IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 177/97

In the matter between:

WELTMANS CUSTOM OFFICE FURNITURE (PTY) LTD (IN LIQUIDATION) **Appellant**

and

WHISTLERS CC **Respondent**

CORAM : HEFER, NIENABER, SCHUTZ, JJA, MELUNSKY AND MADLANGA, AJJA

HEARD : 6 May 1999

DELIVERED : 1 June 1999

JUDGMENT

NIENABER JA

NIENABER JA :

[1] I have read the judgment of Melunsky AJA. I am in broad agreement with virtually everything he says in it - except for his final conclusion.

[2] In my respectful opinion the magistrate was right in dismissing the appellant's claim; the court *a quo* was right in dismissing the appeal with costs; and this court should do likewise.

[3] My disagreement with my colleague arises from the nature of the proceedings. S 69(1)(a) of the Magistrates' Courts Act of 1944 provides:

> "**69 Interpleader claims**
>
> (1)(a) Where any person, not being the judgment debtor makes any claim to or in respect of any property attached or about to be attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the manner provided by the rules."

The section applies because the sheriff, having attached the goods to which the liquidators of the appellant now lay claim, issued an interpleader summons.

[4] The attached goods, so the magistrate found as a fact, formed part of the stock-in-trade which the respondent sold to Weltman in February 1994 for a price of R140 000. Weltman, as purchaser, was repeatedly in arrears with the payment of the instalments, in consequence of which the respondent was obliged to take the series of judgments against Weltman described in the judgment of my colleague. Against that background it is somewhat of a surprise

to discover that Weltman was able, in September 1994, to resell the business, of which he was so singularly unable to make a success, at a price of R200 000 "plus the net asset value of the assets of the business as disclosed in the seller's books .....". The business was sold

> "as a going concern, including all the stock-in-hand as at the Effective Date furniture, fixtures, fittings, vehicles, appliances, equipment and book debts together with the goodwill of the said business".

But the surprise is tempered by two considerations: The first is that the R200 000 (quite apart from the value of the assets) is something of a phantom price, since clause 3 of the agreement provides that the

> "amount shall be reflected as a credit to Seller's loan account in the books of the Purchaser and which shall be payable on demand".

The second is that the agreement was signed by Weltman on behalf of both the seller and the purchaser - which rather suggests that the sale was a contrived transaction. Moreover, knowledge of the sale was deliberately withheld from Weltman's creditors, including the respondent, as appears from clause 13 of the agreement which reads:

> "The parties hereby agree that the sale pursuant hereto shall not be advertised in terms of section 34 of the Insolvency Act".

So too the existence of the agreement of sale to the applicant was manifestly not disclosed to the respondent when the settlement agreement was negotiated and

concluded.

[5] The respondent obtained various judgments against Weltman. The defences raised by Weltman were all spurious. These judgments the respondent was entitled to enforce by means of a writ of attachment as the first step in the process of execution. The attachment related to the very goods which the respondent sold to Weltman and for which payment remained outstanding. It is to this attachment that the appellant, as the claimant in the interpleader proceedings, responded in the following terms:

> "3. Weltmans Custom Office Furniture (Pty) Ltd (in liquidation), the claimant in this matter, is the owner of the goods which have been attached by the Sheriff of the Court pursuant to the judgment granted in favour of the judgment creditor.
> 4. The insolvent company purchased the attached goods and obtained delivery thereof from Ivan Weltman pursuant to a written deed of sale concluded between Mr Ivan Weltman and the insolvent company dated the 26th September 1994 ...
> 5. ...
> 6. As the judgment debtor is not the owner of the attached goods, the judgment creditor cannot attach and sell same in execution of its judgment against the execution debtor. In the circumstances, I respectfully request this Honourable Court to release from the attachment the movable goods in question."

[6] The sole issue before the magistrate was therefore whether the appellant was the owner of the goods attached. That in turn depended upon whether the sale by Weltman to the appellant was effective against the respondent in the

light of s 34(3) of the Insolvency Act. The attitude of the appellant, as claimant, was that the subsequent settlement agreement rendered the section inapplicable. It is on that issue that the appellant lost before the magistrate, lost before the Cape Provincial Division and, according to the judgment of Melunsky AJA, should lose before this court.

