THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 712/2012
Reportable

In the matter between:

AXAL PROPERTIES 2 CC **FIRST APPELLANT**

K B STRICKER HOLDINGS CC **SECOND APPELLANT**

and

HENDRIK NICOLAAS KOTZE **RESPONDENT**

Neutral citation: *Axal Properties 2 CC v Kotze* (712/2012) [2013] ZASCA 110 (16 September 2013)

Coram: Mthiyane AP, Brand, Tshiqi & Majiedt JJA & Swain AJA

Heard: 29 August 2013

Delivered: 16 September 2013

Summary*:* **Interpretation of s 34(3) of the Insolvency Act 24 of 1936 – sale of property by close corporation to appellants, set aside by high court on basis that claim of respondent arose in connection with the business of the CC – correct approach to determine whether claim arises in connection with business of CC – claim of respondent did not arise in connection with business of CC – appeal against decision of South Gauteng High Court accordingly upheld.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Sutherland J sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:
'The application is dismissed with costs, such costs to include all reserved costs.'

JUDGMENT

SWAIN AJA (**MTHIYANE AP, BRAND, TSHIQI & MAJIEDT JJA** concurring):

[1] The respondent, Mr Hendrik Kotze, is a judgment creditor of Mega Super Cement CC (Mega). He obtained orders before the South Gauteng High Court (Sutherland J) in terms of s 34(3) of the Insolvency Act 24 of 1936 (the Act), declaring void a disposition by Mega of an immovable property to the first appellant, Axal Properties 2 CC (Axal) and moveable property to the second appellant, KB Stricker Holdings CC (Stricker Holdings).

[2] The issues before the court below and on appeal were whether

2.1 Mega was a 'trader' within the meaning of that term as contained in s 34(3) read with s 2 of the Act, at the time it disposed of these assets; and whether

2.2 Kotze's claim fell within the meaning of the phrase 'in connection with' the business of Mega, as contained in s 34(3) of the Act at the time it disposed of these assets.

[3] Axal and Stricker Holdings bear the onus of proving that Mega was not a 'trader' at the relevant time. See *Gainsford NNO v Tiffski Property Investments (Pty) Ltd* 2012 (3) SA 35 (SCA) at 44G-H. Kotze, however, bears the onus of proving that his claim is one 'in connection with' the business of Mega.

[4] The background facts which are not in dispute are as follows:

4.1 Kotze obtained judgment against one Shepherd and Mega jointly and severally on 15 February 2007 for payment of the sum of R872 000, together with interest and costs.

4.2 The members of Mega in 50 per cent shares were Shepherd and the Kyle Court Trust of which one Stricker was a trustee.

4.3 On 14 April 2007 Mega was placed under a provisional winding up order which was discharged on 24 June 2008.

4.4 Mega had a secured creditor, Come What May Properties 2 (Pty) Ltd, (CWMP) which was owed in excess of R22 million. Stricker represented this entity.

4.5 After Mega had been discharged from liquidation, according to Stricker Shepherd visited Mega's place of business and discovered that the business had been destroyed.

4.6 According to Stricker, Mega did not have the financial ability to resurrect its business. In order to pay its indebtedness to CWMP, Mega resolved to sell certain of its assets to Axal and Stricker Holdings.

4.7 Stricker is the sole member of Axal and Stricker Holdings and deposed to the affidavits filed on their behalf.

4.8 On 3 July 2008 Mega sold the immovable property to Axal for R6,3 million.

4.9 On 3 July 2008 Mega sold the movable property to Stricker Holdings for R15 million.

[5] In terms of s 2 of the Act

‘“[T]rader” 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 . . . and any person shall be deemed to be a trader for the purpose of this Act . . . unless it is proved that he is not a trader as hereinbefore defined . . .’

[6] The argument advanced on behalf of Axal and Stricker Holdings was that Mega was not a ‘trader’ at the time of the alienation of its property, because it was unable through no fault of its own, as a result of the destruction of its business, to carry on any ‘trade, business, industry or undertaking’.

[7] An inability to trade on the part of Mega formed the cornerstone of this argument, formulated as it was in an attempt to distinguish the present case from the decision in *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA).

