



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 9179/2019

In the matter between:

HYDE CONSTRUCTION CC

Applicant

and

K2013046547 (SOUTH AFRICA) (PTY) LTD

First Respondent

INVESTEC BANK LIMITED

Second Respondent

BLUE CLOUD INVESTMENTS 40 (PTY) LTD

Third Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Fourth Respondent

JUDGMENT DATED 29 APRIL 2020

KUSEVITSKY, J:

[1] This is an application in which the Applicant seeks to set aside an agreement of sale entered into between the Third Respondent as seller and the First Respondent as purchaser in terms of section 34(3) of the Insolvency Act, No. 24 of 1936 (as amended) and that the subsequent transfer of the property to the First Respondent and registration of the bond in favour of the Second Respondent, be declared void and similarly set aside.

[2] The Third Respondent, ("Blue Cloud"), purchased Erf 2941 in 2003 and developed the property into a shopping centre, known as "The Square" which is situated in Plettenberg Bay ("the property"). During July 2005, Blue Cloud contracted the Applicant, ("Hyde Construction"), to undertake alterations to the shopping centre. The building work was done over a period between July 2005 to 3 May 2007. The remainder of Erf 2941 was subsequently sub-divided into 12 sectional title units and a sectional title register opened in 2007. I shall refer to the First and Third Respondents interchangeably as the "the Respondents".

[3] It is common cause that a dispute arose between the parties and litigation ensued on the building contract, which action was instituted by Hyde Construction on 26 April 2010. Due to various delays, to which I shall return, judgment in favour of Hyde Construction was only delivered on 21 May 2019. After Hyde Construction instituted its claim against Blue Cloud, Blue Cloud then sold the property which formed the basis of the dispute, to the First Respondent ("the K Company"). Transfer of the property to the new owners was effected on 14 August 2014. According to

Hyde Construction, the property was sold without notice of the sale to it in terms of s 34(1) of the Insolvency Act.

[4] A company search done on Blue Cloud reveals that its directors are Mr Neil Lurie (“Lurie”) and Mr Donald Gavin Borthwick (“Borthwick”). The same Mr Lurie also happens to be one of the the directors of the K Company, the company which bought the property.

The history of litigation between the parties

[5] It is perhaps prudent to firstly deal with the litigation history between Hyde Construction and Blue Cloud. Hyde Construction issued summons against Blue Cloud on 26 April 2010¹ for amounts due in terms of their building contract. The parties agreed that merits and *quantum* would be separated in terms of Rule 33(4)². The merits trial was heard by Schippers J (as he then was) and judgment was handed down on 12 August 2015. Hyde Construction was substantially successful³. Blue Cloud’s application for leave to appeal was dismissed by both Schippers J and the Supreme Court of Appeal on 11 May 2016.

[6] On 4 February 2019, Hyde Construction filed its practice note in respect of the *quantum* hearing which was set down for hearing on 25 February 2019 before Hack AJ. On 12 February 2019, Blue Cloud’s attorneys of record filed a notice of withdrawel.

¹ Case No. 8293/2010

² Consolidated Practice Notes

³ A partial claim for attendant costs of R 34 650.75 was disallowed as is evident from paragraph (d) of the judgment.

[7] On 22 February 2019, an application was brought for the winding up of Blue Cloud in the KwaZulu-Natal High Court. The application was brought by three entities, Alhock Properties, whose sole member is Gavin Borthwick, the father of Donald Borthwick who is also the co-trustee of Blue Cloud; Forestdene Investments (Pty) Ltd whose directors are Borthwick and his father Gavin; and the B & A Trust made up of trustees Borthwick, his father Gavin and mother Jennifer. Borthwick in his capacity as director of Forestdene and trustee of the B&A Trust, deposed to the liquidation application.

[8] In the meantime, the *quantum* hearing was heard on 25 February 2019. According to the judgment⁴, it is apparent that Blue Cloud did not appear on the day of the hearing and that after consideration of correspondence presented to the presiding officer, it was clear that Blue Cloud had no intention of participating in that hearing and accordingly, the court ordered that the trial continue in their absence.

[9] In the judgment⁵, Hack AJ found⁶ in favour of Hyde Construction and ordered Blue Cloud to pay Hyde Construction *inter alia* the sum of R 4 062 380.59 plus Vat and R 4 518 716.03 in compensatory interest. Blue Cloud was also ordered to pay costs on a punitive scale.