[7] I am in agreement with my colleague that once the appellant's contention fails and s 34(3) is held to be applicable, it does not follow as a matter of course that the respondent, as judgment creditor, is entitled to priority amongst the appellant's creditors to the full value of the post settlement consent to judgment i.e. in an amount of R105 520,09. That follows from the express wording of s 34(3), particularly if it is contrasted to the wording of s 34(1), quoted in my colleague's judgment. In terms of s 34(1) "the said transfer shall be void as against his creditors", provided the requirements of the section are met. The transfer is void in its entirety. In terms of s 34(3), if a creditor has instituted proceedings "for the purpose of enforcing his claim" the transfer shall be void "as against him for the purpose of such enforcement". The transfer is void but only up to a point. That point is the amount of the claims for which proceedings had been instituted prior to the transfer of the business to the new purchaser. The respondent's entitlement to the proceeds of a future sale in execution should

accordingly be restricted to the sum of R22 188,57.

[8] It is at this very point that I part company from the ultimate conclusion arrived at by Melunsky AJA in his judgment. That fact, namely, that the respondent would only be entitled to execute against the attached goods to the value of his pre-transfer proven claims, does not, in my opinion, translate into success for the appellant on appeal.

[9] Nowhere in the papers that I could discover did the respondent positively assert that it was entitled to execute against the attached goods to the full value of the judgment it obtained by consent i.e. R105 000. That was never an issue in the proceedings before the magistrate. Nor was that ever the basis of the appellant's challenge to the validity of the attachment. Its stance throughout was that the attachment was assailable because it was owner of all the goods; and that it was the owner because s 34(3) was inapplicable, having been superseded by the agreement of settlement. If the appellant's stance had been that the respondent was only entitled to attach certain of the goods on the list, or to the proceeds of a sale in execution only up to a certain limit, the entire proceedings would undoubtedly have taken on an entirely different complexion. The point (as to a limitation in the respondent's demand) is in any event not closed to the appellant. It can, if necessary, no doubt be raised more

appropriately at some other stage.

[10] The appellant's attitude was an all or nothing one. Its approach was that the attachment had to be set aside in toto. I agree with counsel for the respondent that if the attachment is good to the extent of R22 148, it is still a good attachment, even if, at the proposed sale in execution, the respondent's entitlement to the proceeds will have to be limited to an amount substantially less than the value of its judgment debt.

[11] What the court *a quo* said, in the *dictum* quoted in paragraph 17 of my colleague's judgment, is what I am saying: that the issue of any restriction on the amount to which the appellant would be entitled at the impending sale in execution was irrelevant to the issues before the magistrate. To now find that the appeal is to succeed and that the respondent is to remain liable for its own costs, not only in this court but also before the magistrate and the court *a quo*, will, in my respectful view, be grossly unfair to the respondent which throughout acted perfectly properly and regularly in trying to enforce a judgment debt in its favour.

[12] The following order is made: The appeal is dismissed with costs.

.....
P M NIENABER
JUDGE OF APPEAL

Concur:

Hefer JA
Schutz JA

MELUNSKY AJA/

MELUNSKY AJA:

[1] The issue in this appeal is whether the transfer of a business from Ivan Weltman ("Weltman") to Weltman's Custom Office Furniture (Pty) Limited ("the company") is void as against the respondent in terms of s 34(3) of the Insolvency Act 24 of 1936 ("the Act").

[2] Weltman carried on business as a furniture manufacturer in Cape Town. On 25 February 1994 and pursuant to a written agreement ("the original agreement") he purchased a business known as DMS Woodcraft from the respondent, a close corporation, for R140 000 payable at the rate of R5 000 per month with effect from 1 May. No provision was made for the acceleration of payments in the event of the purchaser's default. Weltman failed to make any

payment in reduction of the purchase price and the respondent instituted proceedings against him in the Cape Town Magistrates' Court in which the following amounts were claimed:

R12 188,57	for the May and June instalments and R2 188,57 for rentals in respect of certain motor vehicles which were leased under the same agreement (case 17167/94, summons served on 20 June 1994);
R5 000	for the July instalment (case 20803/94, summons served on 27 July 1994);
R5 000	for the August instalment (case 24686, summons served on 29 August 1994);
R20 000	for the September, October, November and December instalments (case 37631/94, summons served on 3 January 1995).

