REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13/6/12

CASE NO 2011/35866

In the matter between -

HENDRIK NICOLAAS KOTZÉ	APPLICANT
and	
AXAL PROPERTIES 2 CC	1ST RESPONDENT
KB STRICKER HOLDINGS CC	2ND RESPONDENT
THEODOR WILHELM VAN DEN HEEVER *N O* **(In his capacity as Joint Liquidator of MEGA SUPER CEMENT CC (IN LIQUIDATION) MASTER'S REF G184/09)**	3RD RESPONDENT
MFANIMPELA MOSES DINGISWAYO *N O* **(In his capacity as Joint Liquidator of MEGA SUPER CEMENT CC (IN LIQUIDATION) MASTER'S REF G184/09)**	4TH RESPONDENT
ABSA BANK LIMITED	5TH RESPONDENT
ECKRAAL QUARRIES (PTY) LIMITED	6TH RESPONDENT

JUDGMENT

SUTHERLAND J:

INTRODUCTION

[1] This case is about the application of Section 34(3) of the Insolvency Act, 25 of 1936, and the proper meaning to be attributed to the term "trader" and the phrase "in connection with the business" as they appear in the section.

[2] At stake is the interest of a judgment creditor, the applicant, in respect of a judgment for R872 000 he wishes to execute against Mega Super Cement CC, a close corporation in liquidation (Mega).

[3] The relevant sections are these:

In the definitions, in Section 1, "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"

Section 34 provides:

"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 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."

[4] It is common cause that:

4.1 the applicant is a judgment creditor and that Mega is his debtor in respect of a judgment for R872 000 granted on 15 February 2007;

4.2 Mega disposed of its assets to the first and second respondents (who shall be called Axal and KBS in this judgment) on 3 July 2008. The other respondents, who include the liquidators of Mega and other creditors or affected parties, abide the outcome and did not participate in the hearing.

[5] Both Axal and KBS are controlled by one Stricker, through the Kyleheart Trust or directly. Stricker was, with one Shepherd, a member of Mega at the time of the disposition of the assets to Axal and to KBS.

[6] It bears mention that this present litigation is just one of several suits that have occurred since 2006 involving the various litigants. It is unnecessary for the purposes of this judgment to traverse that history, a bizarre and dismaying extravaganza showcasing the feebleness of our legal institutions and the vulnerability of our legal process in the face of litigants determined to resist the judgments of the courts.

[7] The resistance to the applicant's case that the disposition is void against him is premised on the contention that Mega was not, on 3 July 2008, a 'trader' as defined and that even if it was, the applicant has not shown that its claim is "against the said trader in connection with the [said] business". Each defence is addressed in turn.

WAS MEGA A TRADER ON 3 JULY 2008?

[8] Axal and KBS accept they bear an onus to prove that Mega was not a trader.

[9] The factual basis upon which the argument is premised is not itself disputed. The thesis is thus:

9.1 In 'December 2007' [sic; ? 2006] Mega 'sold its business' to Sethaba Power (Pty) Ltd who at once took possession of the assets.

9.2 The sale was cancelled. We are not told exactly when, or favoured with copies of the agreement alleged. But before Mega could "re-possess" the assets, First National Bank (FNB) intervened to perfect a notarial bond.

9.3 On 14 April 2007 Mega was placed under a provisional winding up order at the instance of FNB. From that time, one Van der Merwe was the liquidator in charge. He disposed of some assets during his tenure.

9.4 On 24 June 2008 the provisional winding up order was discharged.

9.5 "Shortly after" 24 June 2008, Shepherd visited the premises of Mega. What he saw, so says Stricker on behalf of Axal and KBS, was that the business could not be resurrected.

9.6 At this time, Mega had a secured creditor for R22 million, called "What May Come CC" (WMC), represented by none other than Shepherd himself.

9.7 Because the prospects of Mega were so dire, in consultation with CWM, represented by Shepherd, Mega, represented by Shepherd and Stricker, sold the assets of Mega to Axal and to KBS, represented by Stricker. This is the contested disposition of 3 July 2008.

9.8 Based on these events, it is alleged that Mega was not a trader from as early as February/ March 2008 and was not a trader on 3 July 2008. It is alleged that from the time of the discharge of the provisional liquidation order, Mega employed nobody and did not engage in any trading.

[10] *Mr Hollander,* on behalf of Axal and KBS, quite properly, pointed to the decisions in *Kelvin Park Properties CC v Paterson NO* 2001 (3) SA 31 (SCA) (at [17]), and *Bank of Lisbon International Ltd v Western Province Cellars Ltd* 1998 (3) SA 899 (W) at 901D-E, which are authority for the proposition that the mere absence of trading activity does not mean the entity is not a trader and that, in particular, a trader who has debts outstanding, after the cessation of trading, remains a trader as defined.