[10] In summary, it is common cause that the property was sold by Blue Cloud and transferred to the K company, on 14 August 2014 after action was instituted by Hyde

⁴ Paragraph 1 of the judgment

⁵ Judgment handed down on 21 May 2019

⁶ Paragraph 46 of the judgment

Construction against Blue Cloud and before judgment was handed down. It is also apparent that there was an attempt by Borthwick to liquidate Blue Cloud before the hearing of the *quantum* trial. The effect of the sale was that Lurie⁷ (and his co-director Borthwick) sold the property back to himself and others in the form of the K Company, with Lurie also being a co-director of the K Company.

[11] At the start of the proceedings, there was an application by the First and Third Respondents to file a supplementary affidavit. It is trite that a court is vested with the discretion whether or not to allow the filing of further affidavits. A court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the court considers such a course advisable.⁸ A court must furthermore be satisfied that no prejudice is caused to the opposing party.

[12] I could find no special circumstances that warranted the filing of a further affidavit, nor was I convinced that the arguments advanced by counsel for the Respondents, that they were entitled (and would be prejudiced if such application was refused) to file a further affidavit in light of ‘new evidence’ ostensibly sought to be relied on by the Applicant in its Reply. The ‘new evidence’ relied upon was ostensibly based on a document, the so-called Board paper, to which I shall later return, attached to the Respondents’ answering affidavit. In its reply, the Applicant rightfully dealt with the contents of the document and it is these averments that ostensibly constituted ‘new evidence’ as alleged by the Respondents. They argued that special circumstances may exist where something unexpected or new emerges from the applicant’s replying affidavit which permits the delivery of a further affidavit.

⁷ as co-director of Blue Cloud

⁸ *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) at para 10

In my view, the Respondents can hardly claim that this is new or ‘unexpected’ evidence when it is evidence within their knowledge and upon which they themselves sought to rely. I could therefore find no special circumstances which warranted such a deviation. I was also mindful of the previous manner in which the litigation was conducted and considered any attempts to file further affidavits, particularly on the day of the hearing, a dilatory attempt to stall the matter, to the prejudice of the Applicant.

[13] There was also an application by the Applicant for the matter to be referred to oral evidence in the event that I was of the view that a dispute on the papers became evident. In adjudicating the issue of a referral to oral evidence or to trial, a court will only exercise its discretion to do so in the event that it is satisfied that the balance of probabilities favour the Applicant and that *viva voce* evidence will not disturb the balance of probabilities.⁹ This application was refused as I was of the view that the issue could be determined on the papers and that no genuine disputes of fact existed that would have warranted such a referral.

[14] In order for Hyde Construction to be successful in setting aside the sale of the property in terms of section 34(3) of the Insolvency Act, it has to prove that Blue Cloud was a “trader”, as defined in section 2 of the Insolvency Act when it sold the property to the K Company.

⁹ Roos NO and Another v Kevin & Lasia (BK) and Another 2005 JDR 0977 (T) at para 10

The legislative framework

[15] Section 34 of the Insolvency Act reads as follows:

- "(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."

[16] In *McCarthy Ltd v Gore NO 2007 SA 366 (SCA)*¹⁰, the issue of voidable dispositions of assets as intended by s 34(1) of the Insolvency Act were enunciated. There, Thereon AJA stated that the purpose of the legislature in enacting s 34(1) is 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 advertisement to all the creditors of the business. But the provisions of s 34(1) can only be invoked if the company is a 'trader' as defined in s 2 of the Insolvency Act. Section 34(3) cannot therefore be read in isolation of s 34(1).

[17] In section 2 of the Insolvency 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 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'.

[18] 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*'.

¹⁰ at para 8

This emerges from the judgment of Mthiyane JA in *Kevin and Lasia Property Investment CC v Roos NO and Others*¹¹ 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”, 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.’

[19] Thus the question is not whether Blue Cloud 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 and the approach to be adopted is to ascertain whether the company is a trader by having regard to the nature of the undertaking and determining whether such an undertaking is part of the core business of the company, or incidental thereto.

[20] The Respondents bear the onus of proving that Blue Cloud was not a ‘trader’ at the relevant time of the disposition.¹² Thus , even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the *Plascon-Evans* rule.¹³

¹¹ 2004 (4) SA 103 (SCA) at para 14

¹² Gainsford NNO v Tiffski Property Investments (Pty) Ltd 2012 (3) SA 35 (SCA) at 44G-H; para 31

¹³ Ngqumba en ‘n Ander v Staatspresident en Andere 1988 (4) SA 224 (A) at 259E-263D; Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[21] According to Hyde Construction, Blue Cloud described their business, in their liquidation application, by stating that it was the intention of the shareholders to purchase properties and to develop same. However, Hyde Construction contends that they went a step further by purchasing the properties, developing same and trading with such properties. This was denied by Blue Cloud. The directors of Blue Cloud at the time in 2002 was *inter alia* Lurie and Borthwick. Their shareholding in Blue Cloud came in various forms, being the majority shareholder at the time¹⁴ of Amatshe (Pty) Ltd whose directors were Lurie and Borthwick.

