THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 163/06

In the matter between:

McCARTHY LIMITED **APPELLANT**

and

STEPHEN MALCOLM GORE N.O. **RESPONDENT**
In his capacity as the duly appointed liquidator of
Ramsauer Transport (Pty) Ltd (In Liquidation)

CORAM: **HARMS ADP, BRAND, NUGENT, JAFTA JJA *et* THERON AJA**

DATE OF HEARING: 20 MARCH 2007

DATE OF DELIVERY: 28 MARCH 2007

Summary: Insolvency – Insolvency Act 24 of 1936 − Disposition of property – Insolvent selling property – No notice of sale given in terms of s 34(1) − Definition of 'trader' limited to primary business activities and does not extend to incidental activities .

Neutral citation: This judgment may be referred to as *McCarthy Ltd v Gore N.O.* [2007] SCA 32 RSA

JUDGMENT

THERON AJA:

[1] The respondent, in his capacity as liquidator of Ramsauer Transport (Proprietary) Limited (in liquidation) (the company) instituted action against the appellant in the High Court (Cape) in terms of s 34(1) of the Insolvency Act 24 of 1936 ('the Act'), read with s 340 of the Companies Act 61 of 1973 for an order declaring the transfer of 28 vehicles by the company to the appellant ('McCarthy'), void. The order was granted and McCarthy now appeals with the leave of the court *a quo*.

[2] The background to this litigation is the following. The business of the company was that of a transport haulier conveying goods on a long-haul basis. It owned and operated a fleet of between sixty and eighty heavy vehicles and generated an average income from the conveyance of goods of between R32m and R35m annually during the period 1996 to 1999. The company did from time to time renew its fleet of vehicles and this involved the purchasing and selling of vehicles. The evidence was that there had been a recoupment on the sale of vehicles by the company in the amounts of R3 108 211,50 and R86 903,42 for the 1996 and 1997 financial years, respectively.

[3] In 1996, the company entered into a factoring agreement with Cutfin (Proprietary) Limited ('Cutfin') in terms of which its book debts were sold to Cutfin on a monthly basis and advance payments by Cutfin to the company were discounted. According to the evidence, the sale of vehicles and the factoring of book debts were effected in order to improve the liquidity of the company to allow it to continue with its transport business.

[4] On 17 December 1999, the company and McCarthy concluded an agreement in terms of which the company sold to the appellant 28 vehicles for a purchase consideration of R2 052 000,00. The trailers were transferred to the appellant prior to the winding-up of the appellant on 29 December 1999. It is common cause that the company did not benefit from the sale as the proceeds thereof were paid by the company to an associated company. It is also common cause that the sale was not advertised in terms of s 34(1) of the Act.

[5] The liquidator, in the court *a quo*, contended that inasmuch as the primary business of the company was that of a transport contractor, the company was a 'trader' for the purpose of s 34(1) as it sold its vehicles from time to time on a substantial basis and also sold its book debts as a regular and integral feature of its business. It was alleged that the company had disposed of the vehicles and transferred them otherwise than in the ordinary course of the company's business. By reason of the fact that the company had not published a notice concerning the sale and transfer of the vehicles to the appellant as provided for in s 34(1) of the Act, the transfer was voidable at the instance of the liquidator. McCarthy, on the other hand contended that the company was not a trader as defined in s 2 of the Act and that therefore the provisions of s 34(1) were not applicable to the transaction.

[6] Davis J in the court *a quo* held that the sale of the vehicles to the appellant was the kind of transaction which the company 'had performed regularly in the past,

namely, the sale of vehicles pursuant to and as part of its business'. The learned judge found that 'trader' should not be interpreted restrictively and is not to be limited to the company's primary business but includes transactions concluded in the ordinary course of a business ancillary to its primary (haulage) business. The trial court held that the transfer of the vehicles to the appellant was void for want of compliance with the provisions of s 34(1).[1]

[7] The sole issue in this appeal is whether the company was a 'trader' within the meaning of s 34(1) as read with the definition of 'trader' in s 2 of the Act. Section 34(1) reads:

'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.'

[8] The purpose of the legislature in enacting s 34(1) is clearly to protect creditors by preventing traders who are in financial difficulty from disposing of their business assets to third parties who are not liable for the debts of the business, without due

[1] The judgment of Davis J in the court *a quo* is reported as *Gore NO v McCarthy Ltd* 2006 (3) SA 229 (C).

advertisement to all the creditors of the business.[2] But the provisions of s 34(1) can be invoked only if the company is a 'trader' as defined in s 2 of the Act. Section 2 reads as follows:

