IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SLIMS (PROPRIETARY) LIMITED ..... First Appellant

and

REBEL DISCOUNT LIQUOR STORES
(EASTERN CAPE) (PROPRIETARY)
LIMITED ..... Second Appellant

and

DAVID MORRIS N. O.
in his capacity as Trustee in the
Insolvent Estate JUAN IGNACIO MARSAL..... Respondent

CORAM: CORBETT, BOTHA, VAN HEERDEN, NESTADT JJ A
et NICHOLAS AJA.

Date of Hearing: 7 September 1987

Date of Delivery: 10 November 1987

J U D G M E N T

NICHOLAS, AJA :

/This .....

This appeal concerns two leases. The one, which was concluded in September 1984 between SLIMS (PROPRIETARY) LIMITED as lessor and JUAN IGNACIO MARSAL as lessee, related to the Phoenix Hotel in Chapel Street, Port Elizabeth and Phoenix Hotel Off-Sales in Prince Alfred Road, Port Elizabeth. The other, which was con= cluded in April 1980 between PROGRESSIVE HOLDINGS (PRO= PRIETARY) LIMITED (the name of which was later changed to REBEL DISCOUNT LIQUOR STORES (EASTERN CAPE) PROPRIETARY LIMITED) as lessor and MARSAL as lessee, related to the Swartkops Hotel with Off-Consumption Authority in Swartkops, Cape.

/The .....

The same questions arise in regard to both of the leases, and counsel were agreed that the Court's decision in regard to the Swartkops Hotel lease should follow the decision in regard to the Phoenix Hotel lease. Consequently only the Phoenix Hotel lease falls to be considered.

SLIMS (PROPRIETARY) LIMITED is itself the lessee of the properties concerned from OFFIT CHAPEL STREET (PROPRIETARY) LIMITED and OFFIT PRINCE ALFRED ROAD (PROPRIETARY) LIMITED respectively.

The preamble to the lease recited that SLIMS (PROPRIETARY) LIMITED

/"conducts .....

"conducts business as an hotelier at the Phoenix Hotel, Chapel Street, Port Elizabeth, and Phoenix Hotel Off-Sales, Prince Alfred Road, Port Elizabeth, (hereinafter referred to as the 'LESSOR')

and that JUAN IGNACIO MARSAL

"(hereinafter referred to as the "LESSEE') wishes to lease the business conducted by the LESSOR and the premises in which such business is conducted subject to certain terms and conditions."

Under clause 1 the lessor agreed "to sub-let the properties leased from Offit Chapel Street (Pty) Limited and Offit Prince Alfred Road (Pty) Limited on which the business of an hotel and off-sales are conducted respectively.

Clause 24 provided that the agreement was "subject to permission being granted to transfer

/the .....

the licences by all relevant authorities." Under clause 4 it was agreed that the lessee "shall hand back the properties at the termination of the lease in the same good order and condition as at the effective date of the Agreement - - - - - - ." And in terms of clause 21 -

> "In the event of the termination of this Agreement, the LESSEE shall do all things as may be necessary to ensure that the relevant trading licenses are transferred back to the LESSOR but in any event shall sign a Power of Attorney authorising the LESSOR to apply for such transfers as may be necessary ---------."

Thereafter the liquor licence was transferred to Marsal on the application of the lessor; and Marsal duly entered into occupation of the Phoenix Hotel and

Phoenix Hotel Off-Sales, where he conducted the business on his own account until 2 July 1985. On that date his estate was provisionally sequestrated. The order was made final on 6 August 1985. Mr David Morris was appointed as provisional trustee and later, on 17 September 1985, as trustee in Marsal's insolvent estate. Through an agent the trustee continued the business until the termination of the lease.

The trustee did not give notice determining the lease in terms of s. 37(1) of the Insolvency Act, 24 of 1936, and he did not, within three months of his appointment, notify the lessor in terms of s. 37 (2) that he desired to continue the lease on behalf of the

/estate.....

estate. The trustee was accordingly deemed to have determined the lease at the end of such three months' period.

The trustee then vacated the premises, but refused to take any steps to retransfer the liquor licence to the lessor. He contended that, although the leased premises reverted to the lessor by reason of the termina= tion of the lease, the licence vested in and belonged to Marsal's insolvent estate. He as trustee was not bound by the terms of the lease providing for the restoration of the licence to the lessor on the termination of the lease, nor was he bound by any term prohibiting or restricting transfer of the licence to third parties. He claimed

/that .....

that he was entitled to realize the licence as an asset in the insolvent estate.

SLIMS (PROPRIETARY) LIMITED as first applicant and REBEL DISCOUNT LIQUOR STORES (EASTERN CAPE) (PROPRIETARY) LIMITED as second applicant then made an application against the trustee as respondent in the South Eastern Cape Local Division of the Supreme Court. They claimed:

> "(ii) An order directing Respondent, within a time to be fixed by this Honourable Court, to take all steps necessary and to sign all documents necessary to :-
>
> (a) Transfer to First Applicant or its nominee, the Hotel Liquor Licence with Off-Consumption Authority

/pertaining .....

pertaining to the Phoenix Hotel, Chapel Street, Port Elizabeth, Cape, the Off-Consumption Authority being conducted under the name of Phoenix Hotel Off-Sales, at Prince Alfred Road, North End, Port Elizabeth, Cape;

(b) Transfer to Second Applicant or its nominee, the Hotel Liquor Licence with Off-Consumption Authority pertaining to the Swartkops Hotel, Main Road, Swartkops, Cape;

and failing compliance therewith

(iii) An order authorising and directing the Sheriff of this Honourable Court or his lawful deputy to take all such steps and sign all such documents on Respondent's behalf.

(iv) Granting alternative relief.

(v) Directing that the costs of this application be paid by the Respondent, or alternatively that First and Second Applicants' costs of suit be costs in the sequestration of the insolvent estate of JUAN IGNACIO MARSAL."

/The .....

The application was heard by KANNEMEYER J, who held that the licences had vested in the insolvent estate; and that clause 21 of the lease gave the lessor merely a jus in personam, which could not be enforced against the insolvent estate. Judgment was accordingly granted for the trustee with costs, including those occasioned by the employment of two counsel. Subsequently the learned judge granted leave to appeal to

/this .....

this Court, and directed that the costs of the application for leave be costs in the appeal.

The question for decision is res nova. There has been no reported case, in South Africa at any rate, in which it has been considered by a court. This is a matter for surprise, because the occasions for dis= putes in this regard must have been frequent. The ab= sence of any reported case would seem to suggest that it has been generally accepted that, in circumstances such as those in the present matter, the licence does not fall in= to the insolvent estate. But this is by the way.

The nature of a retail liquor licence, and the extent to which the rights conferred by it can be

parted with, were discussed in three early decisions of this Court. In Fick v. Woolcott & Ohlsson's Cape Breweries Ltd., 1911 AD 214, INNES J said at 229-230:

> "Now, such a licence authorises the sale of liquor by the holder upon specified premises, for consumption there. It is a privilege granted to a particular person to sell liquor at a particular place. And the law attaches the greatest importance, and provides for the strictest supervision, in regard to both these elements. - - - - - - - - Moreover, the privilege which he enjoys is purely personal; it involves the exercise by the authorities of a delectus personae, so that he would have no power to assign his licence, were there no statutory provision for its transfer. He can only deal with it in such a manner as the Ordinance pre= scribes. - - - - - - - - - - - And the law pro= vides that the transfer of a licence can only be effected by the authority which sanctioned its issue. Contractual undertakings on the part of a holder to transfer his licence to

/some ....

some other person on the happening of certain contingencies are of frequent occurrence. But the expression, though convenient, is inaccurate. No holder can transfer his licence; that is the sole prerogative of the Licensing Court. So that the only way to give any effect to such an undertaking is to treat it as an agreement by the promisor to exercise in favour of the promisee such right to apply for a transfer as the statute gives him, and to do all thing necessary on his part to enable the Licensing Court to deal with the application. And that is what, in my opinion, an agreement to transfer a licence amounts to."

And in Pietermaritzburg Corporation v. South African Brew= eries Ltd., 1911 AD 501, INNES J pointed out at 517 that, although a licence operates only on the specified premises, it can be separately held and dealt with, and it has a commercial value apart from the premises to which it re= lates. See also Receiver of Revenue, Cape v. Cavanagh,

1912 AD 459 at p 463.

Relying on these cases, VAN ZYL JP held in Solomon v. Registrar of Deeds, 1944 CPD 319 at 325, that a liquor licence is not merely a privilege, but is a right which has a potential commercial value which may sometimes be very considerable. And it is a right which is alienable and can be sold.

/Finally .....

