

SOUTH AFRICA / JUDGMENT

Roos NO and Another v Kevin & Lasia Property Investment Bk and Another (30533/01) [2005] ZAGPHC 88 (7 September 2005)

[2005] ZAGPHC 88

COURT

High Courts - Gauteng

BEFORE

E M Patel

CASE / FILE NUMBER

30533/01

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IN THE HIGH COURT OF SOUTH AFRICA/ES(TRANSVAALPROVINCIAL DIVISION)CASE NO:
30533/2001DATE: 7/09/2005REPORTABLEIN THE MATTER BETWEENANTON ROOS NO

FIRST APPLICANTPIETER BERNARDUS VAN ROOYEN NO[MEDE-LIKWIDATEURS VAN IJ VAN
DER LITHFAMILY HOLDINGS (EDMS) BPK](REGISTRASIENOMMER 65/02085/07)(IN
LIKWIDASIE)

SECOND APPLICANTANDKEVIN & LASIA PROPERTY INVESTMENTS BK(REGISTRASIENOMMER
1999/070820/23)

FIRST RESPONDENTABSA BANK BEPERK

SECOND RESPONDENTDIE REGISTRATEUR VAN AKTES PRETORIA(VIR KENNISNAME)01000900
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01ffff040000002d010000030000000000JUDGMENTPATEL, J[1] The applicants are the joint
liquidators of the company I J van der Lith Family Holdings (Pty) Limited (in liquidation),
referred to as "the insolvent company" or "the company". On 25 February 2000 and at Boksburg the
insolvent company entered into a written purchase and sale agreement of immovable property
with the first respondent. In terms of the agreement the first respondent, Kevin & Lisa Property
Investments CC, purchased erven 875, 876, 908, 350, 352 and 200 in the Edleen Township for a
purchase price of R7,7 million. The properties were transferred to the first respondent, in terms

of deed of transfer T79361/2000, on 29 June 2000. The second respondent, Absa Bank Limited, was the existing bondholder at the time of the sale and also advanced the purchase price to the first respondent under security of a mortgage. The second respondent is the mortgage holder over the properties, by virtue of a bond in the amount of R7 835 000,00.[2] In terms of an amended notice of motion of 4 February 2002 the applicants seek an order in the following terms:"1. Dat die vervreemding van die besigheid en die oordrag van besigheidsbates, welke onder andere insluit onroerende eiendom wat bekend staan as erwe 875, 876, 350, 352 en 200, Edleen, Gauteng, Registrasie Afdeling IR, gehou kragtens Akte van Transport No T79361/2000 na verwys in die koopkontrak, aangeheg en gemerk aanhangsels 'D' en 'E' tot die funderende eedsverklaring van Anton Roos, nietig verklaar word teenoor die likwidateurs van die applikant se boedel ingevolge artikel 34(1) van die Insolvensiewet, 24 van 1936 (soos gewysig) en/of alternatiewelik ingevolge artikel 228 van die Maatskappywet, no 61 van 1973." [3] The Van der Lith Family Holdings (Pty) Ltd as owners of the various properties erected a shopping centre thereon. The applicants, as subsequent liquidators of the company, seek to void the sale of the property to first respondent based on alleged noncompliance by the company with the provisions of section 34(1) of the Insolvency Act 24 of 1936. [4] The application was initially argued before SOUTHWOOD, J. Roos NO en 'n Ander v Kevin & Lasia Property Investments Bk2002 6 SA 409(T) without any replying affidavit having been filed by the applicants. The first and second respondents conceded at the hearing that section 34 was applicable to the transaction. Hence, SOUTHWOOD, J granted an order declaring that the transfer and subsequent registration of the bond in favour of the second respondent was void against the liquidators and the company's creditors in terms of section 34(1). The second respondent appealed against this judgment on the basis that the company was not a trader as contemplated in section 2 of the Act, despite the purported admission thereof prior to SOUTHWOOD, J's judgment. The Supreme Court of Appeal Kevin and Lasia Property Investment CC and Another v Roos NO and Others 2004 4 SA 103(SCA) held that the order of the Court a quo 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." Id para [17] at 109D/E [5] The application is remitted to the Court a quo to also consider the question: "whether the property was also disposed of in the ordinary course of business of a company." Id para [18] at 109E/F [6] Thus, the applicants filed a replying affidavit. As a matter of caution the second respondent filed a duplicating affidavit in order to deal with certain new allegations contained in the replying affidavit. [7] At the outset of the proceedings Mr Puckrin SC, appearing with Mr Blom, raised a point in limine that the matter should be referred to trial since whatever disputes there on the papers can be resolved by means of evidence. The "kooptransaksie" (which counsel described as a strange or peculiar transaction) since the property that was worth anything between R3 million to R5 million was sold to the first respondent for R7,7 million. Counsel submitted that there is no explanation why any rational human being would pay almost double the commercial value of the property. [8] The point in limine raised by the applicants is intrinsically linked with the merits of the application. Crisply, this application is about the applicability of the provisions of section 34(1) read with the definition of "trader" contained in section 2 pertaining to the sale of the property. Therefore, the preliminary