[3] The debts remained unsatisfied and during January 1995 the respondent obtained judgments against Weltman for R37 188,57 in terms of the summonses in cases 17167/94, 24686/94 and 37631/94. For reasons which are not apparent, judgment was not granted in case 20803/94. On 16 January 1995 the respondent caused a warrant of execution to be issued pursuant to the

judgments but, as far as I am able to judge, no attachments were made at that stage.

[4] On 18 August 1995 Weltman and the respondent concluded a further agreement which was designated "Deed of Settlement" ("the settlement agreement"). This recorded, *inter alia*, that in settlement of a dispute between the parties relating to the purchase price payable for DMS Woodcraft, Weltman would pay the respondent a reduced price of R114 000 in monthly instalments of R8 000 together with interest on the balance of the capital sum. The agreement provided that failure to make any one payment would result in the full balance becoming due and payable. It was also agreed that Weltman would sign a consent to judgment in terms of s 58 of the Magistrates' Court Act 32 of 1944. This he duly did.

[5] Weltman made only two payments under the settlement agreement and on 27 November 1995 the respondent obtained judgment against him in the Cape Town Magistrates' Court in terms of the consent. The amount of the judgment - R105 520,09 - included the balance of the capital, interest and costs. Thereafter a warrant of execution was issued. The case numbers reflected on the warrant were 17167/1994, 20303/1994, 24686/1994 and 37631/1994. (The reference to case 20303/1994 instead of 20803/1994 appears to be nothing more

than a typographical error.) On 6 December 1995 and pursuant to the warrant the sheriff made an attachment of movable property, consisting in the main of woodworking machinery and equipment.

[6] On 26 September 1994, some eleven months before the settlement agreement, Weltman had sold his furniture manufacturing business as a going concern to the company in terms of a written agreement. Included in the sale were the stock, furniture, fixtures, fittings, vehicles, appliances and equipment of the business. It was a term of the agreement that the sale would not be advertised in terms of s 34 of the Act. The property attached at the instance of the respondent on 6 December 1995 had been transferred by Weltman to the company pursuant to the sale. This led to the present dispute. The company, relying on the sale, claimed ownership of the goods under attachment. As a result an interpleader summons was issued at the instance of the sheriff on 2 January 1996 in terms of s 69 of the Magistrates' Court Act. On 16 January 1996 the company was placed under a provisional winding-up order which was made final on 20 February 1996. The provisional liquidators of the company proceeded with the interpleader proceedings on the company's behalf. We were informed from the Bar that liquidators have since been appointed. They persist in claiming ownership of the property under attachment.

[7] The present dispute is, therefore, between the liquidators and the respondent. The resolution of the dispute is dependent upon a proper construction of s 34(3) of the Act.

[8] Section 34 reads:

"(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."

It is not in dispute that Weltman was a trader within the meaning of the section; that the respondent's claim was in connection with Weltman's business; that the property subsequently attached was transferred by Weltman to the company; that the transfer was not in the ordinary course of business or for securing the payment of the debt; that the sale was not advertised in terms of s 34(1) of the Act; and that both Weltman and the company knew at the time of transfer that the respondent had instituted actions against Weltman by means of the summonses in cases 17167/94, 20803/94 and 24686/94 in the Cape Town Magistrates' Court.

[9] The liquidators' contentions, in short, are that the goods under attachment became the property of the company pursuant to the sale of 26 September 1994 and that s 34(3) of the Act has no application to this case as the legal proceedings instituted by the respondent against Weltman were for the purpose of enforcing the original agreement and not the settlement agreement. Moreover the attachment was effected pursuant to a consent to judgment given

by Weltman under the settlement agreement.

[10] The respondent contends that the proceedings taken against Weltman before the transfer of the business to the company resulted in the settlement agreement and that the proceedings were in fact enforced by means of the settlement and the consent to judgment which formed part of it. Consequently, according to the argument, s 34(3) applied and the transfer of all of the property by Weltman to the company was void as against the respondent.

[11] The magistrate who heard the interpleader proceedings found in the respondent's favour and ordered that the liquidators' claim be dismissed with costs. An appeal to the Cape Provincial Division (Van Zyl J and S F Burger AJ) was dismissed with costs but leave to appeal to this Court was subsequently granted.