Finally on this aspect, reference may be made to Weintraub & Weintraub v. Joseph & Others, 1964(1) SA 750 (W). In that case the applicants were the joint owners of certain premises on which a beer hall had been conducted for many years by virtue of a wine and malt licence. They had let the premises in terms of a lease which in clause 3(g) provided inter alia that the lessee was not to transfer the licence to other premises or persons without the consent of the applicants; and that at the termination of the lease the licence was to be transferred to the applicants, to facilitate which the lessee was obliged to grant them a

/power .....

power of attorney. Unbeknown to the applicants, the lessee had in breach of these provisions obtained from the liquor licensing board, which was the second respondent, authority permitting the transfer of the licence and its removal to other premises. The applicants now applied for an order setting aside the authority. In that part of the judgment which is presently relevant, VIEYRA J said (at 754):

> "Although in some reported cases the lessor in the position of the applicants here is referred to as being the owner of the licence it is clear from Fick's case, supra, that this is not a correct description of his rights. No doubt the lease talks of the licence attaching to the premises as if the premises were a dominant tenement and the licence a

/servitude .....

servitude. But that is not quite correct. Although a licence is in respect of par= ticular premises it belongs to the licensee as delectus personae. Once transferred to the lessee it is his and no longer vests in the lessor; the only one who is entitled to apply for its transfer, removal or renewal is the lessee. All that the lessor has is a right in personam to enforce the obligations set out in clause 3(g), which the cases above referred to show will be specifically enforced whether by interdict or otherwise. Had the applicants approached the Court timeously no doubt interdicts preventing the first respondent from making the applications to the second re= spondent and the latter from acceding thereto would have been granted."

KANNEMEYER J came to the conclusion, upon a consideration of the authorities,

"... that when the licences were transferred to Marsal they became an asset in his estate and, unless some statutory provision other= wise provides, they vested in his trustee on his insolvency and, the contracts whereunder

> he was required to take steps to transfer them back to the applicants having been abandoned by the respondent, there is no contractual basis upon which the applicants can reclaim the licences or require the respondent to take steps to retransfer them."

(The reference to "some statutory provision" was to s.47(1) of the Liquor Act, 87 of 1977 and s. 37(5) of the Insol= vency Act, 24 of 1936, on which the applicants based con= tentions which were dismissed later in the judgment.)

As an asset belonging to Marsal, the Phoenix Hotel liquor licence vested in his trustee under the law of insolvency. Furthermore s. 47(1) of the Liquor Act, 87 of 1977, provides that if the estate of any licensee is sequestrated, the licence shall vest in his trustee, who may, subject to the law relating to insolvency, with= out formal transfer, carry on the business for a period not exceeding eighteen months.

/It

It does not, however, follow from the fact of enforceable vesting, and the fact that the trustee is under no contractual obligation to retransfer the licence to the lessor, that the trustee necessarily has the power to dispose of the licence for the benefit of the creditors. That must depend upon the facts of the particular case. This can be illustrated by reference to s. 67 of the former Liquor Act (No 30 of 1928).

That section provided that with certain exceptions no licence may be issued to a company, society, partnership or other association of persons. This was subject to a proviso:

> "Provided that nothing in this section contained shall be deemed to prevent the issue of any licence to a person in the employ of a company, society, partnership or other association of persons, and if any

/such .

such employee to whom any such licence was issued, ceases to be employed in a position in which he is required to hold such licence, his employer may take such steps for the transfer of the licence to some other employee as a licensee may take under subsection (1) of section forty-two for the transfer of his licence to some other person ..."

The position in a case covered by the proviso was put in this way by Lansdown, South African Liquor Law, 3rd edition, p 108:

"A company may own and control a business carried on by, and under the personal re= sponsibility of, an individual licensee who is in its employ. The application for the licence must be made by the individual who is to be the licensee, and who, in the affidavit presented with his application, must, in terms of sec. 31(3), set forth, inter alia, the name and address of the company and the nature and extent of its financial interest ... The licence must

be issued to the applicant personally, and not in his capacity in relation to his employer."

(This passage was quoted with approval in Distillers Corporation (SA) Ltd. v. Stellenbosch Liquor Licensing Board, 1951(3) SA 467 (C) at 469).

Hence it was the employee to whom a licence was issued in terms of the proviso, and not his employer, who was the holder of the licence. (See Walker v. Carlton Hotels (SA) Ltd, 1946 AD 321 at 329). But it is clear from the terms of the proviso that he was the licensee in name only. He had no beneficial interest in the licence, which could be transferred to another employee without his co-operation or consent. His insolvent estate could

/likewise .....

likewise have had no beneficial interest, and the fact that upon insolvency the licence vested in the trustee could not, it is conceived, have affected the statutory power of the employer to take steps for the transfer of the licence to some other employee.

It is accordingly necessary to go further than did KANNEMEYER J, and to give consideration to the question whether the lessor did not, upon the determination of the lease, have a right, independently of contract, to the transfer of the licence.

The lease was a lease not merely of the premises, but of the business of the Phoenix Hotel and Phoenix Hotel Off-Sales as a going concern. Cf. Bosman, Powis & Co. v. Norden, (1904) Buch. App. Cas. 201 at 206. That is shown firstly by the terms of the preamble to the lease (quoted above) which recited that Marsal wished to

lease .....

lease the business conducted by the lessor and the premises in which such business was conducted. Then in terms of clause 1,

> "The LESSOR agrees to sub-let the properties leased from Offit Chapel Street (Pty) Limited and Offit Prince Alfred Road (Pty) Limited on which the business of an hotel and off-sales are conducted respectively."

Clause 7 provided that -

> "The LESSEE shall conduct the businesses of an hotel and off-sales on his own account ...."

In terms of clause 8, the lessee was to take over at a valuation the "movable assets of the LESSOR's furniture crockery, cutlery, linen, etc." He was, in terms of clause 11, to take over at cost, "cash floats, liquor,

/food .....

food and other consumable stock." He accepted responsibility for compliance with Hotel Board requirements in respect of the hotel property (clause 12). He undertook "to operate the business in accordance with all Acts, Regulations and By-laws which may be relevant with specific reference to the Liquor Act ..." (clause 14). He agreed to employ all employees of the lessor (clause 17). And upon termination of the lease, he undertook to hand back the properties (clause 4), and to transfer the relevant licence back to the lessor (clause 21).

The sale of a business is commonplace in South Africa. For many years there have been in force statutory provisions relating to such sales.

S. 34 .....

S. 34(1) of the Insolvency Act, No. 24 of 1936, provides that if a trader alienates any business belonging to him, or the goodwill of such business, and such trader does not publish a notice as prescribed, the said alienation shall be void as against his creditors for a period of six months after such alienation, and shall be void against the trustee of his estate if his estate is sequestrated at any time within the said period. The previous Insolvency Act (No. 13 of 1916) contained in s. 33(1) a similar provision relating to "every sale or alienation by a trader of any business or the goodwill ... of the business". The Transvaal Registration of Businesses Act 1909 contained a similar provision in s. 11(2) read with s. 4(1).

The components of the merx in a sale of a

business .....

business are to be ascertained from the contract of sale. They will normally, if not invariably, include the goodwill of the business.

The lease of a business is likewise commonplace. Juristically, the concept of a lease of a business offers no greater problems than the concept of a sale of a business. Subject to specific exceptions all things in commercio, whether corporeal or incorporeal, can be let. (Graham v Local and Overseas Investments (Pty) Ltd, 1942 AD 95 at 108 in fin.) The only material difference between the sale of a business and the lease of a business is that in the case of a sale the intention of the parties is that the seller should dispose of all his rights in the business, whereas in the case of a lease their intention is that the

lessor .....

lessor should part temporarily with the use and enjoyment of the business.

In this case the lease included, as one of the components of its subject-matter, the goodwill attaching to the business.

Goodwill was epitomized by COLMAN J in Jacobs v. Minister of Agri-

culture .....

culture, 1972(4) SA 608 (W) (which was an expropriation case) at 621 A-B:

> "As to the nature of goodwill there have been many judicial pronouncements, and I shall have to refer to some of those later. At this stage it will suffice if I say that goodwill is an intangible asset pertaining to an established and profitable business, for which a purchaser of the business may be expected to pay, because it is an asset which generates, or helps to generate, turn-over and, consequently, profits."

(My underlining). (See also pp 624-625).

Goodwill is property. See Torf's Estate v. Minister of Finance, 1948(2) SA 283 (N) at 292, where the dictum of LORD MACNAGHTEN in Inland Revenue Commissioners v. Muller & Co's Margarine, Limited, 1901 AC 217 at 223 was quoted:

> "It is very difficult, as it seems to me, to say that goodwill is not property.

> Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will - of course, under the conditions attaching to property of that nature."

Compare s. 34(1) of the Insolvency Act of 1936 to which reference is made above.

The importance attached by the parties to the liquor licence is manifest from the provisions of the lease.

In clause 24, referred to above, it was provided that the agreement of lease was subject to the grant by the relevant authorities of permission to transfer the licences. It was provided in clause 14 that should the lessee "endanger the continuance of the liquor licence, the lessor may immediately re-possess the licence and properties and apply to transfer them to its nominees."