point and the merits are considered together rather than separately.[9] It is trite that the onus is on the applicants to establish their case in the founding affidavit. *Minnaar v Judge* 1964 1 SA 770(D). Where the application is opposed and there appear to be disputes of fact, the principles expounded by CORBETT, J (as he then was) in *Plascon-Evans Paints v Van Riebeeck Paints* [1984] ZASCA 51; 1984 3 SA 623(A) should be applied: "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted of those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Company (Pty) Limited v Jeppe Street Mansions (Pty) Limited*, 1949 3 SA 1155(T) at 11635; *Da Mata v Otto* NO, 1972 3 SA 858(A) at 882(DH)). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)(g) of the Uniform Rules of Court ... and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which he seeks ... Moreover, there may be exceptions to this rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers." *Idat* 634E [10] Where an application cannot be decided on the papers and the applicant does not contend that the matter should be referred to oral evidence or be sent to trial so as to resolve the evidential disputes, the applicant faces the risk that the application may be dismissed because the applicant did not make out a case for the relief in motion proceedings. *Transnet t/a Metro Rail v Rail Commuters Action Group* [2003] 4 All SA 228(SCA) at 237A. In adjudicating the issue of a referral to evidence or to trial, the court will only exercise its discretion to do so in the event it is satisfied that the balance of probabilities favours the applicant and that viva voce evidence will not disturb the balance of probabilities. *Wiese v Joubert* 1983 4 SA 182(O) at 201B(H); *Botha v Maree* 1964 1 SA 168(O) at 172F(G). Then the court will first have to scrutinise the papers to determine whether there exists a genuine dispute of fact on the papers. *First Rand Bank of South Africa Ltd v Pretorius* 2002 3 SA 489(C) [11]. Both Mr Robinson SC for the second respondent and Mr Labuschagne for the first respondent argued that the applicants failed to establish that the insolvent company was a trader as contemplated in section 34. It was submitted by Mr Robinson that even if the insolvent company fell within the purview of the definition of a trader, the applicants failed to establish that it did not sell the property in the ordinary course of business of such as a trader. [12] The Afrikaans text of the Insolvency Act was assented to and the definition of a trader in section 2 reads as follows: "'handelaar' beteken iemand wat 'n handel, besigheid, bedryf of onderneming dryf waarin goed verkoop word of gekoop, ingeruil of vervaardig word om verkoop of verruil te word of waarin bouwerk van watter aard ook al verrig word of wat openbare vermaaklikheid of onthaal beoog, of wat die besigheid van 'n hotelhouer of losieshuishouer bedryf, of wat as makelaar of agent van 'n ander optree by die verkoop of koop van enige goed of by die huur of verhuur van onroerende goed; en elkeen word by die toepassing van hierdie Wet (behalwe by die toepassing

van subartikel (10) van artikel een-en-twintig) as 'n handelaar beskou tensy bewys word dat hy nie 'n handelaar is soos in die voorgaande omskrywe nie: Met dien verstande dat indien iemand die handel, besigheid, bedryf of onderneming dryf om goed te verkoop wat hy deur middel van boerdery geproduseer het (hetsy persoonlik of deur 'n diensbode), die bepalings van hierdie Wet wat alleen op handelaars betrekking het, nie op hom in verband met sy genoemde handel, besigheid, bedryf of onderneming van toepassing is nie;"The English version reads:"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 (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."[13] On behalf of the first respondent, Mr Labuschagne 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 applicants filed a lengthy replying affidavit in which they sought to bolster their case regarding whether the company was a trader by advancing two propositions: First, it was conceded by the applicants that historically the insolvent company did not sell any property. Secondly, they contend that since building operations were performed on the property "for purposes of enhancing its letting and hiring business", thus, this made the company a "trader". In reply the first respondent contended that it was not the company itself which conducted the building operations but it contracted with, inter alia, Propert to undertake building operations. Counsel for the first respondent submitted that, even on the applicants' affidavits, Propert was a contractor effecting building operation on the insolvent company's property. Therefore, the attempt by the applicants to establish that the company was a "trader" because of the building operations was not based in fact and in this regard no genuine dispute of fact has been created. The building operations did not occur in the context of any trade or business as contemplated in the definition of "trader".[14] Further, the applicants' approach in the replying affidavit was that the company acted as an agent for purposes of collecting rental income on behalf of the previous registered owners of the properties. In response, the second respondent in its duplicating affidavit points out that, in terms of the purchase agreement, the company was entitled to the rental for a period prior to transfer as of right. Hence, it was not acting as an agent for collecting of the rentals. On the basis of the second respondent's response, Mr Labuschagne for the first respondent submitted that the applicants failed to establish a factual basis for the second assertion in its new case in the replying affidavit and, therefore, no bona fide disputes of fact have been established. In the circumstances, Mr Labuschagne rightly submitted that the balance of probabilities certainly does not weigh in favour of the applicants. Therefore, referral to evidence will certainly not enhance the applicants' case.[15] The second respondent contended that upon a proper interpretation