[22] In its founding affidavit, Hyde Construction attached a printout of a company property search history report in respect of all the properties Blue Cloud had purchased and subsequently disposed of, in order to show that Blue Cloud was a 'trader', as defined in s 2 of the Insolvency Act. Blue Cloud admitted that it had purchased these properties but denied it was a trader as contemplated in s 2 of the Insolvency Act. I will list these properties later.

[23] The Respondents submit that when Blue Cloud was established in 2002, the intention was that Blue Cloud would develop and hold immovable property for investment purposes and in particular, establishing a rental enterprise at each property.

[24] In its answering affidavit, Blue Cloud admitted that it did buy and sell the properties referred to and that for the period from approximately 2002 to 2006, Blue

¹⁴ Nedbank was initially a shareholder but after disposal of its shares, the shareholding was made up as follows: Amatshe (Pty) Ltd with 54 3663 shares; The B & A Trust with 22 240 shares; and the Jeldal Trust, with Lurie and Borthwick as trustees, with 22, 240 shares

Cloud had sold, as rental enterprises, a number of properties it had initially invested in. They also admitted that from 2002 when it was established, its intention was to develop property, and to hold such property for investment purposes. It similarly attached a “Windeed Report” listing the immovable properties it previously owned. This report corresponds with the property search report annexed to the founding affidavit. Hyde Construction therefore submitted that it was common cause that the properties mentioned were indeed purchased, developed and sold.

[25] The Respondents stated that Blue Cloud did not, on a short-term basis, purchase, develop and sell immovable properties. It was also not in the business of developing and selling properties in order to generate an income stream on that basis. In other words, its business objective was not the buying and selling property *per se* as its stock in trade. They argued that the core business of Blue Cloud was the acquisition and rental of immovable property and the fact that “certain of those properties” were sold off over the years was incidental to that core business.

[26] The Respondents also explained that Blue Cloud’s properties would be sold only if its investment objectives were not met by the holding of such properties. Four scenarios under which the properties were disposed of were given; when the rental income which was either not profitable enough for investment purposes or did not meet the “loan to value” requirements of the mortgagee; or was not enough to pay the expenses incurred in respect of the property; or Blue Cloud would otherwise sell such properties if approached by interested purchasers such as the tenants of the property and Blue Cloud stood to make a substantial profit from the sale of such asset. The Respondents maintained that such sales were ancillary to the main

business of Blue Cloud which was investing in commercial immovable property and generating rental income from such properties.

[27] It is therefore common cause between the Applicant and Respondents that Blue Cloud purchased properties, developed such properties and eventually sold such properties. The only issue in dispute is that the Respondents allege that such sales would only be made under specific circumstances and not as a matter of course as its core business.

[28] To provide written examples to illustrate the point that the sale of immovable properties was ancillary to the main or core business of Blue Cloud, the Respondents attached *inter alia* two annexures to their answering affidavit, firstly a document entitled “*Blue Cloud/Disposal of Properties*” referred to as the “Board Paper” and secondly their Annual Financial Statement dated 28 February 2010 (“AFS”).

The Board Paper

[29] It is apparent that Blue Cloud was registered as a company on 22 March 2002 and the Board Paper was dated 10 December 2003, one year and nine months after Blue Cloud came into being. The Board Paper dealt with the subject matter of Blue Cloud’s property portfolio and was titled “Blue Cloud/Disposal of Properties” and indicated that the purpose of the Board Paper was “*to dispose of certain properties*” from Blue Cloud’s property portfolio and then addressed specifically the aspect “*to dispose of certain properties in the portfolio*”.

[30] In respect of the Board Paper, the Respondents stated that Blue Cloud purchased properties for investment purposes and that the disposal of properties occurred only as realisations on investment, within “investment parameters”, after having tenanted the buildings usually with long-term leases of 3 – 10 years’ duration. However, Hyde Construction argued that this contradicted the Respondents averments made in their answering affidavit where they allege that the properties would be sold because of the insufficiency of the rental income. Hyde Construction further argued that what is contained in the the Board Paper, supports their contention that the Respondents wanted to make substantial profits from the sale of such assets and this, they say support their contention that Blue Cloud “traded” in property.

[31] The introduction to the Board Paper, it was argued, made it clear that throughout 2003, from at least 10 months after Blue Cloud had been established, that Blue Cloud had investigated and pursued the disposal of its property portfolio in its entirety. The Board Paper was therefore a specific document which provided the background and reasons for Blue Cloud to dispose of certain of its properties in its property portfolio.

