

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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McCarthy Ltd v Gore N.O.

In a judgment today the Supreme Court of Appeal has upheld an appeal relating to the definition of 'trader' in s 34(1) of the Insolvency Act 24 of 1936.

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, read with s 340 of the Companies Act 61 of 1973 for an order declaring the transfer of 28 vehicles by the company to McCarthy, void.

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.

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).

The SCA, in a judgment by Theron AJA in which Harms ADP, Brand JA, Nugent JA and Jafta JA concurred, found that 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 was stated that it is not the function of this court to extend the list created by the legislature.

The SCA found that the trial court had erred in extending the definition of 'trader' to virtually every type of business by elevating the incidental activities of that business above its actual trade, business, industry or undertaking. The SCA held that 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.

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