of section 34, read with the definition section of a trader, the seller cannot be characterised as a trader for statutory purposes. Mr Robinson submitted that, first, the introduction of section 34 into the Insolvency Act affects and amends the common law and that it should be restrictively interpreted. *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 3 SA 158(A) at 175. Secondly, that upon an ordinary grammatical interpretation of the numerous clauses of a business or trader as defined in the statute, the business of the company cannot be said to be that of a trader for the purposes of the section. The company was not an entity that carried on any trade or business or industry or undertaking in which property was sold or exchanged or manufactured for the purposes of sale or exchange. It was neither a broker nor an agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property. In this regard the reference to the sale, purchase and letting or hiring of immovable property is a reference to the business activities of a broker or an agent and not a reference to the owner of the property. This is underscored by an analysis and a comparison of the section with the Afrikaans text, which is the operative version. [16] Counsel further submitted that having regard to the Afrikaans version of the definition of a trader, it is clear that the reference to immovable property pertains to the business of a "broker or agent" ("makelaar of agent"). The respondents point to the punctuation in the definition section, both in the Afrikaans and in the English texts, from which it is clearly apparent that the reference to the immovable property pertains to the business of the agent and broker and not to the owner of the business. Furthermore, a trader is defined in the *Shorter Oxford English Dictionary* inter alia, as: "one whose business is trade or commerce, or who is engaged in trading; a dealer trafficker". The noun "trader" is derived from the verb "trade". A number of interpretations are given to the word "trade", the closest being: "the practice of some occupation, business or profession habitually carried on, esp when practiced as a means of livelihood or gain; a calling; now usually applied to a mercantile occupation and to a skilled handicraft as distinct from a profession ...". [17] Mr Robinson also submitted that the definition of a trader, although wide, is specific. For the purposes of the Act, it only means those classes of traders which the definition section incorporates. The respondents contend that the seller bought the properties to hold them for the purposes of generating income. It did not purchase the properties for the purposes of sale. The erven were not "stock", as one could expect in a property development company, but could be sold as with any other asset owned by a person. The mere sale of an asset cannot promote a person so as to fall within the definition of a trader. The mere fact that the centre was erected to produce rental income upon the erven, does not elevate the erven to be part of the business of the seller. The reference to goods or property forming part of the business in section 34, must be seen in the context of the introductory part of section. It must be part of the business, such as stock, implements and not the vehicle through which the business is conducted. It is submitted on behalf of the second respondent that the facts in this case are distinguishable from those in *Paterson NO v Kelvin Park Properties CC*. 1998 2 SA 89 (ECD). The conclusion in the latter case that the building in which the butchery was situated formed part of the business of the butchery is both wrong in law and in logic. The business, being a butchery, is not confined to a particular location or property. Location may have an impact upon the goodwill of a business, but this is not relevant in determining the nature of the business. [18] The applicants limited their founding affidavit to a mere assertion that the company

and the sale of the property were subject to section 34(1) read with section 2. In both their founding and replying affidavits they confirmed that the company conducted "'n verhuuringsbesigheid". However, both the first and second respondents in their respective answering affidavits denied the applicability of the relevant statutory provisions. Mr Robinson submitted that the allegations in the applicants' replying affidavit which suggest the contrary are simply incorrect. Because of the incorrect allegation by applicants, the respondents in their answering affidavits fortuitously admitted to the applicability of section 34. Tactically this admission is deployed by the applicants as a stratagem to introduce "further facts" in their replying affidavit. In the circumstances, their attempt in the replying affidavit is to put up a different version regarding the nature of the business of the company, contrary to "'n verhuuringsbesigheid". It would be contrary to the case made out in the applicants' founding papers. Hence, such contrary allegations stand to be struck.

