THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 480/2002

In the matter between:

KEVIN & LASIA PROPERTY INVESTMENTS CC **FIRST APPELLANT**

ABSA BANK LIMITED **SECOND APPELLANT**

and

ANTON ROOS N.O. **FIRST RESPONDENT**

P B VAN ROOYEN N.O. **SECOND RESPONDENT**

THE REGISTRAR OF DEEDS
PRETORIA **THIRD**
RESPONDENT

CORAM: **HOWIE P, NAVSA, MTHIYANE, CLOETE and LEWIS JJA**

HEARD: **18 NOVEMBER 2003**
DELIVERED: **1 DECEMBER 2003**

Summary: Withdrawal of admission – Applicability of s 34(1) of the Insolvency Act 24 of 1936.

JUDGMENT

MTHIYANE JA:

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[1] This appeal concerns the provisions of 34 (1) of the Insolvency Act 24 of 1936 read with the definition of 'trader' in s 2 thereof; and the withdrawal of an admission made in argument.

[2] The respondents are the liquidators of a company, I J van der Lith Family Holdings (Pty) Limited ('the company'). The appeal arises from an application launched by them in the Transvaal Provincial Division (before Southwood J) against the first and second appellants and the Registrar of Deeds, Pretoria, for an order setting aside the transfer by the company to the first appellant of certain immovable property over which a bond was registered in favour of the second appellant.

[3] The facts giving rise to the application are the following. On 25 February

2000 the company, represented by Mr Izak van der Lith, concluded a written agreement of sale with the first appellant ('the purchaser') pursuant to which certain immovable property known as OK Sentrum ('the property') was sold for R7 700 000 and transferred to the purchaser on 29 June 2000. A mortgage bond for R7 825 000 was passed over the property in favour of the second appellant ('Absa'). The sale and transfer were not preceded by the publication of a notice as contemplated by s 34 (1) of the Act.

[4] The company was provisionally liquidated on 21 November 2000 and a final liquidation order was made on 23 November 2000, barely five months after the transfer. The liquidators claimed that the transfer was a nullity as against them and the company's creditors in that the notice provisions of s 34 (1) had not been complied with. Section 34 (1) provides:

'**34 Voidable sale of business**

(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 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 as against the trustees of his estate, if his estate is sequestrated at any time within the said period.'

[5] A trader is defined in s 2 of the Act and the definition is quoted and discussed in paras [13] and [14] below.

[6] The purchaser and Absa admitted that a notice of transfer was not published as provided in s 34 (1) but adopted the stance that the section was not applicable to the transaction because it was in the ordinary course of business. Mr Kevin Stefanus Luther who deposed to an opposing affidavit on behalf of the purchaser, stated that the company was merely a property owner whose only asset, comprising six erven situated in Edleen Township, Kempton Park was let out to tenants in order to generate income. He described its business as follows:

'…Die feitlike posisie is dat die verhuring van die persele op die erwe gekoppel was aan die insolvente maatskappy se eienaarskap van die erwe en kon daar sonder nie geskied nie.

Dieselfde is waar van die Eerste Respondent [the purchaser] se huidige eienaarskap van die betrokke erwe.'

'Die betrokke transaksie [sale and transfer] het geskied in die gewone loop van die besigheid van die insolvente maatskappy. Soos reeds vermeld was die verkoper [the company] 'n "property holding" maatskappy met enigste noemenswaardige bates die erwe en verbetering daarop, welke erwe aan die Eerste Respondent [the purchaser] verkoop is.'

[7] When the matter came before Southwood J the purchaser and Absa, through counsel who then represented them, admitted that the company was a trader within the meaning of the Act. The terms of the admission were:

'dat die eerste en tweede respondente [the purchaser and Absa] formeel erken dat die maatskappy 'n handelaar was soos beoog in Artikel 34 (1) van die Wet.'

On the available common cause facts which, it would seem, might not present the full picture, the admission would appear to be incorrect. In the founding affidavit deposed to by first respondent, the liquidators would appear to accept that the property, comprising a shopping complex, was purchased for the sole purpose of conducting a letting business in order to generate income. That, without more, would not fall within the definition of 'trader' for the reasons discussed below in paras [13] and [14].

[8] Counsel then proceeded to identify to the learned judge what they considered to be the only remaining issue in the case. This was whether the transfer of the property occurred in the ordinary course of its business in accordance with s 34 (1) of the Act.

[9] The judge *a quo* found that the transfer of the property from the company to the purchaser did not occur in the ordinary course of its business and held that s 34 (1) was applicable. He duly granted an order declaring the transfer, and the subsequent registration of the bond in favour of Absa, void against the liquidators and the company's creditors in terms of s 34(1).