[12] This brings me to consider whether the institution of proceedings during June to August 1994 can properly be said to relate to the settlement agreement for the purposes of s 34(3). Counsel for the liquidators submitted that the deed of settlement, being an unconditional compromise, had the effect of terminating the original agreement. According to the submission, the claims in respect of which the respondent had instituted proceedings arose out of the original agreement but this agreement could not be enforced once the

compromise became effectual. Accordingly the judgment granted on 27 November 1995 was an enforcement of the settlement agreement, for the respondent did not - and could not - rely on the earlier proceedings or the original agreement.

[13] The resolution of the dispute, however, is dependent upon a proper construction of s 34(3) and not only on whether at common law a compromise ordinarily precludes the creditor from enforcing the original debt. What is necessary to decide is whether the creditor loses his protection under the subsection if, after the institution of proceedings, the contract on which the claim is based is amended or superseded by a subsequent agreement. The determining factor in each case is the closeness of the connection between the original agreement and the amending or subsequent agreement. It is, for instance, unthinkable that the mere reduction of the original contract price after the institution of proceedings to enforce the debt would result in the removal of the protection that a creditor had acquired under the subsection. Section 34(3) was intended, *inter alia*, to benefit a vigilant creditor and not to penalise him for reducing his claim in order to resolve a festering dispute. Moreover it is clear that it is not necessary for the creditor to take judgment against the transferee in order to obtain the benefit of the sub-section. All that is required is that the

proceedings should have been instituted prior to the transfer.

[14] It now becomes necessary to decide whether, on the facts of the present case, the proceedings instituted before the transfer are sufficiently closely connected to the settlement agreement to entitle the respondent to contend that the transfer is void in terms of s 34(3). The recital to the settlement agreement recorded that a dispute which had arisen relating to the sale of DMS Woodcraft had been settled. Clause 10 provided that the agreement

> "constitutes a full and final settlement of differences and disputes between [Weltman and the respondent] arising from and relating to the purchase of the business known as DMS Woodcraft in terms of the Agreement and arising from and relating to the various actions in the Cape Town Magistrate's Court under case numbers 17167/94, 20803/94, 24686/94, 37631/94."

In terms of the agreement the respondent undertook to consent to the rescission of the three default judgments that had been granted against Weltman and to withdraw the other action (case 20803/94) with no order as to costs. In due course the judgments were rescinded and case 20803/94 withdrawn.

[15] Clearly, therefore, the settlement agreement was a compromise of the dispute that had arisen out of the original agreement. As part of the settlement Weltman's liability was reduced, the monthly instalments were

increased and an acceleration clause was inserted. Significantly the sale of DMS Woodcraft remained effectual to the extent that Weltman retained the business. The consent to judgment that Weltman signed was akin to an acknowledgment of debt. It made provision for judgment to be granted against him for the capital sum, interest and costs if he failed to pay any one instalment in terms of the settlement agreement.

[16] Counsel for the appellant was undoubtedly correct in arguing that after the compromise the respondent was not entitled to fall back on the original agreement as the settlement agreement made no express or implied provision for this. That submission, as I have pointed out, does not take into account the statutory provisions which have to be construed. On the facts of this case it is clear that the compromise did not change the essential nature of the respondent's claim against Weltman for the purposes of the sub-section. Both the original and the settlement agreements related to the sale of the same business and the respondent's claim, under each agreement, was for payment of the purchase price. The compromise differed from the original agreement in relation to the amount payable and the method of payment but it did not alter the essence of the respondent's claim or the debtor's obligation. Nor does anything turn on the rescission of the judgments and the withdrawal of the action in case 20803/94.

These steps were taken to implement the settlement and not to negate it. The result is that the proceedings instituted by the respondent before the transfer are sufficiently closely connected to its claim under the settlement agreement to entitle this Court to hold the transfer to be void for the purposes of s 34(3).

[17] That conclusion does not dispose of the appeal. The proceedings instituted before the transfer of the property to the company were for claims which totalled R22 188,57. It may be observed that when the transfer was effected on 26 September 1994 only a further R5 000 had become due in terms of the original agreement. The question raised in this Court was whether the transfer is void only to the extent of R22 188,57. This issue was not dealt with in the Magistrates' court but it was alluded to in the court *a quo* as follows:

> "The fact that the amount of such claims totalled only R22 188,57 is irrelevant for purposes of the applicability of the said section, which merely requires 'any claim' which has been enforced by the institution of proceedings before transfer of the business. The respondent in fact had three claims which it enforced by instituting proceedings prior to such transfer and which proceedings culminated in the settlement agreement which immediately rendered them *res judicata*."