[19] Furthermore, the Supreme Court of Appeal *Fn. 2* above, at 108F/G-109B (my emphasis in italics) has already pronounced on the question whether the letting of immovable property falls subject to the relevant statutory provisions, expressing itself as follows: "[14] Counsel on behalf of the liquidators submitted that the definition of 'trader' can be interpreted as meaning 'any person who carries on any business in the letting or hiring of immovable property'. There are several problems with this submission. 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', ie 'who carries on any trade ... or who carries on the business ... or who acts as a broker'. Each clause is separate and distinct from others. The interpretation suggested necessitates taking the verb in the first clause as referring to the last clause. That is simply not permissible. Nor is the result it produces sensible English: "'Trader' means any person who carries on any ... business ... in the letting or hiring of immovable property.' The (signed) Afrikaans version produces a worse result: "'Handelaar" beteken iemand wat 'n bedryf ... dryf ... by die huur or verhuur van onroerende goed.' [15] It was also submitted that there is no apparent reason why a business consisting of a letting or hiring of immovable property should be excluded. But it cannot be submitted that the omission results in an absurdity entitling a court to fill the lacuna. It might equally be asked why the Legislature did not include, as it obviously did not, a person who acts as a broker or agent of any person in the letting and hiring of moveable property. In the absence of some factor common to the enterprise which are included – and there is none – a court cannot add to the list on the basis that the omission was an obvious legislative oversight." [20] On applicants' own version the nature of the company's business is such as to fall outside the definition of "trader". However, even if the "further facts" are considered, it takes the matter no further. The allegation that the company "performed building operations" from time to time and that it was "an agent in the letting and hiring of immovable property" is simply an unsubstantiated afterthought to circumvent the consequences of the finding by the Supreme Court of Appeal that the letting and hiring of immovable property relied upon in the founding affidavit falls outside the ambit of section 34. Those rentals arose from the transfer of risk in the sale transactions which took place some years prior to the present sale, forming the subject-matter of this dispute. The company did not perform building operations in the sense of "carrying on" such business, instead it contracted other entities that performed building operations from time to time. The company did not as a matter of business activity perform any

building operations as contemplated in the definition of the word "trader". It employed Propert to do so. Thus, it certainly falls outside the ambit of section 34. Further, Mr Robinson submitted that the attempted reliance by applicants on the so-called "objects" of the company is equally flawed. Furthermore, there appears to be deliberate omission to draw the Court's attention to the limited stated objectives of the company namely, investment and immovable property. Mr Roos alleged that the company conducted the business of "renting and hiring". This assertion is unsubstantiated. However, it is apparent from the Director's report that the company operated as a property investment company and held immovable property for capital investment purposes. That assertion is too wide and at best for the applicants the company merely let immovable property but certainly not in letting and hiring immovable property.[21] On a proper interpretation, both in logic and law, it is found that the investment company was not a trader envisaged in section 34.[22] However, a further question that needs to be considered is whether the property was disposed in the ordinary course of business. See Fn 4 above. Mr Puckrin submitted that what is antithetical to the respondent's case is that in the duplicating affidavit disposed of by John Twedde on behalf of the second respondent, he stated: "I iterate that the sale in question occurred in the ordinary course of business of the property holding Seller Company and that it was done to secure payment of the debt." At first blush this assertion seems to cast doubt upon the respondents' version but since it is found that the company was not a trader for the purposes of section 34 it is not necessary to determine whether the sale of the property was in the ordinary course of business.[23] In the final analysis it needs to be emphasised that the alleged disputes do not relate to the facts but to the law and the application of legal principles. Objectively the disputes relied upon by the applicants are divergent interpretations of legal principles and as such there is no need to refer the matter to trial. *Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] All SA 118 (NC) at 119d-e/f; 124b-c. Therefore, the applicants' point in limine stands to be dismissed.[24] Finally, the first respondent seeks to strike out paragraphs 21, 22 and 23 containing "further facts" in the applicant's replying affidavit. These "further facts" ought to have been in the founding affidavit and as such they constitute new matter in the replying affidavit. Inasmuch as they are susceptible to be struck off but having heard the application on the merits and having found that the insolvent company was not a trader, it would serve no purpose to strike out these paragraphs at this juncture.[25] In conclusion, the following order is made: 1. The applicants' point in limine, to refer the matter to trial, is dismissed. 2. The applicants' application is dismissed with costs, such costs to include the costs of 5 and 19 May 2004. E M PATEL JUDGE OF THE HIGH COURT 30533-2001 FOR THE APPLICANTS: ADV C E PUCKRIN SC WITH ADV G BLOM INSTRUCTED BY: MESSRS HENRITTE MLLER FOR THE FIRST RESPONDENT: ADV E C LABUSCHAGNE INSTRUCTED BY: JOUBERT SCHOLTZ INC FOR THE SECOND RESPONDENT: ADV P ROBINSON SC INSTRUCTED BY: WILLEMSE BENADE SMITH HAUPTFLEISCH INC DATE OF HEARING: 5 OCTOBER 2004 DATE OF JUDGMENT: 7 SEPTEMBER 2005

IN THE HIGH COURT OF SOUTH AFRICA

/ES

(TRANSVAALPROVINCIAL DIVISION)

TRANSVAAL

PROVINCIAL DIVISION

IN THE MATTER BETWEEN

JUDGMENT

PATEL, J

[1] The applicants are the joint liquidators of the company I J van der Lith Family Holdings (Pty) Limited (in liquidation), referred to as "the insolvent company" or "the company". On 25 February 2000 and at Boksburg the insolvent company entered into a written purchase and sale agreement of immovable property with the first respondent. In terms of the agreement the first respondent, Kevin & Lisa Property Investments CC, purchased erven 875, 876, 908, 350, 352 and 200 in the Edleen Township for a purchase price of R7,7 million. The properties were transferred to the first respondent, in terms of deed of transfer T79361/2000, on 29 June 2000. The second respondent, Absa Bank Limited, was the existing bondholder at the time of the sale and also advanced the purchase price to the first respondent under security of a mortgage. The second respondent is the mortgage holder over the properties, by virtue of a bond in the amount of R7 835 000,00.