[32] At the time of the Board Paper, Hyde construction contends that Blue Cloud had purchased the following four properties, but had not disposed of same:

- 32.1 La Lucia 2833, purchased on 12 September 2003, which was sold on 12 July 2006 and held for two years and 10 months.

32.2 Pinetown 4599,5 purchased on 8 April 2003 and sold on 12 July 2006 and held for three years and four months;

32.3 Plettenberg Bay 2941 which was purchased during 2003 which was converted into the Sectional Title Scheme The Square with 12 units on 20 August 2007 of which units 2 to 12 were all sold or exchanged before 20 August 2007 and unit 1 sold in November 2011¹⁵. The construction of the 12 units started in July 2005 and was completed before 20 August 2007. The process of conversion from a single stand into a Sectional Title Scheme therefore ran from after the transfer to Blue Cloud on 11 May 2004 to 20 August 2007 when the Sectional Title Scheme was registered.

32.4 Mount Edgecombe 143,4 which was purchased on 31 May 2002 and sold on 15 March 2004 and therefore held for one year and 10 months.

[33] Prior to the Board Paper, Blue Cloud had purchased and had already disposed of the following two properties:

33.1 La Lucia 2746,5 which was purchased on 31 May 2002 and sold on 30 October 2003 and therefore held for one year and five months;

33.2 La Lucia 2771,3 which was purchased on 31 May 2002 and sold on 19

¹⁵ which sale was subsequently cancelled

September 2003 and therefore held for one year and four months.

[34] After the Board Paper, Blue Cloud purchased the last of its properties¹⁶, Pinetown Ext. 2, 7502,0 on 18 July 2005 which was sold on 10 March 2009 and therefore held for three years and 10 months.

[35] Hyde Construction argued that the above sale transactions, which was not disputed, did not accord with the Respondents' contention that the properties were purchased for investment and rental income.

[36] In summary, the reliance that the reasons as advanced in the answering affidavit for the rationale of the disposal *viz a viz* the intention as stated in the Board Paper was contradictory. As an example, three properties were held for just over one year and less than two years; one property was held for two years and 10 months; two properties were held for just over three years and less than four years; and The Square as Erf 2941 Plettenberg Bay existed for less than four years as a single stand in which time the property was converted from a shopping centre only, into a shopping centre and 11 apartments for which a Sectional Title Register was opened on 20 August 2007, by which time all the apartments had been disposed of already and the last unit, unit 1 The Shopping Centre, was sold within four years and three months (albeit that the sale was cancelled) from the registration date of 20 August 2007.

[37] In its answering affidavit, Blue Cloud contends that the intention was that Blue

¹⁶ as contained in paragraph 50.2 of the founding affidavit

Cloud would develop and hold immovable properties for investment purposes, in particular establishing a rental enterprise at each property. According to the Board Paper, it was argued, that it is clear that Blue Cloud purchased properties for investment purposes and the disposal of properties occurred only as realisations on investment, within investment parameters and after having tenanted the buildings, usually with long-term leases of 3 to 10 years' duration.

[38] This further showed, it was argued by the Applicant, that Blue Cloud's core business was not the acquisition, development and "holding" whereby rental enterprises were established at each property which were only sold under exceptional circumstances, but to purchase and develop the properties. It also showed that Blue Cloud traded in properties after having acquired such properties in order to be able to sell it at a profit, as the Board Paper stated. The rental aspect was not Blue Cloud's core business and the rental aspect was created as an ancillary activity to the property as developed, to more than likely increase the value of the property.

[39] It was therefore submitted that the manner in which Blue Cloud purchased the properties, developed them, tenanted them and ultimately sold the properties, brought Blue Cloud's purchasing and disposing of properties squarely within the definition of "trader" in terms of s 2 of the Insolvency Act.

[40] The Board Paper states expressly that the investment profile for the property portfolio was always based on "a medium-term investment horizon (i.e. 3 – 5 years)". It then provides that it would be prudent to dispose of those properties in its portfolio

“where additional value has already been created”. This, properly interpreted, means that Blue Cloud would dispose of its properties (after value had been created) after about 3 – 5 years. Blue Cloud submits that the quoted passage cannot, and does not, mean that Blue Cloud should not sell the properties, because such properties were acquired to establish rental enterprises.

[41] On Mr Lurie’s version, argues Hyde Construction, Blue Cloud added value to the properties by developing the properties. According to the Board Paper, where additional value had been created, the time was ripe to dispose of those properties, also because Blue Cloud’s intended investment period had been reached. If the core business and investment profile of Blue Cloud’s property portfolio was indeed to “hold” properties to create rental enterprises in order to create an income stream from rental income, as was suggested by Mr Lurie, then the aforesaid part of the Board Paper would have been in direct conflict with Blue Cloud’s core business and investment profile.

