

TRANSFER AND BOND VOID: CHILLING THOUGHTS

K2013046547/07 (South Africa) (Pty) Ltd and Others v Hyde Construction CC and Another (513/2020) [2021] ZASCA 82 (17 June 2021)

As a trader, it is business as usual to sell stock in trade. However, a creditor becomes alarmed if a trader sells off goods not in the ordinary course of business at a time when that trader's financial position brings thoughts of liquidation to the fore. To protect creditors, our law has very strict rules for such instances and, in a property trader context, may result in a declaration that a property sale and resulting registration of transfer and new bond, be declared void. This judgment highlights the considerations.

The Judgment can be viewed [here](#).

FACTS

In 2003, Blue Cloud purchased a property in Plettenberg Bay. In 2007, the erf was converted into a sectional title scheme with 12 units. Section 1 is a retail shopping centre complex and sections 2 to 12 are residential units

In mid-2005, Hyde Construction CC ("Hyde Construction") was contracted by Blue Cloud to conduct renovations to the shopping centre on section 1. Disputes arose between Hyde Construction and Blue Cloud over the renovations. Arbitration proceedings followed in which Hyde Construction was largely successful. This did not resolve the issues between the parties and in 2010, Hyde Construction instituted action against Blue Cloud for payment of what it claimed was due and owing to it. (By then, all of the sections in the scheme, other than section 1, had been sold. In addition, all of the other properties previously owned by Blue Cloud had been sold.) Hyde Construction was substantially successful in the outcome in court.

Between 2013 and 2015, rental income from the shopping centre proved insufficient to service Blue Cloud's various debts. Financial pressures mounted and tensions arose between the two directors of Blue Cloud. Thus, in 2014, Blue Cloud sold the shopping centre to the K company as a rental enterprise for a purchase price of R36 million. This was funded by a loan from Investec. (At the time, Investec required confirmation that Blue Cloud was not a trader or, if it was a trader, that the disposal of the property would be made in the ordinary course of its business. The auditors issued a certificate to the effect that Blue Cloud was not a trader.) The purchase price was used to settle some of Blue Cloud's debts; but Hyde Construction remained unpaid.

In 2019, certain creditors applied for the liquidation of Blue Cloud.

Hyde Construction then applied in the Cape Town High Court for an order setting aside the transfer of the property as well as the registration of the mortgage bond. It argued that at the time of the sale, Blue Cloud was indeed a trader and that it was obliged to advertise the sale, as required in the Insolvency Act 24 of 1936 (the Act), before transfer could take place. As it failed to do so, the transfer and registration of the mortgage bond was void.

The action was successful, and the present matter deals with the appeal against this judgment.

HELD

- Section 34 of the Act states that if a "trader transfers ... 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)", that trader must publish a notice to that effect "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

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is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer”, the transfer shall be void as against such trader’s creditors for a period of six months after such transfer.

- In addition, in section 34(3) it is stated that if any person who has a claim against the trader in connection with the business and has instituted action to enforce the claim against the trader, “the transfer shall be void as against him for the purpose of such enforcement.”
- It is clear that section 34(1), if applicable, results in a transfer which is void against all creditors for six months after transfer, in insolvency proceedings. By contrast, s 34(3), if applicable, results in a transfer which is void against a particular creditor or creditors for the purpose of the enforcement of their claim against the debtor. This means that, to the extent that the transfer affects the ability of the creditor to enforce its claim, the transfer is void.
- Crucially, for section 34 to apply, the debtor must be a trader as this term is defined in the Act. Section 2 of the Act defines ‘trader’ as a 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 ...” .
- It is clearly a factual enquiry. In the present matter the Court noted that apart from section 1 on which the shopping centre was situated, all of the sales of all of the properties ever owned by Blue Cloud had taken place by March 2009. By the time Hyde Construction instituted action in 2010, the only remaining property in the portfolio of Blue Cloud was the shopping centre complex. No further properties were purchased by Blue Cloud after 2009.
- Blue Cloud testified that its objective with the acquisitions of property over the years was to create rental enterprises. All the properties it bought were tenanted, and when they were disposed of they were sold as rental enterprises.
- On the date of transfer in August 2014, section 1 had been the only property held by Blue Cloud for a period of some five and a half years. While a number of properties were acquired and disposed of between 2002 and 2006, the only sales thereafter were of one Pinetown property in March 2009 and units under the scheme, the last of which was sold by August 2007.
- On these facts, it could not be stated that Blue Cloud was a trader whose core business at the relevant time was the purchase and sale of immovable properties. The transfer was therefore not hit by section 34(3) of the Act.

CONCLUSION

The appeal was successful.