[2] In terms of an amended notice of motion of 4 February 2002 the applicants seek an order in the following terms:

"1. Dat die vervreemding van die besigheid en die oordrag van besigheidsbates, welke onder andere insluit onroerende eiendom wat bekend staan as erwe 875, 876, 350, 352 en 200, Edleen, Gauteng, Registrasie Afdeling IR, gehou kragtens Akte van Transport No T79361/2000 na verwys in die koopkontrak, aangeheg en gemerk aanhangsels 'D' en 'E' tot die funderende eedsverklaring van Anton Roos, nietig verklaar word teenoor die likwidateurs van die applikant se boedel ingevolge artikel 34(1) van die Insolvensiewet, 24 van 1936 (soos gewysig) en/of alternatiewelik ingevolge artikel 228 van die Maatskappywet, no 61 van 1973."

[3] The Van der Lith Family Holdings (Pty) Ltd as owners of the various properties erected a shopping centre thereon. The applicants, as subsequent liquidators of the company, seek to void the sale of the property to first respondent based on alleged noncompliance by the company with the provisions of section 34(1) of the Insolvency Act 24 of 1936.

section 34(1)

Insolvency Act 24 of 1936

[4] The application was initially argued before SOUTHWOOD, J. Roos NO en 'n Ander v Kevin & Lasia Property Investments Bk2002 6 SA 409(T) without any replying affidavit having been filed by the applicants. The first and second respondents conceded at the hearing that section 34 was applicable to the transaction. Hence, SOUTHWOOD, J granted an order

declaring that the transfer and subsequent registration of the bond in favour of the second respondent was void against the liquidators and the company's creditors in terms of section 34(1). The second respondent appealed against this judgment on the basis that the company was not a trader as contemplated in section 2 of the Act, despite the purported admission thereof prior to SOUTHWOOD, J's judgment. The Supreme Court of Appeal in *Kevin and Lasia Property Investment CC and Another v Roos NO and Others* 2004 4 SA 103 (SCA) held that the order of the Court should be:

Roos NO en 'n Ander v Kevin & Lasia Property Investments Bk

2002 6 SA 409 (T)

2002 6 SA 409

section 34

section 34(1).

section 2

Kevin and Lasia Property Investment CC and Another v Roos NO and Others

2004 4 SA 103 (SCA)

2004 4 SA 103

a quo

"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." *Id* para [17] at 109D/E

section 2

Id

para [17] at 109D/E

[5] The application is remitted to the Court a quo to also consider the question:

"whether the property was also disposed of in the ordinary course of business of a company." *Id* para [18] at 109E/F

para [18] at 109E/F

[6] Thus, the applicants filed a replying affidavit. As a matter of caution the second respondent filed a duplicating affidavit in order to deal with certain new allegations contained in the replying affidavit.

[7] At the outset of the proceedings Mr Puckrin SC, appearing with Mr Blom, raised a point in limine that the matter should be referred to trial since whatever disputes there on the papers can be resolved by means of evidence. The "kooptransaksie" (which counsel described as a strange or peculiar transaction) since the property that was worth anything between R3 million to R5 million was sold to the first respondent for R7,7 million. Counsel submitted that there is no explanation why any rational human being would pay almost double the commercial value of the property.[8] The point in limine raised by the applicants is intrinsically linked with the merits of the application. Crisply, this application is about the applicability of the provisions of section 34(1) read with the definition of "trader" contained in section 2 pertaining to the sale of the property. Therefore, the preliminary point and the merits are considered together rather than separately.

in limine

section 34(1)

[9] It is trite that the onus is on the applicants to establish their case in the founding affidavit. *Minnaar v Judge* 1964 1 SA 770(D) Where the application is opposed and there appear to be disputes of fact, the principles expounded by CORBETT, J (as he then was) in *Plascon-Evans Paints v Van Riebeeck Paints* [1984] ZASCA 51; 1984 3 SA 623(A) should be applied:

onus

Minnaar v Judge

1964 1 SA 770(D)

1964 1 SA 770

Plascon-Evans Paints v Van Riebeeck Paints

[1984] ZASCA 51; 1984 3 SA 623(A)

[1984] ZASCA 51

1984 3 SA 623

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted of those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Company (Pty) Limited v Jeppe Street Mansions (Pty) Limited*, 1949 3 SA 1155(T) at 11635; *Da Mata v Otto* NO, 1972 3 SA 858(A) at 882(DH)). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)(g) of the