Annual financial statement

[42] Blue Cloud also relied on an annual financial statement dated 28 February 2010, which was to provide support for its contention that its core business was that of a rental enterprise and that the rental was treated as income. This reliance was misguided, it was contended. This was because the statements were not as a result of a forensic audit, but of Blue Clouds. Hyde Construction also stated that in any event, the income derived from an incidental activity of renting commercial space would always be income.

Discussion

[43] The purpose of the legislature in enacting s 34(1) is 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 advertisement to all the creditors of the business. 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.¹⁷

[44] The question whether a company is a trader is answered by having regard to the nature of the undertaking and determining whether such an undertaking is part of the core business of the company or incidental thereto.¹⁸ It is not disputed that Blue Cloud purchased and sold properties.

[45] As stated, the Board paper was relied upon for the contention that Blue Cloud was not a trader. This Board Paper was ostensibly submitted to the directors of Blue Cloud in relation to certain properties from the portfolio. This document is dated 10 December 2003. The rationale for the disposal of properties was based on the prevailing market conditions such as a drop in interest rates. According to the annual financial statement, the principal activity is recorded as the acquisition and rental of immovable property. The immovable property is recorded as 'investment property' under the heading 'non-current assets'. The Respondents argued that the disposal of section 1 of the Square was subject to capital gains tax paid by Blue Cloud to the

¹⁷ McCarthy Ltd v Gore NO 2007 (6) SA 366 (SCA) at para 8

¹⁸ McCarthy *supra* at para 11

South African Revenue Service. They further argued that a company holding property comprising a shopping complex purchased for the sole purpose of conducting a letting business in order to generate income, was found by the courts to not be a trader within the definition of s 2 of the Insolvency Act.

[46] In this regard, reliance was placed by the Respondents on *Roos NO and Another v Kevin & Lasia (BK) and Another 2005 JDR 0977 (T)*. In that case, the liquidators of a company, IJ van der Lith Family Holdings (Pty) Ltd (“the company”) instituted an application against the purchaser of a building (Kevin & Lasia Property Investments CC) and Absa Bank Limited for an order setting aside the transfer by the company to Kevin & Lasia Property Investments CC of certain immovable property over which a bond was registered in favour of Absa. In the court a *quo* Kevin & Lasia Property Investments CC opposed the application by the liquidators and on behalf of Kevin & Lasia Property Investments CC a certain Mr Luther deposed to an opposing affidavit for the purchaser (Kevin & Lasia Property Investments CC) and stated that the company (which was in liquidation) was merely a property owner whose only asset, comprising six erven was let out to tenants in order to generate income. He furthermore stated that the company was a “property holding” company with the only significant assets the erven and improvements thereon, which was sold to the purchaser (Kevin & Lasia Property Investments CC). In the course of the proceedings, Kevin & Lasia Property Investments CC and Absa admitted, through their counsel, that the company was a trader within the meaning of the Insolvency Act. The application was initially argued before Southwood J, and, in the absence of a replying affidavit having been filed, the court found in favour of the applicants. The second respondent took the matter on appeal and the Supreme Court

of Appeal held that the order should be:

“ set aside [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 section 2 of the Act.” ¹⁹

[47] When the matter was reheard, the first respondent submitted that the insolvent company was a property holding company and did not fall within the ambit of ‘trader’ as contemplated by section 34. The second respondent argued that the applicants also failed to establish that the insolvent company was a trader as contemplated in section 34 and even if the insolvent company did fall within the purview of a trader, the applicants failed to establish that it did not sell the property in the ordinary course of such a trader. The applicants, on the other hand, after filing a comprehensive replying affidavit, sought to bolster their case by relying on two propositions: the first that it conceded that historically, the insolvent company did not sell any property; and secondly, they contended that since building operations were performed on the property for the purposes of enhancing its letting and hiring business, that this made the company a trader.²⁰

[48] The facts in *Roos* are distinguishable from the present matter and the court in *Roos* rightly dismissed the application because it can never be said that building operations conducted on a property could by any stretch of the imagination, bring a company within the definition of a trader. The court then commented that there appeared to be a deliberate omission to draw the courts attention to the limited stated objectives of the company, namely investment and immovable property. The

¹⁹ *Roos* at para 4

²⁰ *Roos* at para 11 and 13

court also stated that (without more) the assertion that the company operated as a property investment company and held immovable property for capital investment was too wide. On the aforementioned basis, the court found that that investment company was not a trader as envisaged in s 34.