[11] The line of authorities is collected in the *Bank of Lisbon* case (from 901C–902B). That survey is instructive. Recognition is expressed of the policy purpose that informs s 34 of the Act. The point of the protection given to the creditor of a trader – debtor is to prevent a fraud on the creditor by the debtor divesting itself of the wherewithal to satisfy the claim. Hence these needs

oblige a liberal construction of the definition of a 'trader' lest the artful trader should wriggle out of its liabilities. Therefore, in the circumstances examined, in *Bank of Lisbon*, shutting up the shop was not allowed to defeat the aim of the section.

[12] *Mr Hollander* would like to persuade me that these authorities can be distinguished from the present circumstances on the grounds that at the relevant time, as an objective fact (on the unrebutted say-so of Stricker), Mega could not have engaged in trade even if it wanted to. Thus, an "inability to trade" removes an ex-trader from the realm of persisting liability to a creditor. The alleged inability is the supposed de facto destruction of the capcity to trade whilst Mega was in the hands of Sethaba and of Van der Merwe.

[13] In my view both the law and the facts defeat this contention. When Stricker and Shepherd cast their crestfallen eyes on the wreck that was once Mega after the ravishing by Sethaba and the indifference of Van der Merwe, they were in no different a position than the shopkeeper whose lack of working capital forces him to take down his shingle. Moreover, Stricker himself has deposed to his zeal to free Mega from the clutches of the Bank in order to carry on its business, and that a shortage of ready money induced them not to pursue trading *de facto* but to sell the assets to two juristic persons controlled by him.

[14] Accordingly, I find that Mega was a trader, as defined, at all material times and s 34 is applicable to it.

IS THE APPLICANT'S CLAIM "IN CONNECTION WITH THE SAID BUSINESS" OF MEGA?

[15] The starting point is to acknowledge that "any person who has any claim against the said trader" who may invoke the protection. This "person" does not himself, or herself or itself, have to be trader. The only required credential is the existence of a 'claim'. In this case, the credibility of the claim is beyond reproach; it is the judgment of the court.

[16] It is contended that the applicant bears an onus to prove the necessary connection. That must be right. The applicant takes the view that as a judgment creditor the case is complete as against a juristic person.

[17] The case for Axal and KBS rests upon an important nuance. The contention is that the mere existence of the claim, even in the form of a judgment debt, does nothing to establish a necessary '*connection with the said business*'. What the enquiry into 'connection with the business' requires, so it is argued, is an interrogation of the *causa* of the debt itself.

[18] Only when such interrogation takes place would it possible to ascertain whether the debt is connected to the business of the trader or is a personal debt. I agree with this approach. The section appears, it must be remembered, in the Insolvency Act. That Act was framed to address the insolvency of real people, not only juristic persons. In the case of natural persons, who trade, there will always be a distinction to be made between their trader persona and their individual persona. Therefore it is to be expected that the statute, in creating a special protection in s 4 should expressly delimit the scope of that special protection by the phrase: "any person who has any claim against the said trader in connection with the said business".

[19] The problem about multiple persona does not arise in respect of juristic persons. A corporate person, whether created under the Companies Act or under the Close Corporation Act owes its existence to the founding documents, duly registered and who it is and what it can do is defined therein. Everything a corporate person does, albeit at the behest of human beings, it does as a single persona.

[20] Axal and KBS would like to expose the claims of the applicant as originating in a cause that seemingly arose as between members of Mega as distinct from involving Mega *per se* as a party. Ostensibly, the applicant's *causa* was payment for brokering a sale of the interest one, Stapelberg, in Mega, to Shepherd. Subsequently, for reasons undisclosed, Mega assumed, in terms of

an agreement, co-liability towards the Applicant for his fee. The judgment granted was pursuant to this agreement. On that premise, it is contended that the debt that applicant relies is unconnected with the business of Mega in that it had nothing to do with the activity of trading.

[21] It is unnecessary to quarrel with this description of the core facts. However, the significance sought to be attached to these facts is mistaken. It is quite irrelevant why Mega assumed the liability. A trader wearing his trader's hat, who incurs a liability to a person for a reason unconnected with its trading activity, cannot escape the net. The connectivity is not a qualitative norm concerned with the trading activity of the trader.

[22] The mention of 'the said business' in the phrase "any person who has any claim against the said trader in connection with the said business" does not mean "business = trading activity" but merely seeks to distinguish the trader's private persona from his business persona. In this case Mega, a corporate person with no private persona, assumed a liability to pay the applicant R872 000 in its sole capacity or persona as a business.

