

122/95

Case No 103/94
/MC

**IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)**

In the matter between

LESLIE COHEN NO	First Appellant
REGINALD BARRY PROSCH NO	Second Appellant
LESLIE COHEN NO	Third Appellant
REGINALD BARRY PROSCH NO	Fourth Appellant

and

S A P H I (PROPRIETARY) LIMITED	Respondent
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CORAM: Joubert, Vivier, Van den Heever, Olivier JJA et
Van Coller AJA.

HEARD: 14 September 1995.

DELIVERED: 29 September 1995.

J U D G M E N T

VIVIER JA:

The appellants are the joint liquidators of two companies in liquidation, Projec Investment Holdings Ltd ("Projec") and Canvacor (Ladismith) Pty Ltd ("Canvacor"), which companies were wound up by the Court on 7 August 1990, the applications for their winding-up having been presented to the Court on 15 June 1990. In their capacities aforesaid the appellants instituted action in the Transvaal Provincial Division for an order declaring the sale to respondent prior to liquidation of a certain business and the goodwill, goods and property forming part thereof ("the business") to be null and void in terms of sec 34 (1) of the Insolvency Act 24 of 1936 ("the Act") as it read prior to its amendment by sec 1 (a) of Act 6 of 1991, as read with sec 340 (1) of the Companies Act 61 of 1973, and for an order restoring the business to the appellants.

The business was sold in terms of a written contract concluded between Projec, Canvacor and African Oilskin Industries (Pty) Ltd as sellers, and the respondent, as purchaser. It was signed by the parties thereto on 6 December 1989 and provided that notwithstanding the date of signature the effective date would be 16 December 1989.

In the particulars of claim it was alleged that the business belonged to Projec, a trader; that pursuant to the said contract the business was delivered to the respondent on 16 December 1989; that such delivery constituted a disposition in terms of sec 34 (1) of the Act; that such disposition was not made in the ordinary course of that business; that at no time did Projec publish a notice of such intended disposition in the Gazette and the press as is required by sec 34 (1) of the Act, as read with sec 340 (1) of the Companies Act, 1973 and that Projec was unable to pay its debts.

It was alleged that the disposition was therefore void in terms of these provisions. In the alternative identical allegations were made, and relief sought, in regard to Canvacor. It is thus only necessary to refer to the appellants' case in respect of Projec.

An exception that the particulars of claim lacked averments necessary to sustain the action was taken and Spoelstra J allowed the exception with costs. With the necessary leave the appellants appeal to this Court against the decision of Spoelstra J.

The sole issue raised by the appeal is when the disposition for purposes of sec 34 (1) was made. It was contended on behalf of the respondent that it was made when the contract was concluded, ie on 6 December 1989. On behalf of the appellant it was contended that both the contract and the delivery constituted dispositions within the meaning of sec 34 (1) of the Act and that the latter disposition was void as against the appellants as having

been made within a period of six months of the liquidation.

In applying the provisions of sec 34 of the Act to the winding-up of a company unable to pay its debts, the date the application for the winding-up is presented to the Court is in terms of sec 340 (2) (a) of the Companies Act, 1973 deemed to correspond with the date of sequestration. In the present case that was 15 June 1990. This means that if the date of the disposition was 6 December 1989 it was not affected by sec 34 (1) of the Act as more than six months elapsed after the disposition and before the liquidation, whereas if the date of the disposition was 16 December 1989 it was within six months of Projec's liquidation and therefore void in terms of sec 34 (1) of the Act. In the alternative counsel for the appellants contended that if the sole disposition for purposes of sec 34 (1) of the Act was made when the contract was concluded, the contract, on a proper interpretation

thereof, was concluded on 16 December 1989.

Sec 34 (1) of the Act, prior to its amendment in 1991, provided as follows :

"If a trader disposes of 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) and such trader does not publish a notice of such intended disposition 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 disposition, the said disposition shall be void as against his creditors for a period of six months after such disposition, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period."

Sec 2 of Act 27 of 1987 amended only the English version of the Act, substituting the words "disposes of" and "disposition" in subsections (1) and (3) of sec 34 for "alienates" and "alienation". In the Afrikaans version of the Act, which is the

signed one, the words "vervreem" and "vervreemding" are used. These latter words are defined in terms identical with the definition of the word "disposition" whereas the words "alienates" and "alienation" are not defined at all. The 1987 amendment removed the difficulty caused by the use of the words "alienates" and "alienation" which have a narrower meaning than "vervreem" or "vervreemding" (**Cronje NO v Paul Els Investments (Pty) Ltd** 1982 (2) SA 179 (T) at 190 E-G).