[49] In the present matter, the Respondents admitted that they purchased properties, developed such properties and then tenanted the properties whereafter Blue Cloud would sell those properties. Hyde Construction indicated, that there was a business conducted by Blue Cloud wherein they purchased, developed and sold the properties with a degree of continuity or regularity which constituted trading in properties. As already indicated, Blue Cloud admitted the purchase, development and sale of these properties and added that these properties were tenanted with long leases between 3 and 10 years and sold as “rental enterprises”. In my view, the reliance on *Roos* by the Respondents is misguided.

[50] Blue Cloud argued that the properties were bought for the purpose of investment and generating rental income. They were not purchased for the purpose of sales and were not deemed as ‘stock’ as one would expect in a property development company where properties are developed to be sold. However objectively it seems as though this is in fact what Blue Cloud did – it held onto properties until circumstances were favourable to sell.

[51] The Respondents argued that there is a distinction between the core business of the company and the activities which are incidental to that core business. Thus the fact that a business is sold after five years is incidental to the core of the business, which was the acquisition and rental of the immovable property. They argued that

incidental trading activities do not fall within the definition of a trader for purposes of s 2.

[52] In 2007, Erf 2941 was subdivided into 12 sectional title units. The Square consisted of a retail as well as a residential component. They argued that they did not ordinarily invest in holding residential units as investment returns on them were generally low but stated that they were required by the municipality to include a residential component in the development of Erf 2941. However, the history of its activities require further mention. Blue Cloud was established on 22 March 2002 and by December 2003, some of its properties had already matured to be sold and in fact, had already been sold.

[53] The AFS was for the year ending 28 February 2010. In the financial statement, the property is described as 'investment property' as listed under 'non-current assets'. The answering affidavit stated the property was an investment in commercial property and the generating of income and that Blue Cloud was an investment company. The property was sold in 2014 and SARS did not levy income tax on the proceeds of sale. It was argued that they would have done so had it been stock in trade. However, Capital Gains Tax was paid because it was an investment sale.

[54] According to the Collins Dictionary, non-current assets are described as an asset that is not going to be consumed or converted into cash within one year. Current assets on the other hand are considered short term assets such as cash or resources that a company needs to run its day-to-day operations.

[55] Blue Cloud argued that whether the company owns one or more investment properties is irrelevant. The principles relating to the investment company remains the same. I disagree.

[56] The onus is on Blue Cloud to show that it was not a trader at the relevant time. In 2003, there was a consideration to dispose of their entire portfolio. This was eleven years prior to the sale of Erf 2941. Blue Cloud bought the property in 2003 and opened a register for it in 2007. It was held for 7 years until 2014. The Respondents contended that Blue Cloud would sell the assets due to the reasons advanced. They also stated that in the event that they sold, that the consideration was whether the directors would generate a substantial profit from the sale of such asset.

[57] The Board paper was dated 10 December 2003; one year and 9 months after Blue Cloud was established. Thus it is clear that at the time of purchasing the property, Blue Cloud was firmly managing its property portfolio and had set out guidelines for the disposal of certain properties in the portfolio.

[58] In 2007, the sectional title register was opened and Blue Cloud developed and in two instances, exchanged two of the units - units 11 and 12 of The Square were transferred by Blue Cloud to the Bitou Municipality in lieu of payment for the lease of land on which the parking next to the shopping complex was built – in effect these two units were exchanged for Blue Cloud's rent obligations to the Bitou Municipality. In 'The Square', 12 units were all sold and exchanged before 20 August 2007. Prior

to that, some other properties which were purchased in 2003, were sold in 2006. Blue Cloud also purchased Mount Edgecombe on 31 May 2002 and sold it on 15 March 2004.

[59] After the Board paper, Blue Cloud purchased the last of its properties, Pinetown Ext 2 on 18 July 2005 which was sold on 10 March 2009. The reliance on the AFS in 2010 is of no moment because by this time – it had traded in most of its properties and had only the one property left. No reliance can therefore be placed on the 2010 AFS and the fact that it had paid capital gains tax on the sale of the remaining property is irrelevant. It is also instructive to note that the Respondents failed to annex the AFS for the previous years between 2003 and 2009, given the onus lay on them to prove that Blue Cloud was not a trader. Thus the inference which Blue Cloud seeks to make, that the property was an investment property and was not ‘stock-in trade’, which attracted CGT, is in my view is misguided.

[60] Prior to that, Blue Cloud was happily trading in property from 2003 to 2009. This made it a trader within the definition of section 2. The selling of the properties was not incidental to its business, as contended by Blue Cloud but according to its own Board paper, the intention of the business or undertaking was for it to hold the properties for a period of between 3 to 5 years, to add value and then to dispose of it. The selling of the property was not ‘incidental’ to the business, but went to the very core of the business.