Uniform Rules of Court ... and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which he seeks ... Moreover, there may be exceptions to this rule, as, for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers."Idat 634E

bona fide

Room Hire Company (Pty) Limited v Jeppe Street Mansions (Pty) Limited

1949 3 SA 1155

Da Mata v Otto NO

1972 3 SA 858

at 634E

[10] Where an application cannot be decided on the papers and the applicant does not contend that the matter should be referred to oral evidence or be sent to trial so as to resolve the evidential disputes, the applicant faces the risk that the application may be dismissed because the applicant did not make out a case for the relief in motion proceedings. Transnet t/a Metro Rail v Rail Commuters Action Group [2003] 4 All SA 228(SCA) at 237AD In adjudicating the issue of a referral to evidence or to trial, the court will only exercise its discretion to do so in the event it is satisfied that the balance of probabilities favour the applicant and that viva voce evidence will not disturb the balance of probabilities. Wiese v Joubert 1983 4 SA 182(O) at 201BH; Botha v Maree 1964 1 SA 168(O) at 172FG Then the court will first have to scrutinise the papers to determine whether there exists a genuine dispute of fact on the papers. First Rand Bank of South Africa Ltd v Pretorius 2002 3 SA 489(C)

Transnet t/a Metro Rail v Rail Commuters Action Group

[2003] 4 All SA 228(SCA) at 237AD

[2003] 4 All SA 228

viva voce

Wiese v Joubert

1983 4 SA 182(O) at 201BH;

1983 4 SA 182

Botha v Maree

1964 1 SA 168(O) at 172FG

1964 1 SA 168

First Rand Bank of

South Africa

Ltd v Pretorius

2002 3 SA 489(C)

2002 3 SA 489

[11] Both Mr Robinson SC for the second respondent and Mr Labuschagne for the first respondent argued that the applicants failed to establish that the insolvent company was a trader as contemplated in section 34. It was submitted by Mr Robinson that even if the insolvent company fell within the purview of the definition of a trader, the applicants failed to establish that it did not sell the property in the ordinary course of business of such a trader.

[12] The Afrikaans text of the Insolvency Act was assented to and the definition of a trader in section 2 reads as follows:

Insolvency Act was

"'handelaar' beteken iemand wat 'n handel, besigheid, bedryf of onderneming dryf waarin goed verkoop word of gekoop, ingeruil of vervaardig word om verkoop of verruil te word of waarin bouwerk van watter aard ook al verrig word of wat openbare vermaaklikheid of onthaal beoog, of wat die besigheid van 'n hotelhouer of losieshuishouer bedryf, of wat as makelaar of agent van 'n ander optree by die verkoop of koop van enige goed of by die huur of verhuur van onroerende goed; en elkeen word by die toepassing van hierdie Wet (behalwe by die toepassing van subartikel (10) van artikel een-en-twintig) as 'n handelaar beskou tensy bewys word dat hy nie 'n handelaar is soos in die voorgaande omskrywe nie: Met dien verstande dat indien iemand die handel, besigheid, bedryf of onderneming dryf om goed te verkoop wat hy deur middel van boerdery geproduseer het (hetsy persoonlik of deur 'n diensbode), die bepalings van hierdie Wet wat alleen op handelaars betrekking het, nie op hom in verband met sy genoemde handel, besigheid, bedryf of onderneming van toepassing is nie;"

The English version reads:

"'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 (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."

[13] On behalf of the first respondent, Mr Labuschagne 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 applicants filed a lengthy replying affidavit in which they sought to bolster their case regarding whether the company was a trader by advancing two propositions: First, it was conceded by the applicants that historically the insolvent company did not sell any property. Secondly, they contend that since building operations were performed on the property "for purposes of enhancing its letting and hiring business", thus, this made the company a "trader". In reply the first respondent contended that it was not the company itself which conducted the building operations but it contracted with, *inter alia*, Propert to undertake building operations. Counsel for the first respondent submitted that, even on the applicants' affidavits, Propert was a contractor effecting building operation on the insolvent company's property. Therefore, the attempt by the applicants to establish that the company was a "trader" because of the building operations was not based in fact and in this regard no genuine dispute of fact has been created. The building operations did not occur in the context of any trade or business as contemplated in the definition of "trader".

section 34.

First

Secondly

inter alia

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[14] Further, the applicants' approach in the replying affidavit was that the company acted as an agent for purposes of collecting rental income on behalf of the previous registered owners of the properties. In response, the second respondent in its duplicating affidavit points out that, in terms of the purchase agreement, the company was entitled to the rental for a period prior to transfer as of right. Hence, it was not acting as an agent for collecting of the rentals. On the basis of the second respondent's response, Mr Labuschagne for the first respondent submitted that the applicants failed to establish a factual basis for the second assertion in its new case in the replying affidavit and, therefore, no bona fide disputes of fact have been established. In the circumstances, Mr Labuschagne rightly submitted that the balance of probabilities certainly does not weigh in favour of the applicants. Therefore, referral to evidence will certainly not enhance the applicants' case.