[8] In *Kelvin* (at 35A-C) it was held that trading or carrying on of a business continued ‘until sums due are collected and debts paid’ and that ‘a person who still had debts to discharge does not cease to be a trader merely because he has closed his shop’. The submission being that no decision was taken to close the business of Mega, its inability to continue trading being dictated by the destruction of its business whilst in liquidation.

[9] When regard is had to the object of s 34 of the Act, namely to protect the rights of creditors by ensuring that, in the defined circumstances of the section, traders are prevented from disposing of their businesses, or assets of their businesses, to their creditors’ prejudice, the cause of the cessation of trading is irrelevant. There is no basis for a distinction to be drawn between the situation where a trader voluntarily ceases trading because of financial difficulties and where the trader is compelled to do so by the financial collapse of the business. The need to protect creditors of the trader in the defined circumstances of s 34 of the Act, is equally apparent in both cases.

[10] Axal and Stricker Holdings accordingly failed to discharge the onus of establishing that Mega was not a 'trader' when it sold the respective immovable and moveable properties to them.

[11] Turning to the issue of whether Kotze discharged the onus of proving that his claim fell within the meaning of the phrase 'in connection with' the business of Mega, as contained in s 34(3) of the Act. The provisions of s 34(3) should be considered in the context of s 34 as a whole.

11.1 Section 34(1) provides that in the absence of the specified publication of a trader's intention to transfer any business or any goods, or property, forming part of the business in terms of a contract (except in the ordinary course of that business or for securing the payment of a debt) such transfer shall be void as against his creditors for a period of six months after the transfer, and against the trustee of his estate, if his estate is sequestrated at any time within such period.

11.2 Section 34(2) provides that as soon as such notice is given, every liquidated liability of the 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 this liability.

11.3 Section 34(3) provides that the transfer shall be void as against any creditor who has a claim against the trader 'in connection with the said business' and has before transfer instituted proceedings for the purpose of enforcing his claim, in a division of the high court having jurisdiction in the district in which the business is carried on, or in the magistrate's court of that district. If proceedings are instituted in any other court, it is necessary that the persons to whom the business was transferred knew at the time of transfer that the proceedings had been instituted.

[12] The court below, in concluding that the claim of Kotze arose in connection with the business of Mega in terms of s 34(3) of the Act, relied upon the decision in *Simon v DCU Holdings (Pty) Ltd & others* 2000 (3) SA 202 (T) and in particular the following dictum at 223E-G:

'In my view, the words "in connection with the said business" simply mean that the trader's private liabilities not related to the business in any way, are not affected by the operation of ss 34(2) and (3).
Where, as in the present case, the trader is a company, which carried on no other activity other than its business, it has no private liabilities as would an individual trader.
Given the mischief aimed at by s 34(3), the words "in connection with the said business" should not be interpreted in some narrow technical way. There is no authority, nor any logical reason, why only certain claims against the trader in connection with the business and not others should be contemplated in s 34(3).'

[13] The court below concluded that the object of the phrase 'in connection with the said business' in the case of a natural person, was to distinguish between a trader's 'private persona' and his 'business persona'. The reference to the 'business' of the trader was not to be equated with the trader's 'trading activity'. On this basis because Mega was a corporate person it could not possess 'multiple persona' and had no 'private persona'. Consequently its liability to pay Kotze's claim arose 'in its sole capacity or persona as a business'.

[14] However, the inherent fallacy in applying the distinction drawn between the personal and business liabilities of natural persons, to a close corporation such as Mega, and then concluding that for the purposes of s 34 it can only have liabilities that arise in connection with its business, is revealed by the provisions of s 54(2) of the Close Corporations Act 69 of 1984. This section provides that a corporation is bound by the act of a member 'whether or not such act is performed for the carrying on of business of the corporation'.

[15] To recognise that Mega may have liabilities other than those which arose 'in connection with' its business, in interpreting s 34(3), is not to do so in a 'narrow technical way' and thereby defeat the mischief at which the section was aimed (*Simon* supra). To interpret s 34(3) to mean that all of the claims against Mega arose 'in connection with' its business, is to obliterate in the case of close corporations the distinction between s 34(1) which refers to all the creditors of a trader, and ss 34(2) and (3) which restrict creditors' claims to those in

connection with the business of the trader. See *Vermaak v Joubert & May* 1990 (3) SA 866 (A) at 872H-873A.