Clause 21, which provided for the retransfer of the licence upon the termination of the lease, is quoted above. In terms of clause 23, the lessee, upon becoming aware of any adverse report or danger of losing the liquor licence, was required to give notice thereof, and the lessor might then take any steps it deemed necessary to protect the licence.

The reason for regarding the liquor licence as of primary importance is plain: the licence was es= sential to the goodwill of the business. In Receiver of Revenue, Cape, v. Cavanagh, 1912 AD 459, INNES ACJ said at 464 in fin. to 465 that -

> "So far as a licensed house is concerned, the connection between the licence and the

/goodwill .....

> goodwill is so close that the cases in which they are separately dealt with must be few indeed. And it was this circumstance which probably led to Dr Greer's candid admission that there was no distinction between them ..."

(Dr Greer was counsel for the appellant.) Take away the licence and the goodwill perishes, because without it the business of a licenced hotel cannot be carried on at all.

The goodwill of the Phoenix Hotel was and still remains the property of the lessor. The transfer of the liquor licence to Marsal was the machinery which had necessarily to be employed if Marsal was to enjoy the goodwill during the currency of the lease. It was solely for the duration of the lease and for the purpose of the lease, and it was not in the contemplation of the parties that he should retain the licence after the termination of the lease.

When .....

When he was appointed as trustee in Marsal's insolvent estate, Morris acquired the possession of the business of the Phoenix Hotel, and he continued to carry on that business, as he was entitled to do, until the determination of the lease. When that event occurred, he became obliged to restore the business to the lessor. That was his obligation, not because of the provisions of the lease, but under the common law rule that, upon the termination of the lease, the lessee's right to use and enjoy the leased property ceases and he is obliged to redeliver the property to the lessor. See the authorities cited on p 195 of Cooper, The South African Law of Landlord and Tenant. Those authorities relate to leases of fixed property, but the same principle must apply to

/the .....

the lease of a business, which includes not only the occupation of fixed property but also the enjoyment of the intangible asset of the goodwill of the business.

The ownership of the goodwill (an inseparable part of which is the privilege of selling liquor) is a jus in re, which exists independently of any jus in personam constituted by the lease.

The trustee has restored to the lessor only the premises. Until he redelivers also the goodwill (which requires that he take the steps necessary to retransfer the liquor licence), the Phoenix Hotel will not have the enjoyment of the goodwill attached to a licensed hotel, and will be deprived of that asset. (Cf. Bosman, Powis & Co. v. Norden (supra) at 207).

My .....

My conclusion is that, even though the licence has vested in Marsal's insolvent estate, the trustee is not relieved thereby of his obligation to re-deliver the goodwill of the Phoenix Hotel business, which requires that he should retransfer the licence. The appeal should accordingly be upheld.

Since writing this judgment, I have read the judgment of BOTHA JA. I agree with his conclusion as to the applicability of s. 37(5) of the Insolvency Act, and would uphold the appeal also on this ground.

The appeal is according allowed with costs, including the costs attendant on the employment of two counsel. The order of the Court a quo is set aside, and

there .....

there is substituted for it the following:

"(a) An order is granted directing the respondent, within one month from 10 November 1987 to take all steps necessary and to sign all documents necessary to:

(i) transfer to first applicant or its nominee, the hotel liquor licence with off-consumption authority pertaining to the Phoenix Hotel, Chapel Street, Port Elizabeth, Cape, the Off-Consumption Authority being conducted under the name of Phoenix Hotel Off-Sales, at Prince Alfred Road, North End, Port Elizabeth, Cape; and

(ii) transfer to second applicant or its nominee, the hotel liquor licence with off-consumption authority pertaing to Swartkops Hotel, Main Road, Swartkops, Cape.

(b) An order is further granted that, in the event of non-compliance by the respondent with paragraph (a) hereof, the sheriff or his lawful deputy is

authorised .....

authorised and directed to take all such steps and sign all such documents on respondent's behalf as may be necessary for the transfer of the said licences.

(c) The respondent is ordered to pay the costs of the application, including the costs attendant on the employment of two counsel, as part of the costs of administration of the insolvent estate of Juan Ignacio Marsal."

H C NICHOLAS, AJA

128a/87

LL

Case No 251/1986

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SLIMS (PROPRIETARY) LIMITED — First Appellant

REBEL DISCOUNT LIQUOR STORES (EASTERN CAPE) (PROPRIETARY) LIMITED — Second Appellant

and

DAVID MORRIS N O — Respondent

CORAM: CORBETT, BOTHA, VAN HEERDEN, NESTADT JJA et NICHOLAS AJA

HEARD: 7 SEPTEMBER 1987

DELIVERED: 10 NOVEMBER 1987

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

I agree with my Brother NICHOLAS that the appeal should be allowed, but I have reached that conclusion along a different route. As will appear from what follows, my judgment is based solely upon a consideration of the provisions of section 37 (5) of the Insolvency Act 24 of 1936 and their application to the facts of this case. The facts appear from the judgment of my Colleague. As he has done, I shall confine my discussion to the Phoenix Hotel lease only. I shall refer to the parties to that lease simply as the lessor and the lessee respectively, and to the respondent in this appeal as the trustee.

Before I turn to section 37 (5) of the Insolvency Act, it will be convenient to state briefly the back-drop against which for the purposes of my judgment its provisions fall to be considered. I accept that, generally speaking, a liquor licence, while conferring upon the licensee a purely personal right, can nevertheless be

/attached ...

attached and sold in execution, and that, accordingly, upon the insolvency of the licensee, it vests in the trustee of his estate, who can and must realize it for the benefit of the creditors (c f Solomon v Registrar of Deeds 1944 C P D 319 at 323-326; Nkwana v Hirsch 1956 (4) S A 450 (A) at 457 G - 458 B; Ward v Barrett N O and Another N O 1963 (2) S A 546 (A)); in such a case, on general principles, a contractual right of a third party to claim transfer of the licence cannot prevail against the trustee. I shall assume (without deciding) that, apart from the provisions of section 37 (5) of the Insolvency Act, the application of the considerations I have mentioned to the particular case where the licensee is the lessee of the premises to which the licence relates and of the business conducted thereon, and where the lease obliges him upon its termination to restore to the lessor the licence, the premises and the business, would lead to the result that the trustee in the licensee's insolvent estate is nevertheless not

bound to transfer the licence to the lessor, but is entitled to dispose of it for the benefit of the creditors. The assumption I am making renders it unnecessary for me to express any view on the reasoning contained in the judgment of my Brother NICHOLAS. At the same time it causes section 37 (5) to become of vital importance in the decision of this appeal.

Section 37 (5) provides as follows (for convenience I emphasize the words that are relevant in this case):

> "A stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party shall be null and void, but a stipulation in a lease which restricts or prohibits the transfer of any right under the lease or which provides for the termination or cancellation of the lease by reason of the death of the lessee or of his successor in title, shall bind the trustee of the insolvent estate of the lessee or of his successor in title, as if he were the lessee or the said successor, or the executor in the estate of the lessee or his said executor, as the case may be."

In his judgment in the Court a quo KANNEMEYER J

/summarized ...

summarized the opposing contentions of the parties regarding the interpretation of the words in question and their application to the facts, and then stated his reasons for coming to the conclusion that the section did not apply on the facts. As the arguments presented to this Court followed broadly the same lines as those discussed in the judgment of the Court below, it will be convenient to quote both the learned Judge's summary of the arguments advanced and the views he expressed in regard thereto. The quotation which follows commences with a reference to the argument put forward on behalf of the applicants in the Court a quo (the present appellants):

> "The argument was that in terms of the sub-leases to Marsal, he was given the right to run the businesses under the licences previously held by the applicants. The agreements of sub-lease also provided that, on the termination of the sub-leases Marsal was bound to restore the licences to the applicants and was prohibited from transferring them to any one else.
>
> The right accorded to Marsal to conduct the businesses and to use the licences in order to do so was, it was argued, a right given to Marsal under

/the ...

the leases. Thus the disposal of the licences which Marsal obtained 'under' the leases is governed by Section 37 (5) and, the sub-leases having terminated, the respondent is bound by the provision concerning the transfer of the licences to the applicants in that event.

The respondent's reply to this argument is that the licences were rights which Marsal acquired in consequence of the sub-leases and not 'under' them. The sub-leases, so the argument went, were leases of the premises or businesses and not of the licences. The sub-leases conferred upon Marsal no rights to the licences; he acquired those rights from the licensing authorities. While these authorities would not have transferred the licences to Marsal but for the sub-leases they were not conferred to him by or under the sub-leases.