[23] Reliance was placed on Meskin, "*Insolvency Law*" (para 5.31.18.1 at 5-127), for the notion that the section is confined to protecting one trader from the machinations of fellow traders. The critical passage is:

> "By a claim 'in connection with ' the trader's business, in this context, is meant, it is submitted, one predicated on an obligation incurred by the trader exclusively and directly for the purpose of the actual conduct by him of such business. Essentially, the Legislature here intends to protect a seller of goods intended to be the trader's stock-in-trade or raw materials"

In my view this utility of passage is compromised by its generality. The second sentence is plainly too narrow a scope for the protection of the section. The decision in *Simon v DCU Holdings* 2000 (3) SA 202 (T) addresses the question about the meaning of the phrase. At 221B De Villiers J endorses the first sentence of this passage and rejects the second. However, I am in respectful disagreement with the whole passage. It loses sight of the fact that the section does not limit the protection to another trader but gives to "any person". In my view, if a director causes the company he controls to be liable for his golf club bar bills, the Golf Club enjoys the protection of s 34. It seems to me that Meskin in this passage did not intend to make that distinction, and to that extent it does not correctly describe the true effect of the section.

[24] In *Simon v DCU Holdings*, De Villiers examined the phrase in the context of s 34 at 218C–223H. At 222H –223G, he held:

> "Section 34(1) provides that where a trader transfers any business belonging to him without timeously publishing notices of such intended transfer, the transfer shall be void against his creditors for a period of six months after such transfer, and also against his trustee if his estate is sequestrated within that period.
>
> Section 34(2) provides that as soon as such notice is published every liquidated liability of a trader in connection with the business which would

become due at some future date, shall fall due forthwith, if the creditor concerned demands payment of such liability.

In terms of s 34(1) a transfer in conflict with the provisions of that subsection is void against the creditors of the trader or against his trustee. Accordingly, as far as such transfer is concerned, no distinction is made between the private liabilities of the trader and his liabilities in connection with the business. As indicated in the passage quoted from *Vermaak v Joubert & May (supra):*

'Onder skuldeisers in die algemeen moet ook verstaan word skuldeisers wie se skuldvorderings teen die handelaar nie beperk is tot skuld wat in verband met die besigheid staan nie'.

Sections 34(2) and (3), on the other hand, only relate to liabilities of the trader in connection with his business. The trader's private liabilities are not affected. Section 34(1) and (2) are interrelated in the sense that s 34(2) deals with what happens if a notice complying with s 34(1) is published, whereas s 34(1) deals with the situation where a notice complying with that subsection is not published.

Section 34(3) does not refer to a notice in terms of s 34(1) at all and can accordingly apply in a case where no notice has been published at all in terms of s 34(1). On the other hand, s 34(3) could, as in the instant case, apply to a claim which has been instituted against a trader by a creditor of his who has become aware of the intended transfer of the business as a result of the publication of the notice in terms of s 34(1).

For what reason did the Legislature in effect provide in s 34(1) that a transfer envisaged by that subsection is void against business and private creditors, while only business creditors are affected by the provisions of s 34(2) and (3)?

To my mind, the reason is probably that the Legislature intended to enforce compliance with s 34(1) by means of a stringent penalty, viz that the transfer would in such a case be void against all creditors of the trader.

On the other hand, the Legislature, to my mind, saw no reason to provide that if a trader complied with the provisions of s 34(1), all his liabilities, private as well as business, would become payable. However, accelerating payment of his business liabilities, where the trader published a notice in terms of s 34(1), makes sense since the trader intends transferring his business. There is no need for payment of his private liabilities to be accelerated merely because the trader intends transferring his business.

Similarly, where a business creditor has instituted his claim against a trader before the latter transferred his business, it makes sense that the transfer is void only as against that creditor in order to enable him to recover his claim

in spite of the fact that transfer has already taken place. The subsection only applies to a business creditor because only business creditors of the trader are affected by the transfer of the business.

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).

In the premises the applicant's claim is clearly 'in connection with the said business' transferred as envisaged in s 34(3)...."

[25] Some of the phraseology used by De Villiers requires, in my view, elucidation. The Learned Judge comes down squarely in support of the proposition that the phrase means to distinguish private and business dealings of the trader (at 223E–F). Elsewhere, the learned Judge refers to 'business creditors' and by such label it must follow, he means simply creditors of the business, not creditors who are themselves engaged in business as traders.

[26] Accordingly, the defence of Axal and of KBS must fail.