[15] The second respondent contended that upon a proper interpretation of section 34, read with the definition section of a trader, the seller cannot be characterised as trader for statutory purposes. Mr Robinson submitted that, first, the introduction of section 34 into the Insolvency Act affects and amends the common law and that it should be restrictively interpreted. *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 3 SA 158(A) at 175. Secondly, that upon an ordinary grammatical interpretation of the *numerus clausus* of a

business or trader as defined in the statute, the business of the company cannot be said to be that of a trader for the purposes of the section. The company was not an entity that carried on any trade or business or industry or undertaking in which property was sold or exchanged or manufactured for the purposes of sale or exchange. It was neither a broker nor an agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property. In this regard the reference to the sale, purchase and letting or hiring of immovable property is a reference to the business activities of a broker or an agent and not a reference to the owner of the property. This is underscored by an analysis and a comparison of the section with the Afrikaans text, which is the operative version.

section 34

first

Insolvency Act affects

Cornelissen NO v Universal Caravan Sales (Pty) Ltd

1971 3 SA 158(A) at 175

1971 3 SA 158

numerus clauses

[16] Counsel further submitted that having regard to the Afrikaans version of the definition of a trader, it is clear that the reference to immovable property pertains to the business of a "broker or agent" ("makelaar of agent"). The respondents point to the punctuation in the definition section, both in the Afrikaans and in the English texts, from which it is clearly apparent that the reference to the immovable property pertains to the business of the agent and broker and not to the owner of the business. Furthermore, a trader is defined in the Shorter Oxford English Dictionary *inter alia*, as:

Shorter Oxford English Dictionary

"one whose business is trade or commerce, or who is engaged in trading; a dealer trafficker".

The noun "trader" is derived from the verb "trade". A number of interpretations are given to the word "trade", the closest being:

"the practice of some occupation, business or profession habitually carried on, esp when practiced as a means of livelihood or gain; a calling; now usually applied to a mercantile occupation and to a skilled handicraft as distinct from a profession ..."

[17] Mr Robinson also submitted that the definition of a trader, although wide, is specific. For the purposes of the Act, it only means those classes of traders which the definition section incorporates. The respondents contend that the seller bought the properties to hold them for the purposes of generating income. It did not purchase the properties for the purposes of sale. The erven were not "stock", as one could expect in a property development company,

but could be sold as with any other asset owned by a person. The mere sale of an asset cannot promote a person so as to fall within the definition of a trader. The mere fact that the centre was erected to produce rental income upon the erven, does not elevate the erven to be part of the business of the seller. The reference to goods or property forming part of the business in section 34, must be seen in the context of the introductory part of section. It must be part of the business, such as stock, implements and not the vehicle through which the business is conducted. It is submitted on behalf of the second respondent that the facts in this case are distinguishable from those in *Paterson NO v Kelvin Park Properties CC*. 1998 2 SA 89 (ECD). The conclusion in the latter case that the building in which the butchery was situated formed part of the business of the butchery is both wrong in law and in logic. The business, being a butchery, is not confined to a particular location or property. Location may have an impact upon the goodwill of a business, but this is not relevant in determining the nature of the business.

Paterson

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NO v

Kelvin

Park

Properties CC

1998 2 SA 89 (ECD)

1998 2 SA 89

[18] The applicants limited their founding affidavit to a mere assertion that the company and the sale of the property were subject to section 34(1) read with section 2. In both their founding and replying affidavits they confirmed that the company conducted "'n verhuuringsbesigheid". However, both the first and second respondents in their respective answering affidavits denied the applicability of the relevant statutory provisions. Mr Robinson submitted that the allegations in the applicants' replying affidavit which suggest the contrary are simply incorrect. Because of the incorrect allegation by applicants, the respondents in their answering affidavits fortuitously admitted to the applicability of section 34. Tactically this admission is deployed by the applicants as a stratagem to introduce "further facts" in their replying affidavit. In the circumstances, their attempt in the replying affidavit is to put up a different version regarding the nature of the business of the company, contrary to "'n verhuuringsbesigheid". It would be contrary to the case made out in the applicants' founding papers. Hence, such contrary allegations stand to be struck.

section 2.

further facts

[19] Furthermore, the Supreme Court of Appeal *Fn. 2 above*, at 108F/G-109B (my emphasis in italics) has already pronounced on the question whether the letting of immovable property falls subject to the relevant statutory provisions, expressing itself as follows:

Fn. 2 above, at 108F/G-109B (my emphasis in italics)

