Further, the reason for the sale of section 1 was that the rental income it generated was insufficient to cover the expenses of Blue Cloud and the shareholders had to contribute to these in increasing measure. Apart from that, the litigation with Hyde Construction added to normal running expenses to the extent that Blue Cloud was unable to settle the account of its attorneys amounting to some R3 million.

[20] The reason proffered by Blue Cloud for the acquisition and sale of the residential units was as follows:

‘Blue Cloud did not ordinarily invest by holding residential units as the investment return on such units is generally too low. However, by virtue of the Floor Area Ratio zoning requirements of the relevant municipality, Blue Cloud was required to include residential

properties in the development of Erf 2941. In addition, the sale of the apartments reduced the residual cost of the commercial element of the development sufficiently in order to make same a viable investment.’

This is consistent with the evidence of Blue Cloud that properties were acquired for investment purposes and were only sold if the investment objectives were not met. This statement was not seriously challenged by Hyde Construction. If it had been challenged, the *Plascon-Evans* rule⁶ would have applied and more than a bare denial would have been required to negative the evidence. Hyde Construction said only that the purchase and sale of the residential units did not evidence a rental enterprise. Blue Cloud says that it was obliged to include these for the scheme and this is why it disposed of them as soon as it was able to.

[21] The question of whether, at the relevant time, Blue Cloud was a trader is a legal conclusion to be drawn from the proved facts.⁷ On the date of transfer in August 2014, section 1 had been the only property held by Blue Cloud for a period of some five and a half years. No properties had been acquired after July 2005. While a number of properties were acquired and disposed of between 2002 and 2006, the only sales thereafter were of one Pinetown property in March 2009 and units under the scheme, the last of which was sold by August 2007.

[22] By no stretch of the imagination does this paint the picture of an enterprise whose core business at the relevant time was the purchase and sale

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635. This applies even when the onus rests on the respondent in an application. See *NDPP v Zuma* [2009] ZASCA 1; 2009 (2) SA 277; 2009 (1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243 (SCA) paras 26-27.

⁷ *Commissioner for Inland Revenue v Stott* 1928 AD 252 at 259.

of immovable properties. If this were its primary business activity, it would not have traded for some five years. The most probable inference from all of the material facts is thus that, in August 2014, Blue Cloud was not a trader as defined in s 2 of the Act. The sale and impugned transfer was incidental to the core business of a rental enterprise, which had run into financial difficulty.

[23] Even if it can be said that Blue Cloud was once a trader during the early years of its operation, the cases recognise that the core business of an entity can change. This Court dealt with such a situation in the tax matter of *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd*.⁸ The company in question had initially carried on business both as a speculator in land and as a rental enterprise. At a certain point, it decided to hold and let the properties previously acquired as stock in trade so as to generate monthly rentals. This Court upheld the finding that the stock in trade of land had been converted into a fixed capital asset. This remained the case when it was decided to sell those properties at a profit. The business enterprise had not changed back to that of property speculation.

[24] At best for Hyde Construction, this described the situation of Blue Cloud as it obtained in August 2014. Even if it can be said that the original core business rendered it a trader, by August 2014 it was no longer one. At the time of the transfer of section 1, on any version, Blue Cloud was not a trader. The court of first instance thus misdirected itself on its finding that Blue Cloud was a trader at the relevant time. The transfer is accordingly not hit by the provisions of s 34(3) of the Act, which applies only to traders.

⁸ *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A).

[25] The application was based squarely on s 34(3) of the Act both in respect of the transfer and the mortgage bond of Investec. There can likewise be no basis for s 34(3) to apply to the mortgage bond if Blue Cloud was not a trader. If the transfer is not affected, neither can a subsequent hypothecation be hit by it. This much was correctly conceded by Hyde Construction in argument. That, then, is an end to the matter.

[26] Unfortunately, however, the waters were muddied by Investec's assertion that it was an 'innocent bystander'. Although this did not bear at all on the point in issue, it prompted Hyde Construction to allege that Investec had been involved in an unlawful and contrived transaction. Since Hyde Construction did not seek to formulate any cause of action other than that under s 34(3), nothing more need have been said about the matter. The court of first instance, however, found itself drawn into making a finding against Investec on the point. Apart from being irrelevant, they were in any event not warranted on the facts. In *Gold Circle (Pty) Ltd v Maharaj*,⁹ this Court sounded a cautionary note in this regard:

'I consider next the issue whether the court a quo's remarks constituted a lack of judicial restraint. It is indeed so that judicial officers wield great power. While judges may have occasion to express critical views about litigants or witnesses, such criticism requires circumspection and must be supported by all the facts.'

Those comments apply equally here.

[27] Because the court of first instance dealt with the matter on the basis that s 34(3) applied to the transfer, it made a finding that the mortgage bond was hit by its provisions. Investec urged us to deal with this issue so as to correct

⁹ *Gold Circle (Pty) Ltd v Maharaj* [2019] ZASCA 93 para 25.

what it says is an incorrect application of s 34(3) to a mortgage bond registered over property where the transfer is hit by s 34(3).

[28] As I have indicated, the factual issue of whether Blue Cloud discharged the onus of showing that it was not a trader is dispositive of the appeal. This ought also to have been dispositive of the application. The transfer is not hit by s 34(3). Interesting though the point may be, it would be unwise to enter this terrain, since it is not necessary for the determination of the matter. It should be said, however, that our silence on this issue should not be construed as an endorsement of the correctness of the finding of the court below on this aspect of the application of s 34 to the mortgage bond.

[29] It follows that the provisions of s 34(3) of the Act do not apply to the transfer from Blue Cloud to K company. Neither the transfer nor the registration of the mortgage bond is thus void for the purpose of Hyde Construction enforcing its claim against Blue Cloud. The appeal must succeed. In that instance, the costs must follow the result. In the light of the relative complexity of the matter, the costs of two counsel are warranted where they were so employed.

[30] In the result:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel, where so employed.

2 The order of the high court is set aside and substituted with the following order:

‘The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where so employed.’

T R GORVEN
ACTING JUDGE OF APPEAL

APPEARANCES

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