The English version of Act No 24 of 1936 is signed. However, in the Afrikaans version the word 'under' is translated as 'kragtens'. In Johnstone v Kommissaris van Binnelandse Inkomste 1960 (4) S A 592 (AD) the words 'ingevolge 'n bevel van egskeiding' appearing in Section 58 (3) of Act No 31 of 1941 fell to be interpreted. The words used in the English version of the Act were 'under any order of divorce'. At page 597 Steyn, CJ is reported as follows:-

> 'Die appellant betoog dat die woorde 'ingevolge' en 'under' in 'n sinsverband soos hierdie, nie slegs 'kragtens', 'ooreenkomstig' of 'luidens' beteken nie maar ook kan beteken 'uit hoofde van die bestaan van' of 'as gevolg van' en dat dit

> die betekenis is wat hier aan hul toegeskryf moet word.'

and at page 599

> 'Na my oordeel is die engere betekenis die gewone betekenis van 'ingevolge' ('under') in 'n sinsverband soos die onderhawige. Dit sou selfs betwyfel kan word of die aangevoerde wyere betekenis in so 'n samehang 'n moontlike betekenis is.'

In Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd 1980 (2) S A 245 (W) the term 'under a take over scheme' as used in Section 314 (1) of Act No 61 of 1973 was considered by Franklin J. At page 252 he is reported as saying:-

> 'The official Afrikaans version uses the word 'kragtens' for 'under'. (The same applies to the use of the word 'under' in ss 312, 313 (1) and (2), 314 (1) and (2) and 321 (1) and (3)). The word 'kragtens', according to HAT, means 'uit krag van, op gesag van' and is synonymous with 'ingevolge' which itself means 'op grond van' or 'ten gevolge van'. These expressions ordinarily connote a direct and express connection between the two things linked by them.'

He referred to Johnstone's case, (supra) as authority for this conclusion.

These decisions support the respondent's contentions in this regard. For Section 37 (5) to be applicable to 'rights under a lease' there

/must ...

> must be a 'direct and express connection' between the right concerned and the agreement of lease. In other words the right involved must be acquired in terms of the agreement of lease. The licences were not acquired by Marsal in terms of the agreements whereunder he hired the properties but only as a result of his having entered into these agreements. I am accordingly of the view that Section 37 (5) of Act No 24 of 1936 has no application to the licences or to the provision that on the termination of the sub-leases they must be retransferred to the applicants."

With respect, I do not agree with the conclusion arrived at by the learned Judge, for the reasons following.

At the outset, it should be pointed out that the learned Judge was in error in saying that the English version of the Insolvency Act was signed. In fact, the Afrikaans text is the signed text. Section 37 (5) in its present form was introduced into the Act by section 14 of Act 16 of 1943, which was also signed in Afrikaans. The relevant wording in the Afrikaans text reads as follows:

> "..... 'n beding in 'n huurkontrak wat die oordrag van enige reg wat bestaan kragtens die huurkontrak, beperk of verbied, ... verbind die kurator van die insolvente

/boedel ...

> boedel van die huurder ....., asof hy die huurder ..... was, ..."

It cannot be doubted, I consider, that the lease under discussion in this judgment prohibited the transfer of the liquor licence by the lessee to a third party. For present purposes the licence was merely the embodiment of the right to sell liquor on the leased premises. That right the lessee was obliged, in terms of clause 21 of the lease, which is quoted in the judgment of my Brother NICHOLAS, to transfer back to the lessor upon the termination of the lease, which necessarily involved a prohibition on his transferring it to anyone else. The lease thus contained "a stipulation ..... which restricts or prohibits the transfer" of the right in question.

Hence the crucial enquiry is whether the right in question is to be regarded as a "right under the lease" in terms of section 37 (5) - "enige reg wat bestaan kragtens die huurkontrak". In holding that it was not, KANNEMEYER J relied on the decisions in the cases of

/Johnstone ...

his finding in favour of the narrower meaning of "kragtens" on the context in which the word appeared in the statutory provision with which he was dealing (see at the foot of 252 to the top of 253). In the excerpt from his judgment quoted by KANNEMEYER J, the various meanings of "kragtens" and "ingevolge" culled from HAT demonstrate the narrow sense in which the word "kragtens" can be used ("uit krag van", "op gesag van"), as well as its wider sense ("op grond van", "ten gevolge van" - to which may be added the expressions used by STEYN CJ in Johnstone's case: "uit hoofde van die bestaan van", "as gevolg van"). FRANKLIN J, however, said of all the expressions cited by him that they "ordinarily connote a direct and express connection between the two things linked by them". With this generalisation I am, with respect, unable to agree. In my view it is logically and linguistically unsound. It purports to be founded on Johnstone's case, but an analysis of the judgment of STEYN CJ at 598 H - 599 A shows that his

/references ...

Johnstone supra and Spinnaker Investments supra. In my view, with respect, the learned Judge erred in simply applying, without more, what was said in those cases concerning the meaning of "kragtens" ("under") to the provisions of section 37 (5). An analysis of the reasoning of STEYN CJ in Johnstone's case (at 597 - 599), in my opinion, reveals a clear recognition of the fact that the word "kragtens", in itself, is susceptible of bearing a wider or a narrower meaning. What STEYN CJ said with regard to the usual meaning of "kragtens", in the second excerpt from his judgment quoted by KANNEMEYER J, was limited to the context in which the word appeared in the statutory provisions with which the Court was concerned in that case. The case is no authority for the proposition that the word "kragtens" in general, and without reference to the context in which it is used, usually bears a narrower rather than a wider meaning. In the Spinnaker Investments case FRANKLIN J ultimately based

/his ...

references to the expression "direkte en uitdruklike verband" were bound up with the subject-matter of the statutory provisions being discussed there; they do not constitute any authority for the generalized statement made by FRANKLIN J. In view of what has been said above, it will bear repetition that caution is called for when it is sought to apply a meaning ascribed to a word in a previous case, in relation to a particular context and subject-matter, to the same word appearing in a different context and relating to a different subject-matter (see e g Consolidated Diamond Mines of South West Africa Ltd v Administrator, S W A and Another 1958 (4) S A 572 (A) at 599 B - E and 637 D - G and Falcon Investments Ltd v C D of Birnam (Suburban) (Pty) Ltd and Others 1973 (4) S A 384 (A) at 399 C - H).

In my view the word "kragtens" is clearly capable of bearing different shades of meaning. Used as a link word, connecting two concepts, it is capable of connoting

/varying ...

varying degrees of closeness between the one concept and the other. In a narrow sense, at the one end of the spectrum, it may be used to denote a direct and immediate connection between the two concepts linked by it ("uit krag van", "luidens"). In a wide sense, at the other end of the spectrum, it may connote no more than a loose and indirect relationship between the two concepts ("ten gevolge van", "uit hoofde van"). In this sense, where the connected concepts involve notions of cause and effect, or origin and result, I have no doubt that the word can embrace an indirect relationship, as well as a relationship in which the cause, or origin, is not necessarily the sole cause or origin of the effect or the result respectively. In this sense the word could, I consider, be rendered appropriately as "voortspruitend uit". It is of interest to note that in the Afrikaans-English dictionaries the word "kragtens" is given inter alia the following equivalents (apart from "under"): "by virtue of", "in consequence of", and "pursuant to" (see e g Bosman,

/Van ...

Van der Merwe and Hiemstra, Tweetalige Woordeboek, and Hiemstra and Gonin, Drietalige Regswoordeboek). Similarly, the English word "under" has different shades of meaning. Some of the meanings ascribed to it in the cases are: "in terms of", "in accordance with", "in compliance with", "in pursuance of", "by virtue of", and "pursuant to" (see e g Warmbaths Municipality v Friedman and Another 1949 (4) S A 183 (T) at 187; Commissioner of Taxes v Haysom 1965 (1) S A 67 (S R, A D) at 70 B; Minister of Home Affairs v Badenhorst 1984 (2) S A 13 (Z S C) at 16 F; and Saunders, Words and Phrases Legally Defined s v "Under"). In its wide meaning the word is certainly not confined, in my view, to the designation of a direct or exclusive connection between the two matters which it serves to link to each other.

The next stage of the enquiry is to consider in what sense the words "kragtens" and "under" are used in section 37 (5). This involves, of course, an enquiry

/into ...

into the intention of the Legislature. The answer to this enquiry is to be found, in my opinion, in the subject-matter which is dealt with in the section, and in the context in which the words in question are used. Before I deal with these matters, however, it will be convenient to refer briefly to the history of the subsection.

As mentioned earlier, subsection (5) of section 37, in its present form, was introduced into the Act by section 14 of Act 16 of 1943. Before that, the subsection consisted only of what now constitutes its opening provision, ending with the words "null and void"; all the words after that, commencing with "but", were added in 1943. Prior to 1943 it had been held in a number of cases that neither a trustee nor a liquidator was bound by a clause in a lease prohibiting the lessee from subletting the leased premises or from assigning the lease. These cases were cited in Estate Fitzpatrick v Estate Frankel and Others 1943 A D 207 at 218, where CENTLIVRES

/JA ...