[61] As I have stated before, Blue Cloud contracted Hyde Construction on 25 July 2005 in order to undertake work and alterations to the Square. In 2007, Hyde

Construction cancelled the contract for non-payment and breach of contract on 3 May 2007. It is therefore important to note that Blue Cloud was still trading in property during this time. During 2007 to 2008, certain disputes were referred to arbitration. In 2010, as a result of the issues not having been resolved, Hyde Construction instituted action during 2010. Between 2010 to the time that the property was sold, they were embroiled in litigation. In 2014, just before judgment in that matter was handed down, the property was sold.

[62] Since I have found that Blue Cloud was a trader for purposes of s 2 of the Insolvency Act, the next enquiry would be to ascertain whether Blue Cloud was a 'trader' at the time of the disposition of the immovable property to the K Company. Blue Cloud alleged that the purpose of the sale of the immovable property was for no other reason than the fact that it was in dire financial trouble. On Lurie's own version, the shareholders were paying up to R 120 000 per month in respect of the shortfall on the property. In *Kelvin Park Properties CC v Paterson NO 2001 (3) SA 31 (SCA)*, the court 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 up shop.²¹ I am therefore satisfied that Blue Cloud was a trader at the time that the property was sold to the K Company.

What are the consequence of an unlawful disposition?

[63] In its notice of motion, the Applicant *inter alia* sought the following orders:

²¹ Axal Properties 2 CC v Kotze 2013 JDR 2086 (SCA) at para 7 - 8

63.1 That the transfer of the property from the Third Respondent, Blue Cloud to the First Respondent, the K Company on 14 August 2014, in terms of the agreement of sale entered into between the Third Respondent, as seller, and the First Respondent, as purchaser, be declared void in terms of s 34(3) of the Insolvency Act No. 24 of 1936 and that the transfer of the following assets to the First Respondent accordingly be declared void:²²

63.2 The transfer of the aforesaid property in terms of Title Deed No ST11986/2014; and;

63.3 That the registration of mortgage bond SB4942/2014 registered over the aforesaid property in favour of the Second Respondent (“Investec”) be declared void.²³

[64] In its application, the Applicant contended that the K company did not acquire valid title to the immovable property and therefore could not validly grant the bank a real right right thereon by hypothecating or encumbering the immovable property. Thus the mortgage bond registered simultaneously with registration of transfer of the immovable property to the K company were void.

[65] The Second Respondent on the other hand advanced the argument that s

²² Paragraph 2.3 and 2.3.1 of the Notice of Motion

²³ Paragraph 2.4 of the Notice of Motion

34(3) did not permit a transfer of property to be declared void in its entirety, as is the case under s 34(1). It argued that Hyde Construction is only entitled to a portion of the proceeds from any future sale in execution of the immovable property. In Applicant's heads of argument, this point seems to have been conceded.

[66] This issue was dealt with in *Weltmans Custom Office Furniture (Pty) Ltd (In Liquidation) v Whislers CC* 1999 (3) SA 1116 (SCA) where a creditor had instituted proceedings before the transfer of the property to the company were made and were for claims which totaled R22 188,57. The question which arose was whether the transfer was void only to the extent of R22 188,57. The expression "any claim" which was relied upon by the Provincial Division, is qualified by the words which precede and follow it. Stripped of its inessentials, for present purposes, s 34(3) reads:

"If any person who has any claim against the said trader ... has before such transfer, for the purposes of enforcing his claim, instituted proceedings against the said trader ... the transfer shall be void as against him for the purpose of such enforcement."

[67] Melunsky AJA held that the relevant portions of the sub-section show that there is a direct relationship between the creditor's claim and the proceedings for enforcing it. Secondly the transfer is said to be void for the purpose of the enforcement. There is, therefore, also a clear correlation between the enforcement of the claim and the extent to which the transfer is void.²⁴ The court held that the grammatical construction of s 34(3), *that the transfer shall be void as against him (the creditor) for the purpose of such enforcement*, and that the transfer is void only to the extent to which the creditor had previously instituted proceedings. Thus the court concluded that it followed that the

²⁴ Para 18

transfer from *Weltman* to the company was void as against the respondent only to the extent of property having the value of R22 188,57. Nienaber JA concurred²⁵ stating that the transfer is void but only to a point and that point is the amount of the claims for which proceedings had been instituted prior to the transfer of the business to the new purchaser. Thus the respondent's entitlement to the proceeds of a future sale should accordingly be restricted to the sum of R 22188.57.