"[14] Counsel on behalf of the liquidators submitted that the definition of 'trader' can be interpreted as meaning 'any person who carries on any business in the letting or hiring of immovable property'. There are several problems with this submission. 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', ie 'who carries on any trade ... or who carries on the business ... or who acts as a broker'. Each clause is separate and distinct from others. The interpretation suggested necessitates taking the verb in the first clause as referring to the last clause. That is simply not permissible. Nor is the result it produces sensible English: "Trader" means any person who carries on any ... business ... in the letting or hiring of immovable property.' The (signed) Afrikaans version produces a worse result: "Handelaar" beteken iemand wat 'n bedryf ... dryf ... by die huur or verhuur van onroerende goed." [15] It was also submitted that there is no apparent reason why a business consisting of a letting or hiring of immovable property should be excluded. But it cannot be submitted that the omission results in an absurdity entitling a court to fill the lacuna. It might equally be asked why the Legislature did not include, as it obviously did not, a person who acts as a broker or agent of any person in the letting and hiring of moveable property. In the absence of some factor common to the enterprise which are included – and there is none – a court cannot add to the list on the basis that the omission was an obvious legislative oversight."

any person who carries on any business in the letting or hiring of

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mmovable property'. There are several problems with this submission

lacuna

[20] On applicants' own version the nature of the company's business is such as to fall outside the definition of "trader". However, even if the "further facts" are considered, it takes the matter no further. The allegation that the company "performed building operations" from time to time and that it was "an agent in the letting and hiring of immovable property" is simply an unsubstantiated afterthought to circumvent the consequences of the finding by the Supreme Court of Appeal that the letting and hiring of immovable property relied upon in the founding affidavit falls outside the ambit of section 34. Those rentals arose from the transfer of risk in the sale transactions which took place some years prior to the present sale, forming the subject-matter of this dispute. The company did not perform building operations in the sense of "carrying on" such business, instead it contracted other entities that performed building operations from time to time. The company did not as a matter of business activity perform any building operations as contemplated in the definition of the

word "trader". It employed Propert to do so. Thus, it certainly falls outside the ambit of section 34. Further, Mr Robinson submitted that the attempted reliance by applicants on the so-called "objects" of the company is equally flawed. Furthermore, there appears to be deliberate omission to draw the Court's attention to the limited stated objectives of the company namely, investment and immovable property. Mr Roos alleged that the company conducted the business of "renting and hiring". This assertion is unsubstantiated. However, it is apparent from the Director's report that the company operated as a property investment company and held immovable property for capital investment purposes. That assertion is too wide and at best for the applicants the company merely let immovable property but certainly not in letting and hiring immovable property.

further facts

section 34.

[21] On a proper interpretation, both in logic and law, it is found that the investment company was not a trader envisaged in section 34. [22] However, a further question that needs to be considered is whether the property was disposed in the ordinary course of business. See Fn 4 above. Mr Puckrin submitted that what is antithetical to the respondent's case is that in the duplicating affidavit disposed to by John Tweddle on behalf of the second respondent, he stated:

See Fn 4 above

"I iterate that the sale in question occurred in the ordinary course of business of the property holding Seller Company and that it was done to secure payment of the debt."

At first blush this assertion seems to cast doubt upon the respondents' version but since it is found that the company was not a trader for the purposes of section 34 it is not necessary to determine whether the sale of the property was in the ordinary course of business.

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[23] In the final analysis it needs to be emphasised that the alleged disputes do not relate to the facts but to the law and the application of legal principles. Objectively the disputes relied upon by the applicants are divergent interpretations of legal principles and as such there is no need to refer the matter to trial. *Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] All SA 118 (NC) at 119d-e/f; 124bc. Therefore, the applicants' point in limine stands to be dismissed. [24] Finally, the first respondent seeks to strike out paragraphs 21, 22 and 23 containing "further facts" in the applicant's replying affidavit. These "further facts" ought to have been in the founding affidavit and as such they constitute new matter in the replying affidavit. Inasmuch as they are susceptible to be struck off but having heard the application on the merits and having found that the insolvent company was not a trader, it would serve no purpose to strike out these paragraphs at this

junction.[25] In conclusion, the following order is made:1. The applicants' point in limine, to refer the matter to trial, is dismissed.

Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC

[2001] All SA 118(NC) at 119de/f; 124bc

[2001] All SA 118

2. The applicants' application is dismissed with costs, such costs to include the costs of 5 and 19 May 2004.

E M PATEL JUDGE OF THE HIGH COURT 30533-2001 FOR THE APPLICANTS: ADV C E PUCKRIN SC WITH ADV G BLOM INSTRUCTED BY: MESSRS HENRITTE MLLER FOR THE FIRST RESPONDENT: ADV E C LABUSCHAGNE INSTRUCTED BY: JOUBERT SCHOLTZ INC FOR THE SECOND RESPONDENT: ADV P ROBINSON SC INSTRUCTED BY: WILLEMSE BENADE SMITH HAUPTFLEISCH INC DATE OF HEARING: 5 OCTOBER 2004 DATE OF JUDGMENT: 7 SEPTEMBER 2005

JUDGE OF THE HIGH COURT

30533-2001

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