JA, assuming that they were correctly decided, said that the ratio decidendi of the cases was that a clause in a lease which prohibited the lessee from assigning the lease or sub-letting the premises without the consent of the lessor applied only to voluntary assignments and not to assignments which resulted from a forced sale. It seems to be clear that the Legislature intended, by means of the amendment of section 37 (5) in 1943, to change the pre-existing law as reflected in the cases (c f Durban City Council v Liquidators, Durban Icedromes Ltd and Another 1965 (1) S A 600 (A) at 612 B - D). To that extent the amended section 37 (5) introduced into the Act in 1943 was a remedial measure. True, it was aimed primarily at giving effect in insolvency to prohibitions against sub-letting and assignment, which do not correspond exactly to prohibitions against the transfer of a liquor licence held by the lessee. But the remedy which the amended subsection was designed to provide was not

/in ...

in terms limited by the Legislature to sub-leases and assignments. Instead, the Legislature chose to couch the remedy in wider and general terms, with reference to "the transfer of any right under the lease." The rationale underlying the remedial provision was clearly to remove what were perceived to be inequitable and harsh results imposed on a lessor under the pre-existing regime, despite the detrimental results that might follow for the creditors in the lessee's insolvent estate under the new provision. Accordingly I consider that there is room for the application in this case of the following remarks of SCHREINER JA in Looyen v Simmer & Jack Mines Ltd and Another 1952 (4) S A 547 (A) at 554 B - C:

> "..... the provision was certainly aimed at making the legal position more equitable, or at least clarifying it so as to avoid some apparently harsh results. It seems to me, therefore, that use may properly be made of LORD KENYON'S statement in Turtle v Hartwell 6 T R 426 at p. 429, that
>
> > 'In expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit.'"

/(See ...

(See also Kinekor Films (Pty) Ltd v Dial-a-Movie 1977 (1) S A 450 (A) at 461 B - D.) On this footing the history of the sub-section, while not of conclusive importance, affords some pointer in the direction of preferring a wide interpretation of its provisions rather than a narrow one.

The subject-matter of section 37 (5) is the effect of the insolvency of a lessee on certain kinds of stipulations in a lease. On the one hand, some stipulations are declared to be null and void (i e they are not binding on the trustee); on the other hand, some stipulations are declared to be binding on the trustee. What the Legislature is concerned with, therefore, is the legal relationship between the lessor and the lessee in terms of the lease, which involves the rights and obligations of the parties flowing from the lease, and the extent to which (in the respects dealt with in the sub-section) the trustee upon insolvency of the lessee is

/bound ...

bound or not bound thereby, or, to put it broadly, the extent to which the trustee steps into the shoes of the lessee in relation to the latter's rights and obligations in terms of the lease. That is the setting in which the meaning of the phrase "any right under the lease" must be considered.

The phrase "any right under the lease" is the rendition in English of the words in the signed Afrikaans text, "enige reg wat bestaan kragtens die huurkontrak". At first sight the words "wat bestaan" might suggest that the Afrikaans phrase is narrower in ambit than its English counterpart, but a moment's reflection shows that that cannot be so. Leases do not necessarily create rights; they frequently transfer existing rights from the lessor to, specifically, the lessee. The words "wat bestaan" must of necessity be taken to connote "wat bestaan vir die huurder", just as, in the context, the word "right" must be understood as "right of the lessee". Moreoever, the "reg"

/or ...

or "right" in question can only be derived from the lessor. So, if the English text had read "any right of the lessee existing under the lease", it would have made no difference to the sense of the provision at all. The vital question would still have been: what was the intention of the Legislature in regard to the ambit of the word "under"? The presence in the Afrikaans text of the words "wat bestaan" is consequently of no significance, in my view, in determining in what sense the Legislature intended to use the word "kragtens".

The particular right with which we are concerned in this case is the right of the lessee which was embodied in the liquor licence. The licence was acquired by the lessee from the licensing authority when the latter sanctioned the transfer of the licence from the lessor to the lessee. It was the act of the licensing authority that conferred the right in question upon the lessee. The lessor did not himself transfer the right to the lessee;

/in ...

in law he could not have done so.

On the other hand, the lessee would certainly not have acquired the licence from the licensing authority, but for the provisions of the lease. The transfer by the licensing authority of the licence to the lessee was an integral, and indeed an indispensable facet of the legal relationship between the lessor and the lessee which arose out of the lease. The fundamental purpose of the lease was to enable the lessee to use the leased premises as a licensed hotel with an off-sales facility, and to conduct business thereon accordingly. The lease itself was expressly made subject to the acquisition by the lessee of inter alia the liquor licence, and various other clauses in the lease, referred to in the judgment of my Brother NICHOLAS, point to the important role that the licence assumed in the regulation of the rights and obligations of the lessor and the lessee flowing from the lease.

/We ...

We have this position, then, that two factors caused the lessee to obtain the licence in his name: the lease, and the act of transfer by the licensing authority. If the attention is focused on the latter factor, and if a restricted meaning is assigned to "under" and "kragtens" ("uit krag van"), the right conferred by the licence would not qualify as a "right under the lease". In my judgment, however, such a result would run counter to the intention of the Legislature, for it would ignore, and in fact completely negate, the legal relationship between the lessor and the lessee and their rights and obligations arising from the lease, which, as I have shown, form the very subject-matter of the enactment. In the light of that subject-matter, the position of the lessee vis-à-vis the lessor in terms of the lease must have been intended by the Legislature to take precedence over the position of the lessee vis-à-vis the licensing authority. In the context of the lease and its provisions ("stipulations"),

/with ...

with which the section is concerned, and thus, as between the lessor and the lessee, there can be no doubt that the lessee acquired and held the licence by way of giving effect to a major objective of the agreement between the parties. In substance, they intended that the licence should be transferred from the lessor to the lessee, and the act of the licensing authority in sanctioning that step was merely a necessary formality to achieve their purpose. I am convinced that the Legislature intended the substance of the agreement to prevail, for the purposes of applying the section. In my judgment, therefore, in order to give effect to the intention of the Legislature, the words "kragtens" and "under", in their context, must be given a wide meaning, as connoting "ten gevolge van", "uit hoofde van", "voortspruitend uit", or "in consequence of", "pursuant to".

In the result, my conclusion is that the licence held by the lessee embodied a "right under the lease" as

/envisaged ...

envisaged by section 37 (5). Consequently the trustee is bound by the prohibition against the transfer of it, as provided for in the lease.

Counsel for the trustee conceded that, if that were to be the conclusion arrived at, the relief applied for by the applicants in the Court a quo should have been granted. In my opinion the concession was rightly made. If the trustee has no right to dispose of the licence for the benefit of the creditors, he has no title to it as against the lessor; the transfer of the licence to the lessor can have no influence on the concursus creditorum; and it seems to me that the necessity for the restoration of the right to the lessor is implicit in section 37 (5).

For the above reasons I concur in the order made by my Brother NICHOLAS.

A.S. BOTHA JA

VAN HEERDEN JA CONCURS

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SLIMS (PROPRIETARY) LIMITED ..... first appellant

REBEL DISCOUNT LIQUOR STORES (EASTERN CAPE) (PROPRIETARY) LIMITED..... second appellant

and

DAVID MORRIS NO

in his capacity as Trustee in the Insolvent Estate Juan Ignacio Marsal ..... respondent

CORAM: CORBETT, BOTHA, VAN HEERDEN, NESTADT JJA et NICHOLAS AJA.

DATE OF HEARING: 7 September 1987

DATE OF JUDGMENT: 10 Nov 1987

J U D G M E N T

CORBETT JA:

I have had the privilege of reading the judgments

/ prepared.....

prepared in this matter by my Brothers BOTHA and NICHOLAS. Unfortunately I am not able to agree with either. In my opinion, for the reasons which follow, the appeal should be dismissed with costs.

Like NICHOLAS AJA, I shall confine my consideration of the matter to the case of the Phoenix Hotel on the basis that the position in regard to the Swartkops Hotel is no different. The facts are set out in the judgment of my Brother NICHOLAS and I shall repeat them only where this is necessary for the purposes of my reasoning.

The first question to be considered is whether, apart from the provisions of sec 37(5) of the Insolvency Act 24 of 1936, as amended ("the Insolvency Act"), the first appellant ("Slims"), as sub-lessor of the Phoenix Hotel, was entitled to an order for the retransfer to it or its nominee of the hotel liquor licence with off-consumption authority ("the liquor licence") after the

/ determination.....

determination of the sub-lease in terms of sec 37(2) of the Insolvency Act. This depends to some extent upon the nature of a liquor licence and upon the legal consequences of the insolvency of the licensee.

