

SOUTH AFRICA / JUDGMENT

Hyde Construction CC v K2013046547 (South Africa) (Pty) Ltd and Others (9179/2019) [2020] ZAWCHC 31 (29 April 2020) [2020] ZAWCHC 31

COURT

Western Cape High Court, Cape Town

BEFORE

D.S Kusevitsky

CASE / FILE NUMBER

9179/2019

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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.

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 2010[1] 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 successful[3]. 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 withdrawal.
- [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 judgment[4], 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 judgment[5], Hack AJ found[6] 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 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 Lurie[7] (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. 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.

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) or 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'. 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]
- [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 time[14] 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 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 2011[15]. 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 September 2003 and therefore held for one year and four months.

[34] After the Board Paper, Blue Cloud purchased the last of its properties[16], 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 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.

[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

Counsel for Appellant: Advocate ECD Bruwer

Instructed by De Beer Attorneys c/o Vanderspuy Cape Town

Counsel for Respondents 1 and 3: Advocate G Woodland SC

Instructed by Edward Nathan Sonnenbergs Inc

Counsel for 2nd Respondent: Adv: AL Christison

Instructed by Cox Yeats

Judgment

delivered in Court 28

Delivered on 29 May 2020

[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.

[4] Paragraph 1 of the judgment

[5]

Judgment

handed down on 21 May 2019

- [6] Paragraph 46 of the judgment
- [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
- [9] Roos NO and Another v Kevin & Lasia (BK) and Another 2005 JDR 0977 (T) at para 10
- [10] at para 8
- [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)
- [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
- [15] which sale was subsequently cancelled
- [16] as contained in paragraph 50.2 of the founding affidavit
- [17] McCarthy Ltd v Gore NO 2007 (6) SA 366 (SCA) at para 8
- [18] McCarthy supra at para 11
- [19] Roos at para 4
- [20] Roos at para 11 and 13
- [21] Axal Properties 2 CC v Kotze 2013 JDR 2086 (SCA) at para 7 - 8
- [22] Paragraph 2.3 and 2.3.1 of the Notice of Motion
- [23] Paragraph 2.4 of the Notice of Motion
- [24] Para 18
- [25] In a dissenting judgment at p1126 para 7
- [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

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