THE RESERVED COSTS QUESTION

[27] In keeping with the spirit of the history of the parties' litigation history, various interlocutory skirmishes occurred as this application lurched towards readiness for argument. The costs were reserved. There are grievances on both sides. I am of the view that it will be sufficient to make those costs costs in the cause, a suggestion proposed by *Mr Hollander*.

RESULT

[28] The prayers sought are extensive. They relate to the detail necessary to give effect to the outcome as found that the disposition of 3 July 2008 by Mega does not stand in the way of executing on the judgment which has obtained. Such prayers include an order of executability on fixed property sold to Axal, being Portions 69 of the Farm Zuurfontein 297. Such relief is appropriate.

[29] Accordingly I grant an order in terms of Prayers 1 to 6 of the notice of motion. Those convenience, I set out the prayers which prayers read:

29.1 That pending execution of the applicant, the first respondent is interdicted from disposing, alienating or hypothecating the immovable property, namely Portion 69 of the Farm Zuurbekom 297, Registration Division IQ, purchased from Mega Super Cement CC in terms of a written agreement of sale dated 3 July 2008;

29.2 That pending execution of the applicant, the second respondent is interdicted from alienating, disposing, hypothecating or pledging the movable assets purchased from Mega Super Cement CC in terms of a written agreement of sale dated 3 July 2008;

29.3 An order declaring –

29.3.1 the disposition of Portion 69 of the Farm Zuurbekom 297, Registration Division IQ, by Mega Super Cement CC (In Liquidation) to the first respondent void against the applicant in terms of s 34(3) of the Insolvency Act, 25 of 1936, to the extent of the applicant's claim being -

29.3.1.1 the judgment against Mega Super Cement CC with SGHC Case Number 26476/06 in the amount of R872 000.00, plus interest thereon at the rate of 15.5% *per annum* calculated from 31 January 2006 to date of payment (In Liquidation) plus the costs (to be taxed);

29.3.1.2 plus the costs (to be taxed) in respect of the following matters:

29.3.1.2.1 The costs (to be taxed) in respect of SCA Case Number: 416/08.

29.3.1.2.2 The costs (to be taxed) in respect of the rescission application in respect of SHGC Case Number: 26476/06;

29.3.2 the disposition of the movable assets by Mega Super Cement CC (In Liquidation) to the second respondent void against the applicant in terms of s 34(3) of the Insolvency Act, 25 of 1936, to the extent of the applicant's claim against Mega Super Cement CC, being -

29.3.2.1 the judgment against Mega Super Cement CC with SGHC Case Number: 26476/06 in the amount of R872 000.00 plus interest thereon at

the rate of 15.5% *per annum* calculated from 31 January 2006 to date of payment (In Liquidation) plus the costs (to be taxed);

29.3.2.2 plus the costs (to be taxed) in respect of the following matters:

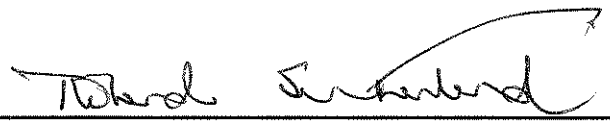
29.3.2.2.1 The costs (to be taxed) of SCA Case Number: 416/08;

29.3.2.2.2 The costs (to be taxed) in respect of the rescission application in respect of SHGC Case Number: 26476/06;

29.4 That the applicant be granted leave to execute against the first and second respondents or any third party in possession of the assets referred to in 29.3.1 and 29.3.2 (*supra*);

29.5 An order declaring the immovable property, being Portion 69 of the Farm Zuurbekom 297, Registration Division IQ, specially executable;

29.6 That the first and second respondents and/or its members, jointly and severally, the one paying, the others to be absolved, be ordered to pay the costs of this application on the scale as between attorney and client.



ROLAND SUTHERLAND
Judge of the South Gauteng High Court, Johannesburg

Hearing	:	25 May 2012
Delivery	:	14 June 2012
For Applicant	:	Adv E F Dippenaar SC
Instructed by	:	Blake Bester Inc
Reference	:	C N Engelbrecht
For First and Second Respondents:		Adv L Hollander
Instructed by	:	John Joseph Finlay Cameron
Reference	:	J Cameron

SUMMARY

Insolvency - Application of Section 34 of the Insolvency Act, 24 of 1936 - Scope of the term 'trader'- Whether objective 'inability to trade' relevant to meaning of the term 'trader' - scope of the phrase 'in connection with the said business'- proper application of phrase is to distinguish business and personal persona of a trader, not to refer to trading activities - A trader can incur a liability in his business capacity for a non-trading debt - Juristic person who is a trader has only one persona and any liability it incurs in connection with the business of that trader – Disposition of assets void as against the creditor of such trader