The nature of a liquor licence has been discussed in a number of cases (see eg Fick v Woolcott and Ohlsson's Cape Breweries Ltd 1911 AD 214; Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501; Receiver of Revenue, Cape v Cavanagh 1912 AD 459; Solomon v Registrar of Deeds 1944 CPD 319; Weintraub and Weintraub v Joseph and Others 1964 (1) SA 750 (W); Bank Station Hotel (Pty) Ltd v Thomas and Others 1970 (4) SA 411 (T)). From these judgments it appears that a liquor licence is a statutory privilege granted to a particular person under the liquor laws (the current law being the Liquor Act 87 of 1977 - "the Liquor Act") entitling him to sell liquor at particular premises. It is a purely personal privilege. Its grant

/ involves.....

involves the exercise by the licensing authorities of a delectus personae so that, save to the extent and in the manner permitted by the Liquor Act, the licensee cannot transfer or otherwise deal with his licence. The law provides for the strict supervision of the grant, transfer and removal of licences. Nevertheless, as pointed out by INNES J in Fick's case, supra, (at p 230) —

> "Contractual undertakings on the part of a holder to transfer his licence to some other person on the happening of certain contingencies are of frequent occurrence. But the expression, though convenient, is inaccurate. No holder can transfer his licence; that is the sole prerogative of the Licensing Court. So that the only way to give any effect to such an undertaking is to treat it as an agreement by the promisor to exercise in favour of the promisee such right to apply for a transfer as the statute gives him, and to do all things necessary on his part to enable the Licensing Court to deal with the application. And that is what, in my opinion, an agreement to transfer a licence amounts to."

(See also Solomon v Registrar of Deeds, supra, at p 325;

/ Bank .....

Bank Station Hotel case, supra, at p 416 A-C). Under current legislation an application for a transfer of a licence is dealt with by the Minister of Industries Commerce and Tourism "or a person acting under his directions" (see sec 45(1) of the Liquor Act, read with the definition of "Minister" in sec 1); but otherwise the statement by INNES J is as pertinent today as it was in 1911. Pertinent too are the remarks of VAN ZYL JP (with whom JONES J concurred) in Solomon v Registrar of Deeds, supra (at p 325):

> ".... a liquor licence is not merely a privilege but is a right of a potential commercial value which may sometimes be very considerable, and a right which is alienable and can be sold. It is, however, not every sale thereof which can be given effect to because when a licence has been sold, transfer thereof to the purchaser will have to be obtained from the Licensing Board; and if the Board does not approve of the purchaser or if the purchaser does not possess one of the essentials required by law, such as e.g. the right to occupy the premises

/to .....

> to which the licence relates, transfer of the licence will not be obtained and the sale will fall through. Although, however, there are these limitations to the giving effect to a sale of a liquor licence, the right to sell is there and it can sometimes be a very valuable right".

(As to a licence having a commercial value, see also the Pietermaritzburg Corporation case, supra, at p 517.) Moreover, where a licence is "sold" by its holder to a person who wishes to conduct the business elsewhere, it would appear to be possible to make simultaneous application for transfer of the licence to another person and its removal to other premises (see 15 LAWSA par 190; Singh and Others v Chairman National Liquor Board and Others 1977 (3) SA 1088 (N)). In Solomon v Registrar of Deeds, supra, it was further held that (see p 326) —

> "As a right of a commercial value which can be separately held, alienated and sold, a liquor licence under our law can also be mortgaged".

This statement was approved in Nkwana v Hirsch, 1956 (4)

/ SA .....

SA 450 (A), at p 457 H, by SCHREINER JA, who added that the licence could accordingly be sold in execution of a judgment on the bond.

As appears from the aforegoing the licence is granted personally to the licensee and only he can be regarded as the owner of the licence (see Bank Station Hotel case, supra, at p 416 A). Nevertheless, as already indicated, a person other than the licensee may by contract acquire a jus in personam against the licensee requiring the licensee to do all in his power to have the licence transferred to such person or his nominee. In addition to the case of a "sale" of a licence, mentioned above, there is the situation created by the leasing of licensed premises and the business conducted thereon. The facts of the present case illustrate the point.

Immediately prior to the sub-letting of the Phoenix Hotel and the off-sales premises, and the businesses

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conducted thereon, to Marsal the liquor licence would have belonged to the sub-lessor, Slims, as licensee. In terms of the sub-lease (clause 24) the contract was conditional on permission being granted for the transfer of the licence by the relevant authorities. It is implicit in the sub-lease that the sub-lessor is obliged to do all that is required of him to effectuate the transfer of the licence into the name of the sub-lessee, Marsal. And, as we know, this was done. Once transferred, the licence no longer belonged to the sub-lessor, Slims, but became the property of the sub-lessee, Marsal (see Weintraub's case, supra, at p 754 C-D). In terms of clause 21 of the sub-lease the sub-lessee is obliged, upon termination of the sub-lease, to do all things necessary to ensure that the licence is transferred back to the sub-lessor. This amounts to a jus in personam created in favour of the sub-lessor against the sub-lessee in the circumstances postulated (see Weintraub's case, supra,

/ at .....

at p 754 D; Bank Station Hotel case, supra, at p 416 A-B). The provisions of clause 18 of the sub-lease, which in the event of a breach of the agreement committed by the sub-lessee give the sub-lessor the right to terminate the agreement forthwith and "repossess the business and all relevant licences", can thus not be implemented literally. At most, in those circumstances, the sub-lessor would be entitled to demand of the sub-lessee that he co-operate in the transference of the licence by the appropriate licensing authority back to the sub-lessor. The provisions in clause 14 of the sub-lease for the repossession of the licence, in the event of the sub-lessee endangering the continuance of the licence, must be similarly interpreted.

Upon sequestration Marsal was divested of his estate, which vested in his trustee upon the latter's appointment (sec 20(1)(a) of the Insolvency Act). Marsal's estate consisted, inter alia, of all his property at the

/ date .....

date of sequestration (sec 20(2)(a)). "Property" means movable or immovable property situated within the Republic and includes contingent interests other than those of a fideicommissary heir or legatee (sec 2). "Movable property" means every kind of property and every right or interest which is not immovable property (sec 2). It is not necessary to refer to the definition of "immovable property". It seems to me that the liquor licence in question constituted movable property of Marsal within this definition and that in terms of sec 20(1)(a) it vested in Marsal's trustee upon the latter's appointment (cf Solomon v Registrar of Deeds, supra, at p 324; Ward v Barrett NO and Another NO 1963 (2) SA 546 (A), at pp 551 G, 554 B). Sec 47(1) of the Liquor Act appears to recognise that upon the sequestration of the estate of the holder of a liquor licence the licence vests in his trustee and it empowers the trustee to carry on the business without formal transfer of the licence for a limited period. This was not disputed.

/ The .....

The sequestration of Marsal's estate did not put an end to the sub-lease (sec 37(1) of the Insolvency Act), but the trustee's failure to notify the sub-lessor of his desire to continue the lease caused it to terminate at the end of three months after his appointment (sec 37(2)). Such termination brought into operation the provisions of clause 21 of the sub-lease with the result that the sub-lessor acquired a personal right against the trustee that the latter should do all things necessary to ensure the re-transfer of the licence to the sub-lessor. What the appellant in this case is, in effect, claiming is specific performance of the correlative obligation. The question is: is it entitled to do so?

It is true that had the sub-lease terminated in some way, without the insolvency of Marsal, Marsal would have been obliged, in terms of clause 21, to do all that was necessary to ensure the transfer of the licence back to Slims. But in fact insolvency has supervened and a

/ concursus .....

concursus creditorum has taken place. Generally speaking, the trustee's duty is, subject to the directions of the creditors, to liquidate the assets of the insolvent estate for the benefit of creditors and to distribute the proceeds among the creditors in accordance with the scheme of preference laid down by the Insolvency Act. As INNES J once remarked —

> "[A] sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body".

(See Walker v Syfret NO 1911 AD 141, at p 166.)

In Consolidated Agencies v Agjee, 1948 (4) SA 179 (N) SELKE J referred to the above-quoted dictum of INNES J and added (at p 189):

> "It is clear, I think, that, thus, a trustee in insolvency does not stand for all purposes of contract in the shoes of

/ the .....

> the debtor or insolvent whose estate he administers, and that he is not bound specifically to perform, or to perform in full, executory contracts made by the debtor before insolvency, if his doing so would operate to the prejudice of the other creditors by giving one creditor an improper preference over the other or others."

(see also Ward v Barrett NO and Another NO, supra, at p 552 H - 553 A; Ex parte Liquidators of Parity Insurance Co Ltd 1966 (1) SA 463 (W), at p 471 A - C). And in 11 LAWSA par 220 the following statement is made:

> "If the trustee decides to abandon or terminate the contract he need not perform any unfulfilled stipulations of the contract and the other party has a concurrent claim against the insolvent estate for any damages he may have sustained".

Among the assets vesting in Marsal's trustee for the benefit of creditors is the liquor licence relating to the Phoenix Hotel. It is the trustee's attitude that the licence should be realized, together with

the insolvent's other assets. In this he appears to have the backing of the majority of the major creditors. In the circumstances I do not think that Slims is entitled to obtain specific performance of the right in personam arising from clause 21 of the sub-lease. It must content itself with a concurrent claim for damages.