[18] The expression "any claim" which was relied upon by the Provincial Division, is qualified by the words which precede and follow it.

Stripped of its inessentials, for present purposes, s 34(3) reads:

> "If any person who has any claim against the said trader ... has before such transfer, for the purposes of enforcing his claim, instituted

> proceedings against the said trader ... the transfer shall be void as against him for the purpose of such enforcement."

The relevant portions of the sub-section show that there is a direct relationship between the creditor's claim and the proceedings for enforcing it. Secondly the transfer is said to be void for the purpose of the enforcement. There is, therefore, also a clear correlation between the enforcement of the claim and the extent to which the transfer is void.

[19] It may be noted that the Afrikaans version of the sub-section differs somewhat from the English version. The relevant parts of the former version provide:

> "As iemand wat 'n vordering teen bedoelde handelaar ..., voor daardie oordrag, ten einde betaling van sy vordering te verkry, 'n regsgeding teen bedoelde handelaar ingestel het ... dan is die oordrag teenoor hom nietig sover as nodig is om sy vordering te laat geld."

Significantly in the Afrikaans version, which is the signed text, the words used are "'n vordering". Moreover what is provided for in this version is the institution of proceedings for the purpose of obtaining payment of the creditor's claim and the transfer is said to be void so far as it is necessary to enable the creditor to maintain his claim. The Afrikaans version, too, clearly envisages a relationship between the claim and the legal proceedings and between the voidness and the recovery of the claim. It follows from the grammatical

construction of the section that the transfer is void only to the extent to which the creditor had previously instituted proceedings. This construction also avoids the incongruous results that would follow if the court *a quo's* interpretation is to be applied. On that construction the transfer would be void in respect of claims which were not due or legally enforceable at the time of the transfer. This in turn would result in an unwarranted windfall to the claimant but prejudice to a *bona fide* transferee and, possibly, his creditors. These consequences could not have been intended. In my view it follows that the transfer from Weltman to the company is void as against the respondent only to the extent of property having the value of R22 188,57. To this extent the appeal succeeds.

[20] It remains to consider the question of costs and the form of the order. In the interpleader proceedings before the Magistrate the parties were agreed that the matter should be dealt with on the basis of affidavits before the court, the contents of which do not need to be set out in this judgment. Accordingly no oral evidence was led and the value of the goods under attachment was not established. It is therefore not possible to say whether the liquidators will ultimately benefit from the finding that the transfer is void only to the extent of R22 188,57. It follows from this that it cannot be decided whether either party will achieve substantial success in the litigation. The fairest

way in dealing with this conclusion is to make no order as to costs in respect of the proceedings in all courts.

[21] It is a matter of concern that the record on appeal, relatively short as it was, contained a considerable number of duplicated documents, the effect of which was to increase the length of the record unnecessarily. To make allowance for this counsel for the liquidators conceded that it would be fair if his attorneys were directed to recover no costs relating to the preparation and perusal of the whole of volume 1 of the record. We were informed that the attorneys concerned had, commendably enough, offered to accept such a direction without the need for an order. This being the case no special order will be made.

[22] In the absence of evidence concerning the value of each item under attachment, the order should make provision for the sheriff, after the sale in execution of sufficient goods under attachment to cover R22 188,57 together with the costs of execution, to deliver the remaining goods, if any, to the liquidators.

[23] I would therefore order:

1. The appeal is allowed;
2. The order of the magistrate is altered to read:

"The sheriff is authorised to sell property under attachment in execution to an amount of R22 188,57 for the benefit of the judgment creditor, together with the costs of execution. The remaining goods under attachment, if any, are to be delivered to the claimant after the sale in execution. There will be no order as to costs."