[68] In *casu*, I am of the view that the Applicant's claim, to the extent that the sale and subsequent transfer falls to be set aside, is restricted to the sum of its judgment amount.

[69] Much like *Weltmans*, the seller of the property was also the purchaser of the property and this made Nienaber JA conclude that the sale was a contrived affair. The similarity to the facts in *casu* is striking to the extent that it is inconceivable that Lurie as seller of the property, and represented by Borthwick, on his own version could not make a success of the property, yet chose to purchase the same property, with unnamed investors. A striking similarity is also that the sale in *Weltman* was deliberately withheld from *Weltmans* creditors as appeared from clause 13 of their agreement which reads that "The parties hereby agree that the sale pursuant shall not be advertised in terms of section 34 of the Insolvency Act." In *casu*, the auditors of Blue Cloud provided a letter stating that in their opinion, the company is not a trader and that section 34 of the Insolvency Act does not apply to the proposed sale of the land and buildings from the company. Blue Cloud then used the proceeds of the sale to settle its legal fees, rates and settle Investec so that Blue Cloud's bond could be settled. It is also apparent that Investec was not an innocent bystander in that they were a party to the sale agreement

²⁵ In a dissenting judgment at p1126 para 7

between Blue Cloud and the K Company²⁶ It seems ironic that despite the settling of Blue Cloud's bond in favour of Investec, that Investec was again called upon to mortgage the very same property in favour of the K Company. Perhaps the fact, as argued by the Applicant, that Investec had negotiated 25% profit participation in the disposal of Blue Cloud as far as unit 1 The Square was concerned by which it profited beyond the interest which Blue Cloud had already paid, was incentive enough to be a party.²⁷ In my view, not only was the entire sale and purchase contrived, but it was a systematic endeavor to retain the property and escape the payment of the judgment debt that it owed to Hyde Construction, facilitated by the Second Respondent who was not an innocent bystander, alternatively, should be censured for a dereliction of performing a proper and credible due diligence. Taking into account the principles of *Plascon Evans*, I am of the view that the Applicant has discharged its onus on the totality of the evidence presented and that the arguments advanced by the Respondents falls to be rejected as false. I similarly find that Blue Cloud and the K-Company did not discharge their onus in disproving that Blue Cloud was not a trader for purposes of s 34(3) of the Insolvency Act.

[70] The Second Respondent argued that in respect of Applicant's ancillary relief declaring the property to be specially executable, that the Applicant has failed to make any allegations to support this item of relief. It is common cause that a court has the discretion to declare a property specially executable. In the normal course, where a court is faced with a property that is a primary residence, different criteria would apply and the court would be obliged to make the necessary inquiries. In this case however, it is common cause that the property in question is a Shopping Centre and on Blue

²⁶ See para 4.1.1.1 of the Sale of Rental Enterprise Agreement

²⁷ See para 2.1.5.3 "Security Conditions" of the Investec Loan Agreement

Cloud's own version, it is hopelessly insolvent which would put paid to the idea that it has sufficient movable property to satisfy its debt. I am therefore satisfied that equity permits me to order that the property is declared specially executable, the value of which is restricted to the value of the Applicant's claim.

[71] In the circumstances, the application succeeds and there is no reason why costs should not follow the result.

The following order is made:

1. The Application succeeds.
2. The transfer of Section 1 of Building 1 of the Sectional Title Scheme The Square, Sectional Plan No.556/2007 situated on Remainder Erf 2941, Plettenberg Bay, Municipality of Bitou, Administrative District of Knysna ('the property') of the Third Respondent, to the First Respondent, the K Company on 14 August 2014, in terms of the agreement of sale entered into between the Third Respondent, as seller, and the First Respondent, as purchaser is declared void in terms of s 34(3) of the Insolvency Act No. 24 of 1936 (as amended) in respect of Hyde Construction and that the transfer of the following assets to the First Respondent accordingly is declared void, limited to Hyde Construction:

- 2.1 The transfer of the aforesaid property in terms of Title Deed No ST11986/2014.

3. The registration of the following mortgage bond is declared void in respect of Hyde Construction:

3.1 Mortgage Bond SB4942/2014 registered over the aforesaid property in favour of Second Respondent.

4. The property is declared specially executable and the Sheriff of Knysna (or his/her Deputy) is authorised, upon a duly issued writ of execution, to attach the property, limited to the sum of Hyde Construction's judgment.

5. The First, Second and Third Respondents are ordered to pay the costs, including the costs of 31 May 2019, jointly and severally, the one paying the other to be absolved.

D.S KUSEVITSKY
Judge of the High Court

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Judgment delivered in Court 28
Delivered on 29 May 2020