Although this was disputed on the papers, it was accepted in argument before us by respondent's counsel that the sub-lease comprehended not only the hotel premises (including the off-sales) but also the businesses conducted thereon. The "lease" of a business creates problems of legal classification. In 14 LAWSA par 137 doubt is expressed as to whether incorporeal things can be let. Be that as it may, a "business" is a somewhat amorphous concept. It no doubt includes the right to occupy the premises from or upon which the business is conducted; the use of the fittings, fixtures and furniture upon the premises relating

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to the business; the existing stock-in-trade; the service contracts of employees of the business; the goodwill; the licences or other permits required for the conduct of the business; and, where applicable, the right to use a trade name, trade mark, design, etc. In a "lease" of a business, such as the sub-lease in the present case, not all of these elements of the business are transferred to the "lessee" on the basis that the "lessee" is only to have the temporary use and enjoyment thereof, is to pay rent therefor and is to restore the same upon the termination of the lease. Thus, for example, clauses 8 and 26 of the sub-lease provide that the sub-lessee is to take over all the movable assets of the business such as furniture, crockery, cutlery, linen, etc for an amount of R40 000 to be paid in four annual instalments; and clause 11 provides for the sub-lessee to take over and pay for cash floats, liquor, food and other consumable stock at a valuation at cost, the amount to

/ be .....

be paid within 90 days. Upon termination the parties are to take stock of all business assets and to value such stock and movables at book value; and the sub-lessor is to pay the sub-lessee the value so determined (clauses 19 and 20). And, as far as the liquor licence is concerned, the "lease" itself does not, as I have explained, cause the licence to be transferred to the sub-lessee. Accordingly, the "lease" of the business appears to be some form of innominate contract rather than a lease in the true legal sense.

I shall assume in favour of Slims that under a "lease" such as this the lessor retains some form of real right in the goodwill of the business which entitles him to the restoration of the goodwill, together with the leased premises, upon the termination of the lease, even as against the lessee's trustee in insolvency. Nevertheless, I do not think, with respect, that it follows from this that in this

/ case .....

case the trustee is not free to deal with the liquor licence otherwise than by transferring it to the sub-lessor. It is true that the goodwill of a licensed business is very much dependent upon the liquor licence and, as pointed out by INNES ACJ in Receiver of Revenue Cape v Cavanagh, supra (at pp 464-5), the cases in which they are separately dealt with must be "few indeed". Nevertheless, they are separate entities and may be separately dealt with. As INNES ACJ said (at p 465):

> "An hotel proprietor of long standing and wide repute might quite conceivably dispose on profitable terms of his premises and their relative licences, while expressly retaining the good will for himself".

It is also true that without the licence the goodwill is deprived of much of its value; and that consequently the restoration to the sub-lessor by the trustee of the goodwill only (the licence being retained for the benefit of creditors) will cause the sub-lessor loss (for which the

/ sub-lessor .....

sub-lessor would no doubt have a concurrent claim against the insolvent estate), but it seems to me that this is an inevitable consequence of the sub-lessee's insolvency. In short, I am of the view that the vesting of the licence in the trustee for the benefit of creditors cannot be reconciled with an obligation upon the trustee to restore the licence to the sub-lessor.

It was argued by counsel for appellant (Slims) that the licence was "encumbered" by the obligation to restore it to the sub-lessor upon termination of the lease and that this obligation was, therefore, binding upon the sub-lessee's trustee. In so far as this argument involves the proposition that the obligation to restore is something more than a personal obligation, I can find no basis for it. And, as I have explained, upon insolvency a creditor with a *jus in personam* cannot claim specific performance as against the debtor's trustee where this conflicts with the interests of the gene-

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ral body of creditors.

Reference was made by appellant's counsel to the case of Ohlsson v Kuhr's Trustee (1901) 18 SC 205. Though it (and the case in which it was followed, Commercial Hotels Co Ltd v Davidson's Trustee 1905 TH 348) are in point, they appear to be based upon an acceptance that upon the termination of the lease neither the lessee nor his trustee had "any right whatever" to the licence. These cases were decided before the nature of a liquor licence had been authoritatively considered by this Court and I do not think that the above-stated proposition is sound.

For these reasons the first question posed must, in my opinion, be answered in the negative.

I turn now to the second question, viz. whether a claim for the restoration of the licence can be based upon the provisions of sec 37(5) of the Insolvency Act. The

/ relevant.....

relevant portion of sec 37(5) in the English text of the Act, reads as follows:

> "A stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party shall be null and void, but a stipulation in a lease which restricts or prohibits the transfer of any right under the lease..... shall bind the trustee of the insolvent estate of the lessee ....., as if he were the lessee.....".

As originally enacted, in 1936, sec 37(5) consisted merely of the first portion, ending with the words "null and void". The remainder was added by sec 14 of the Insolvency Law Amendment Act 16 of 1943. Both the original Act and the amending Act were signed in Afrikaans.

The corresponding words in the Afrikaans text read:

> "'n Beding in 'n huurkontrak dat die huur sal eindig of 'n verandering ondergaan met die sekwestrasie van die boedel van een of ander van die partye tot die huur is nietig, maar 'n beding in 'n huurkontrak wat die oordrag van enige regwat bestaan kragtens die huurkontrak, beperk of verbied.... verbind die kurator van die insolvente boedel van die huurder.... asof hy die huurder.... was..".

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For present purposes we are concerned only with the quoted portion of sec 37(5) introduced by the amending Act of 1943. I shall refer to this as the "latter portion" of sec 37(5).

It was alleged in the founding affidavit that it was an implied term of the sub-lease that the sub-lessee was precluded from transferring the liquor licence to third parties of his own choice, assuming that he could obtain permission to do so from the licensing authority. This was admitted by the trustee in his opposing affidavit. Upon this foundation it was argued by appellant's counsel that this implied term (perhaps more correctly to be described as a tacit term) constituted —

> "..... a stipulation in a lease which restricts or prohibits the transfer of any right under the lease....."

and that the tacit term was accordingly binding on Marsal's trustee. The argument is, in my opinion, fatally flawed.

/ Using,.....

Using, for the moment, the language of the English text, the latter portion of sec 37(5) refers to two concepts, viz. (i) "a stipulation in a lease" and (ii) "any right under the lease"; and provides, in effect, that where the stipulation "restricts or prohibits the transfer of" the right, the stipulation is binding on the trustee of the lessee. It is clear, too, that this portion of sec 37(5) is concerned only with stipulations of this nature imposed upon the lessee, or only with such stipulations in so far as they affect the lessee, for it is only upon the trustee of the lessee that they are made binding. As pointed out by this Court in Durban City Council v Liquidators, Durban Icedromes Ltd and Another 1965 (1) SA 600 (A), at p 612 B-D, prior to the amendment of sec 37(5) by Act 16 of 1943 there had been a number of decisions in our courts (though none of this Court) holding that a provision in a lease prohibiting the sub-letting of the leased property or the assignment of the lease without the

/ consent.....

consent of the lessor was, in the event of the insolvency of the lessee, not binding on his trustee or, in the case of a lessee company, upon the liquidator (see Gardiner NO v London and South African Exploration Company and Another 7 HCG 190 and, on appeal, (1895) 12 SC 225; Stalson v Brook 1922 WLD 143; Heimann v Klempman & Jaspan 1922 WLD 115; Himmelhoch v Liquidators, Fresh Milk and Butter Supply Co Ltd and Others 1925 TPD 958; Mahomed's Estate v Khan 1927 EDL 478). Towards the end of 1942 this line of authority was referred to in a judgment of this Court and it was assumed that these cases were correctly decided (see Estate Fitzpatrick v Estate Frankel and Others 1943 AD 207, at p 218). In my opinion it is to be inferred that, in adding the latter portion of sec 37(5) in 1943 by means of the amending Act, the Legislature intended to reverse the effect of the decisions referred to above. They, or rather the legal situation created by them, was the mischief aimed at by this part of the

amending Act and the remedy provided was a provision making such a restriction or prohibition binding upon the lessee's trustee in insolvency. And, as was held in Durban City Council v Liquidators, Durban Icedromes Ltd and Another, supra, sec 37(5) also renders such a restriction or prohibition binding, in the case of the winding up of a lessee company, upon the liquidator (ie when read with the relevant section of the Companies Act, which was then sec 130(2)(f) of Act 46 of 1926).

The amendment is formulated in general terms. It does not specifically refer to sub-letting or assignment. No doubt the Legislature wished to include as well restrictions or prohibitions aimed at transfers of rights of a less comprehensive nature. It is the appellant's contention that the wording is general enough to include the tacit term in the sub-lease concerning transference of the liquor licence.

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I shall assume in appellant's favour that the term "stipulation" (Afrikaans: "beding") includes a tacit term of the lease, though there is substance in the view that in the context of sec 37(5) "stipulation" refers to an express term. The question then is: can the liquor licence be regarded as a "right under the lease" ("'n reg wat bestaan kragtens die huurkontrak")?