In the context of impeaching a transaction in terms of sec 34 (1) a "disposition" is defined in sec 2 of the Act as "any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court".

It has been held in decisions of this Court that, according to

its definition the word "disposition" is wide enough to take the form of the conclusion of a contract providing for the delivery or transfer of property or the payment of money, and also the actual physical transfer, delivery or payment itself. In **National Bank of SA Ltd v Hoffman's Trustee** 1923 AD 247 at 251 **Innes CJ** said that the almost identical definition of disposition in the Insolvency Act 32 of 1916 included a contract for the transfer of property as well as the transfer itself. In **Estate Jager v Whittaker and Another** 1944 AD 246 at 250 **Watermeyer CJ** said the following about the definition in the present Act :-

"This definition is important. It shows that a disposition may take the form of a contract which creates rights and obligations and may also take the form of an alienation of property."

See also **Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd** 1965 (2) SA 597 (A) at 601 G -

602 A and **Klerk NO v Kaye** 1989 (3) SA 669 (C) at 674 B - D. In the **Langeberg** case, this Court (at 602 F - 603 C and 608 A - D) rejected an argument that the words "or any contract therefor" appearing at the end of the definition clause, should be read as governing only the one word immediately preceding them, namely "donation" and held that these words govern all the transactions enumerated therein and not merely the last of them.

The present contract is one for the sale of a trader's business and the goodwill and goods forming part thereof. It is subject to a true suspensive condition created in clause 10.4 ie "the approval of the Johannesburg Stock Exchange and Shareholders of the Seller". Counsel for the appellant conceded, on the authority of **Cronje v Paul Els Investments (Pty) Ltd, supra**, at 193 G - 196 D that despite the suspensive condition the contract is included

in the definition of "dispose" in sec 2 of the Act as being a contract for a sale. It is accordingly not necessary for present purposes to decide whether the contract is one of sale. According to **Corondimas v Badat** 1946 AD 548 at 558 a sale subject to a suspensive condition is not a contract of sale until the condition is fulfilled, although a binding legal relationship is created in the interim. **Corondimas's** case was followed by this Court in **Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd** 1981 (3) SA 314 (A) at 321 F-G and was not departed from, although it was strongly criticized by this Court, in **Tucker's Land and Development Corporation (Pty) Ltd v Strydom** 1984 (1) SA 1 (A).

In **Cronje's** case the facts were that on 30 January 1980 the insolvent concluded a written contract, subject to a suspensive condition, for the sale of his hotel business to the respondent. On

1 March 1980 the respondent took physical control of the business. On 26 August 1980 the insolvent's estate was provisionally sequestrated and this order was made final on 9 September 1980. The trustee of the insolvent estate applied for a declaratory order that the contract of sale was void in terms of sec 34 (1) of the Act in that the requisite notices had not been published. The respondent made a counter-application for a declaratory order that the contract was valid. It was contended on behalf of the trustee that the disposition for purposes of sec 34 (1) of the Act had taken place on 1 March 1980 which was within the period of six months of the sequestration of the insolvent's estate. The Court (**Ackermann J**) held that a contract of sale subject to a suspensive condition was a "vervreemding" ("alienation", as the English version of sec 34 (1) then read prior to the 1987 amendment) for the purposes of that subsection.

The Court further held that such alienation had taken place when the contract was concluded, ie on 30 January 1980; that the contract was thus not affected by the provisions of sec 34 (1) of the Act and that the counter-application should succeed. The decision in **Cronje's** case was approved by this Court in **Vermaak v Joubert and May** 1990 (3) SA 866 (A) at 873 E where it was held (per **Joubert JA**) that in a case of a contract of sale constituting a disposition within the meaning of sec 34 (1) of the Act the date of the disposition for purposes of that subsection is the date upon which the contract was concluded.