3. There will be no order in respect of the costs on appeal to the court *a quo* or on appeal to this Court.

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L S MELUNSKY
ACTING JUDGE OF APPEAL

MADLANGA AJA:

[1] The conclusion that I come to is that at the time the respondent enforced its claim in terms of the "consent to judgment" no proceedings instituted before transfer were still in existence. That being the case, the protection afforded by section 34(3) upon which the respondent could formerly rely had fallen away. The appeal should thus succeed with costs. I proceed to set out my reasons for this conclusion. I rely on the facts as correctly set out by Melunsky AJA.

[2] Paraphrasing the terms of section 34(3), the factors which trigger the creditor's protection are the following:

(i) the creditor should have a claim against the trader;
(ii) the claim should be in connection with the business of the trader;
(iii) the business, or its goodwill, or its goods or property should have been transferred in terms of a contract;

(iv) before the transfer the creditor should have instituted proceedings against the trader; and

(v) the proceedings should have been instituted for the purpose of enforcing the claim.

[3] The word "such" appearing just before the word "enforcement" at the end of the subsection refers back to proceedings instituted before transfer "for the purpose of **enforcing** [a] claim" (my emphasis). In my view, at the time when the creditor relies on the protection contained in the subsection proceedings should have been instituted before transfer to enforce the claim. Those proceedings must either be pending or have been finally determined in the creditor's favour. Therefore, I do not see any basis upon which a creditor who,

(a) before transfer, institutes proceedings of the nature envisaged in section 34(3) against a trader,
(b) one or two days after transfer, withdraws the proceedings, and
(c) some months thereafter, institutes proceedings which are identical to those withdrawn earlier

could avail him-/herself of the protection contained in the subsection. The earlier proceedings, though instituted before transfer, become irrelevant after their withdrawal. The later proceedings do not assist the creditor because they were not instituted **before** transfer. A further example would perhaps illustrate the point. A creditor may, as *in casu*, seek to avail him-/herself of the section 34(3) protection when, after judgment, he/she meets with resistance when attempting to have the goods or property of the business referred to in the section sold in execution. However, it seems to me that a creditor may invoke section 34(3) even before judgment. I give the following example.

[4] Before transfer a creditor institutes proceedings against a trader in respect of a claim envisaged in section 34(3). The court before which the proceedings have been instituted is not one of the courts referred to in section 34(3)(b). The transferee (i.e. one who took transfer from the trader) knows at the time of

transfer that the proceedings have been instituted. Before judgment but after transfer the creditor discovers that the transferee is about to transfer the business and/or goods or property forming part of such business to yet another person ("third person"). The trader (i.e. the original transferor) has no assets which can be attached to satisfy whatever judgment the creditor may subsequently obtain. Should the transferee who took transfer from the trader effect transfer to the third person, it is doubtful whether the creditor can have recourse against the third person. Firstly, the words "such transfer", "was transferred" and "the transfer" in section 34(3) obviously refer to transfer by the trader and not subsequent transfer by the original transferee. Therefore, even if the third person may be found to have known, whether at the time of the original transfer or at the time of the transfer to him-/herself, that proceedings had been instituted, such knowledge is immaterial for purposes of paragraph (a) of section 34(3). "The transfer" which becomes void is transfer by the trader and not by the original transferee. Secondly, the alternative offered by paragraph (b) of section 34(3) is also not available to the creditor because on this example the court in which the proceedings were instituted is not one envisaged in the said paragraph (b). In the circumstances it seems to me that the creditor, even before judgment, would be entitled to seek an interdict to prevent transfer of the business and/or its goods or property to the third person pending the final determination of the proceedings instituted prior to the transfer by the trader. In this way the creditor would preserve the protection afforded him/her by the subsection. Therefore, save that in my view the proceedings instituted prior to transfer must continue to exist after transfer until culmination in judgment in the creditor's favour, I agree with the last two sentences of paragraph [13] of Melunsky AJA's judgment.