In my view, a liquor licence differs toto caelo from the type of right which the latter portion of sec 37(5) was designed to cover, viz the contractual rights of the lessee under the lease, such as the right to the use and enjoyment of the leased property. Firstly, such a contractual right derives its existence and enforceability in law solely from the lease; whereas the liquor licence is created, not by contract, but by the act of the licencing authority and derives its legal efficacy from the Liquor Act. Secondly, a contractual right under the lease and a liquor licence are

/ jurisprudentially.....

jurisprudentially disparate. Such a contractual right is a legal right in the strict sense and its correlative is an obligation or duty imposed upon the lessor. A liquor licence, on the other hand, is in my view not a legal right in the strict sense but a liberty or privilege of statutory origin for which there is no correlative duty. (See generally W N Hohfeld, Fundamental Legal Conceptions (ed by W W Cook) pp 38-50; Salmond on Jurisprudence, 11th ed, pp 271-3; Paton, Jurisprudence, 4th ed, pp 290-4.) Thirdly, sec 37(5) speaks of the "transfer" of rights. Contractual rights are transferred by agreement, by a cession or assignment. As I have shown, the holder of a liquor licence has no power to transfer his licence by agreement. He is granted the licence by the exercise by the licensing authorities of a delectus personae and only the appropriate licensing authority can effect a transfer thereof and then only in accordance with a procedure laid down by the Liquor Act. In my view, these differences raise serious

/ doubts .....

doubts as to whether the Legislature intended to include within the ambit of the latter portion of sec 37(5) a "right" such as the liquor licence held by the lessee.

The ultimate test, however, is the meaning to be attributed to the words actually used by the Legislature. In my opinion, the ordinary meaning of the words "right under the lease" is a contractual right created by the lease. In argument counsel for Slims tended to concentrate on the word "under" and submitted that it should be given the wider meaning of "in pursuance of". I cannot agree. The word "under" must be viewed in its context: that is, the context of rights and the contract of lease. A lease gives rise to contractual rights and it seems obvious to me that when the Legislature spoke of a "right under the lease" it meant a right arising from, created by or having its origin in, the lease. In other words, a contractual right. And I can see no valid reason for departing from the ordinary meaning of the words used by the Legislature.

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The Judge a quo, in coming to the conclusion that the liquor licence was not a right under the lease, relied to some extent on the judgment of this Court in Johnstone v Kommissaris van Binnelandse Inkomste 1960 (4) SA 592 (A). The case is admittedly not in pari materia - as emphasized by counsel for Slims - but I do not agree that it is of no assistance. The question which arose in that case was whether maintenance payable in terms of an agreement entered into by parties to a divorce action, by an exchange of letters, but not incorporated in the decree of divorce, constituted "n [be]drag betaalbaar by wyse van onderhoud.... ingevolge n bevel van egskeiding" in terms of sec 58(3) of the Income Tax Act 31 of 1941. (The English text read: "Any amount payable by way of alimony..... under any order of divorce".) Two passages in the judgment of STEYN CJ should be noted. At page 597 B-D he said:

/ "Die.....

> "Die appellant betoog dat die woorde ‚ingevolge' en ‚under' in a sinsverband soos hierdie, nie slegs ‚kragtens', ‚ooreenkomstig' of ‚luidens' beteken nie, maar ook kan beteken ‚uit hoofde van die bestaan van' of ‚as gevolg van' en dat dit die betekenis is wat hier aan hul toegeskryf moet word. Die gevolg sou dan wees dat die bedrag van £1,500, hoewel die betalingsooreenkoms nie deel van die egskeidingsbevel uitmaak nie, nogtans ‚ingevolge' die bevel betaal sou wees, omdat die bevel die uitwerking gehad het dat die ooreenkoms van krag geword het en nagekom moes word".

The learned Chief Justice rejected this argument and concluded (at p 599 B):

> "Na my oordeel is die engere betekenis die gewone betekenis van ‚ingevolge' (‚under') in 'n sinsverband soos die onderhawige. Dit sou selfs betwyfel kan word of die aangevoerde wyere betekenis in so 'n samehang 'n moontlike betekenis is. Ek kan geen voldoende rede vind om van die gewone betekenis af te wyk nie".

From the first of the passages quoted it would appear that STEYN CJ was of the view that in the context of the subsection the word "kragtens" would have clearly conveyed the narrower meaning of maintenance payable in terms of

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the order of divorce. This is of importance because in the present case the Afrikaans (signed) text uses the word "kragtens". I shall return to this point in a moment.

The second of the passages quoted above is significant because of STEYN CJ's view that the narrower meaning of "ingevolge" ("under") was the ordinary meaning in a context such as the one he was considering. Now an order of court, like a contract, creates rights, of a particular kind. There is thus, in my view, an analogy to be drawn between the ordinary meaning of "under any order of divorce" and "under the lease". Consequently Johnstone's case is at least some authority as to the ordinary meaning of "under the lease" in sec 37(5). And it is to be observed that STEYN CJ appeared to be doubtful as to whether the wider meaning was even a possible meaning in the context.

The Afrikaans text of sec 37(5), in my opinion,

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supports the interpretation which I have placed upon the words "right under the lease". The corresponding words - "reg wat bestaan kragtens die huurkontrak" - convey to me, if anything more clearly, the concept of a right which owes its existence to the lease; in other words, a right created by the lease. And here I would emphasize the use of the words "bestaan" and "kragtens". "Bestaan", linked as it is with "die huurkontrak", shows that the Legislature connected the existence of the right with the lease. And "kragtens" reinforces this perception. The meanings given to "kragtens" by the Handwoordeboek van die Afrikaanse Taal are "Uit krag van, op gesag van; ingevolge". I have already referred to the meaning evidently attached to "kragtens" in Johnstone's case, supra. More recently, in S v Smith 1986 (3) SA 714 (A), the meaning of the word "kragtens", as conveying the direct source of a right (in the wide sense), was emphasized. This case related to the meaning of sec 31(1) of the Road Trans-

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portation Act 74 of 1977. In discussing the words in sec 31(1)(a) "behalwe kragtens 'n permit wat daardie padvervoer magtig", HEFER JA stated (at p 718 D and F):

> "Padvervoer, dws enige handeling soos beskryf in die definisie van daardie woord in art 1, kan slegs geskied 'kragtens 'n permit wat daardie padvervoer magtig' indien die besondere handeling deur die permit gemagtig is..... In elk geval moet die woord 'kragtens' nie oor die hoof gesien word nie. 'n Handeling kan nie kragtens 'n permit verrig word tensy dit deur die permit gemagtig is nie".

(See also Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd 1980 (2) SA 245 (W), at p 252 G-H.)

It was argued by counsel for Slims, relying upon the principle referred to, inter alia, in Kinekor Films (Pty) Ltd v Dial-A-Movie 1977 (1) SA 450 (A), at p 461, in regard to remedial statutes, viz —

> ".... in expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit" (my emphasis),

/ that .....

that the word "under" ("kragtens") should be given the more extended meaning suggested by him. In applying this principle one must not lose sight of what it was that the Legislature sought to remedy and of the limitation imposed by the words which I have emphasized in the above quotation. In my opinion, the background to the amending Act of 1943 and also the wording thereof show that what the Legislature sought to remedy was the situation created by judicial decisions which rendered stipulations in leases restricting or prohibiting the transfer of contractual rights under the lease not binding on the lessee's trustee in insolvency; and I do not think that the words used will admit of an interpretation as wide as that contended for by the appellant.

At this point it is appropriate to refer to the line of reasoning upon which Slims relies. It is the following: (i) the sub-lease, and in particular clause 24 thereof (referred to above), contemplate that the liquor

/ licence.....

licence of the Phoenix Hotel would be transferred from Slims to Marsal; (ii) this imposed certain (tacit) obligations upon Slims to do all that was required of it to present a proper application for transfer to the appropriate licensing authority in terms of sec 45(1) of the Liquor Act; (iii) this was duly done and Marsal became the holder of the licence; and (iv) the licence was accordingly a "right" enjoyed by Marsal "under the lease". It is not disputed that in these circumstances the so-called right, the licence, is created not by the sub-lease but by the grant of the transfer by the licensing authority. Nor does it necessarily follow that in such circumstances the licensing authority will grant the application for transfer. It may refuse it, for some reason. In other words, the sub-lease does no more than create the rights and obligations which give the sub-lessee the opportunity to apply for the transfer. The connection between the sub-lease and the "right" represented by the licence is thus a tenuous

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tenuous one. Having regard to what I have found to be the true meaning of the words "right under the lease" ("reg wat bestaan kragtens die huurkontrak"), there is no doubt that the liquor licence is not such a right.

In my view, therefore, the Court a quo correctly concluded that sec 37(5) had no application in a case such as the present.

This disposes of both bases for the claim by Slims for the retransfer to it of the liquor licence. In my opinion, therefore, the Court a quo correctly granted judgment for respondent (Marsal's trustee) with costs. Should this be regarded as an inequitable or undesirable result, then only the Legislature can remedy the position.

I would dismiss the appeal with costs, including the costs of two counsel.

M M CORBETT.

NESTADT JA: CONCURS.