[16] There are valid reasons for the distinction. I agree with the views expressed in *Simon* (at 223A-E) as to what the object of the legislature was in drawing this distinction. A failure to publish notices in terms of s 34(1) results in the transfer of the business being void against all of the creditors of the trader, to ensure compliance with the requirement of notification. Section 34(2), however, which provides for an accelerated due date for payment of any claims on demand by creditors after publication, only applies to debts of the business, because the business (or goods belonging to the business) is alienated. In s 34(3) where the creditor has instituted action, the same reasoning applies.

[17] It cannot be said that the mischief at which s 34(3) is aimed is frustrated by recognising that a close corporation may have claims by creditors which do not arise in connection with its business, in the same way as natural persons.[1] A distinction accordingly has to be drawn for the purposes of s 34 of the Act between the debts of Mega which arise in connection with its business and those which do not, in order to determine in which category the claim of Kotze lies.

[18] In order to decide whether the claim of Kotze arose in connection with the business of Mega, the nature of that business has to be determined, as well as the nature of Kotze's claim. Kotze described the business of Mega as 'a manufacturer and trader of blended cement, cement bricks and tile adhesives'. He described his claim in his founding affidavit as 'not in respect of legal work but a brokerage fee'.

---

[1] The distinction is also of importance in the case of companies. A company may be bound in terms of s 36 of the Companies Act 61 of 1973 by a contract which is ultra vires the company in terms of s 33 by reference to the terms of its memorandum defining its main object and business. S 20(1)(*a*) of the Companies Act 71 of 2008 provides that no action of a company is void by reason only that the action was prohibited by any limitation, restriction or qualification in the memorandum of incorporation.

[19] Axal and Stricker Holdings contend that the claim of Kotze is correctly described as a brokerage fee in respect of the sale by one Stapelberg of his member's interest in Mega to Shepherd. In this connection they are supported by the terms of an agreement concluded between Kotze, Shepherd and Mega dated 12 January 2005 in the preamble to which the following is stated:

'Kotze, representing Shepherd, successfully brokered a transaction between Shepherd and Frans Petrus Stapelberg in respect of the acquisition by Shepherd of Stapelberg's member's interest / shares in respect of Mega Super Cement at a purchase price of R30 million.'

[20] Moreover, Kotze in an affidavit filed in support of his claim against Mega in liquidation, describes his claim as follows:

'Judgment (brokerage fee) – settlement.'

Kotze however, denies that his claim is described as a 'brokerage fee' and maintains that it arises from the judgment he obtained against Shepherd and Mega. In addition, Kotze, despite having described his claim as a brokerage fee, repeatedly asserts that his claim arises from an agreement concluded subsequent to that referred to above which he maintains novated all his previous claims. However, for the purposes of s 34 of the Act the true causa of Kotze's claim must be determined.

[21] Fatal to Kotze's claim is that having initially described his claim as a brokerage fee and 'not in respect of legal work' he contradicts this in a subsequent affidavit, stating that his claim 'included legal services rendered by me to Mega during 2005'. An application of the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B to this dispute of fact, leads to the conclusion that Kotze failed to discharge the onus of proving that his claim fell within the provisions of s 34(3) of the Act. Kotze's claim on the evidence was a brokerage fee for the sale by Stapelberg of his member's interest in Mega to Shepherd. This is not a claim that arises in connection with the primary or core business of Mega.

[22] Counsel for the appellants submitted in heads of argument that any costs order in favour of the appellants should include all the reserved costs in

the court below. From the judgment in the court below, it appears there were a number of interlocutory applications prior to the hearing, in which the costs were reserved. The court below directed that these costs be costs in the cause. No argument was advanced why a similar order should not be made on appeal.

[23] In the light of the above the following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:
‘The application is dismissed with costs, such costs to include all reserved costs.’

K G B SWAIN
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	L HOLLANDER
	JOSEPH JOHN FINLAY CAMERON, JOHANNESBURG
	LOVIUS BLOCK, BLOEMFONTEIN
FOR RESPONDENT:	E F DIPPENAAR SC
	NEELS ENGELBRECHT, JOHANNESBURG
	CLAUDE REID, BLOEMFONTEIN