'"trader" means any person who carries on any trade, business, industry or undertaking in which property is sold, or is bought, exchanged or manufactured for purpose of sale or exchange, or in which building operations of whatever nature are performed, or an object whereof is public entertainment, or who carries on the business of an hotel keeper or boarding-house keeper, or who acts as a broker or agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property; and any person shall be deemed to be a trader for the purpose of this Act (except for the purposes of subsection (10) of section twenty-one) unless it is proved that he is not a trader as hereinbefore defined: Provided that if any person carries on the trade, business, industry or undertaking of selling property which he produced (either personally or through any servant) by means of farming operations, the provisions of this Act relating to traders only shall not apply to him in connection with his said trade, business, industry or undertaking;'

[9] A 'trader' is therefore a person carrying on any trade, business, industry or undertaking of the types specified in the balance of the definition after the words 'in which'. This emerges from the judgment of Mthiyane JA in *Kevin and Lasia Property Investment CC v Roos NO*[3] where it was held that each clause in s 2 of the Act is separate and distinct from the other:

'The definition commences with the words '"trader" means any person'. There follows a number of clauses which commence with the word "who" and thereafter, the words "or who", ie "who carries on

[2] *Galaxie Melodies (Pty) Ltd v Dally* 1975 (4) SA 736 (A); *Gore NO v Saficon Industial (Pty) Ltd* 1994 (4) SA 536 (W); *Bank of Lisbon International v Western Province Cellar Ltd* 1998 (3) SA 899 (W); *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA).
[3] 2004 (4) SA 103 (SCA) para 14.

any trade … or who carries on the business … or who acts as a broker". Each clause is separate and distinct from the others.'

[10] The question then is not whether the company carries on any trade, business, industry or undertaking at all but whether it carries on such a trade falling into one of the specified categories. It is apparent that a transport haulier is not included in the definition in s 2. The only category which could possibly be relevant and upon which the liquidator relied in the court *a quo*, is the first, namely, that the company was a person carrying on a business 'in which property is sold'.

[11] The question whether the company is a trader is answered by having regard to the nature of the undertaking (in this instance the sale of book debts and vehicles) and determining whether such undertaking is part of the core business of the company (transport haulier) or incidental thereto. Counsel for the liquidator accepted that the sale of vehicles and the factoring of the book debts were incidental to the company's main business but contended that the factoring of the book debts and the selling of vehicles, although incidental to the core business of the company, was a substantial and integral part of its business, in effect arguing that there are degrees of incidentality.

[12] In my view, once it is established that these undertakings are incidental activities, that is the end of the matter. There are no degrees of incidentality. The construction of 'trader' contended for by the liquidator would apply to any business in which property is sold for whatever reason. Why then have a definition of trader in the

Act which circumscribes the nature of the trades, businesses, industries or undertakings that are conducted by traders? In my view, the purpose of the definition is to identify those types of trade, business, industry or undertaking which, by reason of the fact that they engage in specified activities, attract the obligations of traders in terms of the Act. It is not the function of this court to extend the list created by the legislature. Mthiyane JA put the matter thus in *Roos***:**[4]

'It was also submitted that there is no apparent reason why a business consisting of a letting or hiring of immovable property should be excluded. But it cannot be submitted that the omission results in an absurdity entitling a court to fill the *lacuna*. It might equally be asked why the Legislature did not include, as it obviously did not, a person who acts as a broker or agent of any person in the letting or hiring of movable property. In the absence of some factor common to the enterprises which are included − and there is none − a court cannot add to that list on the basis that the omission was an obvious oversight.'

[13] I accordingly conclude that the court *a quo* erred in finding that -

'to restrict the meaning, of the word "company which carries on trade, or business in which property is sold" to the narrow ambit of its haulage business is to ignore the very nature of the business and the transactions conducted pursuant thereto by the company over a lengthy period'.[5]

The error in my view lies in the fact that it extended the definition of 'trader' as contained in s 2 of the Act to virtually every type of business by elevating the incidental activities of that business above its actual trade, business, industry or undertaking. The interpretation of 'trader' adopted by the court *a quo* is thus far too

[4] *Kevin and Lasia Property Investment CC v Roos NO* 2004 (4) SA 103 (SCA) para 15.
[5] *Gore NO v McCarthy Ltd* 2006 (3) SA 229 (C) 237C-D.

broad for the purposes of the Act. It is difficult to envisage a business in which it is not necessary at some stage to sell or buy goods. In my judgment, the definition of a trader must be linked to the primary business activities of the enterprise concerned and not be extended to activities incidental thereto. Extending the definition of 'trader' would result in undue hardship and operate unfairly against innocent third parties, such as the appellant, who enter into transactions unaware that publication as provided for in s 34(1) of the Act is required. That the legislation does not contemplate.

[13] For these reasons the appeal is upheld with costs. The judgment of the court *a quo* is set aside and substituted with the following:

'The plaintiff's claim is dismissed with costs.'

L V Theron

Acting Judge of Appeal

CONCUR:

HARMS ADP
BRAND JA
NUGENT JA
JAFTA JA