[5] Let me alter the last example. Suppose that some time after the initial transfer by the trader the creditor withdraws the proceedings. As at the time the creditor becomes aware of the subsequent impending transfer to the third

person there are thus no proceedings in existence. In my view the mere fact that proceedings (which were subsequently withdrawn) had previously been instituted is not enough to afford the creditor the protection of the subsection. In the absence of extant proceedings instituted before the initial transfer there can be no question of the **enforcement** of such a claim (*vide* "such enforcement" in section 34(3) *in fine*). It must be noted that a transfer in the circumstances set forth in the subsection is not *ipso facto* void for all purposes. It is void only against the creditor and for the limited purpose of the enforcement of the creditor's claim. Unless and until the creditor invokes the provision the transfer is unaffected. Any fresh proceedings instituted by the creditor **after** transfer can obviously not qualify as fitting the description in section 34(3) of proceedings instituted "before such transfer, for the purpose of enforcing his claim". The definitive moment which determines whether or not the protection afforded by the provision accrues is the moment of transfer. If there is then neither a pending proceeding nor a judgment in favour of the creditor there is no possibility of the transfer being rendered void thereafter. The fact that there was at some prior time a pending proceeding is irrelevant. The provision plainly postulates an unbroken connection between the proceedings which it requires to be instituted before transfer and the enforcement of which it speaks. Enforcement of a claim by the institution of proceedings after transfer cannot be equated with enforcement of a claim by the institution of proceedings before transfer on the ground that there was an abortive and abandoned institution of proceedings in respect of the same claim before transfer.

[6] In the instant case what needs to be established is whether the various proceedings instituted by the respondent before transfer (and enumerated in paragraph [2] of Melunsky AJA's judgment) are still in existence (in a continuous manner as indicated above) or, having so existed and continued to exist, have culminated in judgment/s in the respondent's favour. That is not the

same as an enquiry whether the original claim which the respondent had against Weltman is substantially similar to, or closely connected with, the claim as compromised in the settlement agreement (see paragraphs [13] to [16] of Melunsky AJA's judgment). In my view even if the original claim is substantially similar to, and closely connected with, the claim as compromised, there can be no protection in terms of section 34(3) if, after transfer, there has been a withdrawal or unconditional abandonment of the proceedings that were instituted before transfer for the purpose of enforcing the original claim.

[7] It is so that in concluding the settlement agreement with Weltman the respondent was not abandoning the claim based on the sale of DMS in the sense that Weltman was discharged from liability without offering anything in return. But what seems clear is that it agreed to abandon its entitlement to enforce its original claim against Weltman in return for a renegotiated agreement on very different terms. The question which must be asked is whether, at the time the respondent invoked the protection contained in section 34(3), there were proceedings to enforce the compromised claim (as opposed to the original claim) instituted before transfer of the business by Weltman to Weltmans Custom Office Furniture (Pty) Ltd ("the company", being the appellant herein) which were either still pending or had been finally determined in the respondent's favour. The determination of this question is not necessarily dependent upon the intention of the respondent (or of Weltman and the respondent, for that matter). It depends on whether what took place *in casu* falls within the purview of the protection afforded by the subsection.

[8] The settlement agreement, *inter alia*, provided for the withdrawal of the action in respect of which no judgment was ever obtained (Case No 20803/94 - for R5 000,00) and for the rescission of judgment in the three matters in which judgment had been obtained (Case No's 17167/94, 24686/94 and 37631/94 - respectively for R12 188,57, R5 000,00 and R20 000,00). This was done. Those proceedings and those judgments were no more. In my view, the

unavoidable consequence of this is that the foundation upon which the respondent's right to have the transfer regarded as void against it for the purpose of enforcing its original claim , was destroyed by the respondent's own act. I cannot see how it can be resurrected. Anything done thereafter would not retrieve the situation because, even if whatever was done amounted to the institution of proceedings which sought to enforce the original claim, it would be taking place **after** transfer. Moreover, I do not see how the signing long after transfer of a "consent to judgment" could alter the position even if it took place *simul ac semel* with the agreement to withdraw, and the actual withdrawal of, the proceedings and the agreement to rescind, and the actual rescission of, the judgments. Indeed, it seems that in such a situation it would even be a misnomer to refer to a "consent to judgment". Erasmus, *Superior Court Practice*, p. B1-196, although dealing with "judgment on confession" in the High Court, states that this procedure is what is generally known as "consent to judgment". Placing reliance on **Eloff v Malan** 1928 TPD 393, the learned author makes the following point:

> "A deed of settlement of the plaintiff's claim to a servitude, **the plaintiff's claim being withdrawn** and the defendant undertaking in consideration of such withdrawal to transfer certain ground, is not a consent of claim within the ambit of [rule 31 (1)] and cannot be made an order of court under it." (My emphasis).