Counsel for the appellant did not question the correctness of the decisions in the **Cronje** and **Vermaak** cases, both *supra*. He submitted, however, that in the present case both the conclusion of the contract on 6 December 1989 and the delivery on 16 December 1989 constituted dispositions for the purpose of

sec 34 (1) of the Act. I do not agree. In my view there was only one relevant disposition and that occurred when the contract was concluded. The delivery was no more than a legal incident of that disposition viz the performance of the seller's obligation in terms of the contract. In my view that was also the effect of the judgments in the *Cronje* and *Vermaak* cases, both *supra*. Counsel conceded that if every delivery in a contract of sale were to be regarded as a separate disposition, a multiplicity of successive dispositions, each requiring a notice in terms of sec 34 (1) with a fresh six-month period commencing to run after each disposition, could result. This would clearly be absurd and could never have been intended by the Legislature.

Counsel for the appellant submitted that if the conclusion of the contract and the subsequent delivery were not regarded as separate dispositions, certain creditors will lose their protection

under sec 34. Again I cannot agree. Sec 34 (1) does not oblige a trader proposing to sell his business to advertise. It sets out what the consequences are, for the buyer and all the trader's creditors, if advertisements complying with prescribed characteristics, are not published. Subsections (2) and (3) deal with special situations and do not detract from the generality of the provisions of subsection (1). Subsection (2) accelerates payment of the trader's liabilities and provides that upon publication of any notice of intended disposition every liquidated liability of a trader in connection with his business becomes due forthwith provided only that the creditor demands payment. It clearly applies also to post-publication liabilities. Subsection (3) deals with the situation where a disposition is made after a creditor has instituted court proceedings against a trader for the purpose of enforcing his claim in connection with the trader's business, and

provides that the disposition is void against the creditor for the purpose of the enforcement if the person to whom the disposition was made knew of the proceedings or if the proceedings were instituted in a specified court. The special situation provided for in subsection (3) obtains whether or not notice of the intended disposition referred to in subsection (1) was given. The additional protection afforded by subsection (3) is limited to those creditors who instituted proceedings before the disposition, which in the present case was the contract itself, and the delivery cannot be regarded as a new disposition merely in order to extend the protection under subsection (3).

The requirement of sec 34 (1) prior to the 1991 amendment that, in order to have effect, notice had to be published of the intended conclusion of the contract providing for the delivery of the business or property concerned and not of the intention to effect

such delivery was widely criticised by text-book and other writers.

See Meskin, *Insolvency Law*, para 5.31.18.1 and the articles referred to in footnote 5; Mars, *The Law of Insolvency*, 8th ed 232-233; Smith, *The Law of Insolvency*, 3rd ed at 146; Swanepoel 1949 (12) THRHR 261. So, for example, Meskin, *ibid*, points out that sec 34 (1) created a requirement the observance of which was incompatible with ordinary commercial realities and that the focus of the subsection was misdirected. The criticism is justified but the meaning of sec 34 (1), read with the definition of "disposition" is clear, and effect must be given thereto. Any other interpretation could, moreover, lead to protracted uncertainty, for example where transfer is not only postponed but is to occur in stages. Since the Legislature is dealing with one fixed period of six months, which is vital for the determination of rights, certainty as to the date from which the

period is to run is as imperative as in any statute dealing for example with prescription.

Counsel for the appellant submitted in the alternative that even accepting that the sole disposition was the contract itself, the parties intended the contract to become binding only upon the effective date ie 16 December 1989. There is no merit in the submission and it can be disposed of shortly. Clause 2.1, relied upon by counsel, as read with clauses 1.2.2.1 and 5.1 is not a condition pending fulfilment of which there is no contractual relationship; it is a term of the contract providing that 16 December 1989 is to be the time of performance of certain obligations, including delivery. It is thus no more than a time clause (as to time clauses see **Jurgens Eiendomsagente v Share** 1990 (4) SA 664 (A) at 674 D - J; and as to the legal effect of a suspensive condition see **Odendaalsrust Municipality**

v New Nigel Estate Gold Mining Company Ltd 1948 (2)

SA 656 (A) at 666-7). There is no indication in the contract of an intention to be bound only on 16 December 1989. On the contrary, all indications are that the contract was intended to have validity immediately upon signature. So, for example, clause 2.2 provides for the seller to pay all liabilities including trading expenses up to 15 December 1989.

For these reasons I am of the opinion that the relevant disposition occurred on 6 December 1989 when the contract was concluded and that the exception was correctly upheld.

The appeal is dismissed with costs.

W. VIVIER JA.

JOUBERT JA)
VAN DEN HEEVER JA)
OLIVIER JA)
VAN COLLER AJA) Concurred.