[10] The purchaser and Absa applied for leave to appeal on a number of grounds, including that the company was not a trader as contemplated in s 2 of the Act. The

court granted leave to appeal to this Court on all grounds but for the question whether or not the company was a trader at the time of transfer. In refusing leave to appeal on that ground, the judge said that the formal admission made by the purchaser and Absa during the hearing that the company was a trader, was binding on them. He reasoned as follows:

> 'Hierdie formele erkenning is gemaak om die verrigtinge te verkort en klaarblyklik nadat die respondente [the purchaser and Absa] hulle saak behoorlik oorweeg het. Daar was tydens die argument voor my geen poging om die formele erkenning terug te trek nie. Daar was geen substantiewe aansoek om die erkenning terug te trek nie en daar is geen eedsverklaring geliasseer om die bewering dat die erkenning verkeerdelik gemaak is, te staaf nie. Die applikante kan nie eenvoudig die erkenning ignoreer asof dit nie gemaak is nie. Hulle is gebonde daaraan.'

[11] Because of the admission referred to above the judge *a quo* did not deal with the question whether the company was a trader as defined. If the answer to that question is in the affirmative, then s 34 (1) was applicable and notice had to be published before transfer was effected in order to give the creditors of the company an opportunity to oppose, if they so wished, to avoid any possible prejudice to the creditors.[1] In the appeal the issue is primarily whether the purchaser and Absa are entitled to withdraw the admission that the company was a trader.

[12] It seems to me that one must consider the context in which the admission was made. Having regard to that context, the admission did not require a formal withdrawal. In the circumstances in which it was made the admission amounted to no more than an election not to pursue a particular line of argument on available facts. There is no suggestion that, because of the admission, the liquidators failed to place further facts before the court – on the contrary, before the admission was made, they had elected not to deliver a replying affidavit. No question of *mala fides* can arise. The admission could therefore be withdrawn on appeal.

[13] In s 2 of the Act a trader is defined 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

[1] *cf. Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA) para 15.

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-housekeeper, 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'.

[14] Counsel on behalf of the liquidators submitted that the definition of 'trader' can be interpreted as meaning 'any person who carries on any business in the letting or hiring of immovable property'. There are several problems with this submission. The definition commences with the words '"trader" means any person'. There follow a numbers of clauses which commence with the word 'who' and thereafter, the words 'or who,' i.e. 'who carries on any trade … or who carries on the business … or who acts as a broker'. Each clause is separate and distinct from the others. The interpretation suggested necessitates taking the verb in the first clause as referring to the last clause. That is simply not permissible. Nor is the result it produces sensible English: '"Trader" means any person who carries on any … business … in the letting or hiring of immovable property'. The (signed) Afrikaans version produces a worse result: '"Handelaar" beteken iemand wat 'n … bedryf … dryf … by die huur or verhuur van onroerende goed'.

[15] 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 and 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 the list on the basis that the omission was an obvious legislative oversight.

[16] Counsel for the liquidators asked, in the event that his other arguments were not upheld, for an opportunity to consider whether a replying affidavit should be filed but at the same time indicated that the respondents might be unable to file a replying affidavit, in which case he asked that there be built into the order some provision that would bring an end to the litigation. In my view it would be fair to grant him that indulgence in view of the manner in which the matter was handled by the parties in the court below.

[17] Southwood J as I have said refused leave to appeal on the ground that the company was not a trader. His approach to the admission was wrong, and leave should therefore be granted by this Court on the point so as to enable this Court to set aside that order and to refer the matter back to the court *a quo* for any further facts to be placed before the court. That would enable an informed decision to be taken as to whether the company is or is not a 'trader' as defined in s 2 of the Act.

[18] Southwood J granted leave on the basis that it is arguable that another court may come to a different conclusion on the question of whether the property was disposed of in the ordinary course of business of the company. That question is tied up with the bigger question of whether the company was a 'trader' as defined and should accordingly be dealt with by the court when finally deciding the application.

[19] As to the costs, the purchaser and Absa have been successful and are entitled to the costs of the appeal. The point on which this appeal will succeed was taken by them in their heads of argument and the liquidators did not abandon the order of the court *a quo*. In regard to the costs of the application in the court *a quo* it

seems to me that these should be costs in the cause. Justice will be served by referring the matter back to the court *a quo* and whichever party then succeeds would be entitled to costs of the application.

[20] Accordingly the appeal succeeds and the following order is made.

1. Leave to appeal on the question whether the company was a trader as defined in s 2 of the Act is granted and the costs of the application are made costs in the appeal.

2. The appeal succeeds with costs including, in the case of Absa, the costs of two counsel.

3. The order of the court below is set aside.

4. The matter is remitted to the court below (and may be heard by any judge of that court).

5.1 The appellants are ordered jointly and severally to pay the costs of the hearing before the court below.

5.2. The remaining costs of the application will be costs in the cause.

6.1 The respondents are given leave to deliver a replying affidavit within fifteen days of the date of this order or such longer period as may be agreed by the parties or ordered by the court below on good cause shown.

6.2 If a replying affidavit is not delivered as aforesaid, the respondents will be deemed to have abandoned the application and the respondents in their representative capacity will be liable for the costs of the application (save for the costs referred to in paragraph 5.1 above).

KK

MTHIYANE

JUDGE OF

APPEAL

CONCUR:

HOWIE P
NAVSA JA
CLOETE JA
LEWIS JA