The necessity, in terms of rule 31(1), for the confession to relate to the whole or a part of the claim "contained in the summons" suggests that there should be an action to which such confession will relate. Section 58 of the Magistrates' Courts Act 32 of 1944, which is the section specifically referred to by Weltman and the respondent in the settlement agreement, is somewhat differently worded. In terms of this section a consent to judgment may be based on a summons or on a letter of demand even if no summons has been issued. Where consent to judgment is based on a letter of demand the proceedings as such only

come into existence once a letter requesting judgment has been lodged with the clerk of the court in terms of section 58(1) (or 57(2)) of the Magistrates' Courts Act. In this regard I refer to section 59 of the last mentioned Act which provides that where no summons has been issued the request for judgment in terms of the consent "shall constitute the **first** document to be filed in the action" (my emphasis). In the instant case, because the previous proceedings had been abandoned, the subsequent approach to the magistrate's court for judgment in terms of the "consent to judgment" amounted to no more than proceedings instituted after **transfer**. Any subsequent judgment based upon such proceedings could not have been a judgment given in any of the proceedings which were instituted before transfer. As Melunsky AJA appears to accept, "after the compromise the respondent was not entitled to fall back on the original agreement". It must follow that any judgment subsequently obtained cannot be a judgment in any of the proceedings which were instituted before transfer to enforce the original agreement. The judgment subsequently obtained was quite plainly obtained not to enforce the original claim, but to enforce the compromised claim. The compromised claim only arose after the transfer and the judgment which it is sought to enforce is a judgment in respect of that claim.

[9] I thus come to the conclusion that where proceedings have been withdrawn and judgments rescinded after transfer, and notwithstanding that a deed of settlement containing a "consent to judgment" has been entered into, the proceedings and judgments disappear. I am not unmindful of the fact that my approach may be countered by an argument that after rescission of judgment in terms of the settlement agreement the relevant matters reverted to the status of pending matters and as such, and because two of them were instituted before transfer, they continued to afford the respondent protection in terms of section 34(3). Ordinarily once judgment has been rescinded the matter does revert to the status of a pending matter. In the instant case, however, to say that this is what happened in respect of the two matters would be technical in the extreme

and a complete failure to look at what in fact happened. The intention of Weltman and the respondent was to get rid of all the previous proceedings. This is evidenced by the withdrawal of the one case and the rescission of judgments in the others - withdrawal was not an immediately available option in the latter matters. It would have been too convoluted a procedure for the parties to rescind the judgments and then to withdraw the actions. The intention is clear - all previous proceedings were being abandoned. If at all it can be contended that any of the proceedings continued to exist, they, as Mr *Kirk-Cohen* who appeared for the respondent put it, existed "only as shells" and at no stage in the future could they ever be pursued.

[10] It may be so that considerations of equity informed or dictated the enactment of the protection contained in section 34(3). However, when it comes to determining whether it is open to a creditor to invoke the subsection generalised appeals to equity may not assist him/her. What matters is whether his/her situation does fall within the ambit of the subsection. The approach I have adopted might superficially appear to be inequitable to a creditor (like the respondent) who has throughout been diligent in looking after his interests insofar as the claim he has against the trader is concerned. However, such creditor can easily protect his/her interest by refusing to agree to an unconditional, absolute withdrawal of the proceedings instituted before transfer or the rescission of judgments granted before transfer. An agreement could have been structured which, for the most part, resembled the present settlement agreement but kept the proceedings in abeyance and the judgments intact pending fulfilment by Weltman of the obligations undertaken in the deed of settlement.

[11] In the result, I must regretfully conclude that the respondent failed to bring himself within the provisions of section 34(3) and that the decision of the magistrate and the court *a quo* to the contrary cannot be supported.

[12] I accordingly would make the following order:

1. The appeal is upheld with costs.

2. The order of the magistrate is altered to read:

   "(a) The attachment of goods under a warrant reflecting Case No's 17167/94, 20803/94, 24686/94 and 37631/94 is set aside and the sheriff is directed to return the goods attached in terms of the said warrant to the claimant.

   (b) The judgment creditor shall pay the claimant's costs in the interpleader proceedings."

3. The respondent shall pay the appellant's costs of appeal to the Full Court of the Cape of Good Hope High Court.

M R MADLANGA
ACTING JUDGE OF APPEAL