

**IN THE HIGH COURT OF NAMIBIA**

<p><b>Case Title:</b></p> <p>The Acting Deputy Sheriff Of Windhoek v New Era Investments (Pty) Ltd</p>	<p><b>Case No:</b></p> <p>HC-MD-CIV-ACT-CON-2018/01853 ( INT-HC-INTERP-2019/00195</p>
<p><b>Heard before:</b></p> <p>Honourable Mrs Justice Rakow, AJ</p>	<p><b>Division of Court:</b></p> <p>HIGH COURT (MAIN DIVISION)</p> <p><b>Date of hearing:</b></p> <p>22 January 2020</p> <p><b>Date of order:</b></p> <p>11 February 2020</p>
<p><b>Neutral citation:</b></p> <p><i>The Acting Deputy Sheriff of Windhoek v New Era Investments (Pty)Ltd</i> (HC-MD-CIV-ACT-CON-2018/01853 ( INT-HC-INTERP-2019/00195 [2020] NAHCMD 55 (11 February 2020)</p>	
<p>Having read the record of proceedings as well as submissions made by counsels for the Applicants and the Respondent:</p> <p><b>IT IS HEREBY ORDERED THAT:</b></p> <ul style="list-style-type: none"> <li>a) The Second Claimant's claim is dismissed.</li> <li>b) The Second Claimant and all persons claiming under it be barred against Applicant and the Plaintiff/First Claimant from making any claim on the attached goods.</li> <li>c) The Second Claimant to pay the costs of the First Claimant in these interpleader proceedings.</li> <li>d) The Second Claimant to pay the costs/expenses of the Applicant/Deputy Sheriff in these interpleading proceedings.</li> </ul>	
<p><b>Reasons for orders:</b></p>	
<p><u>Background</u></p> <p>[1] The Applicant in this matter is the Acting Deputy Sheriff of Windhoek, Republic of Namibia. The First</p>	

Claimant, who is the execution creditor in the main matter, is New Era Investment (Pty) Ltd, a private company with limited liability duly registered in the Republic of Namibia. The Second Claimant is AT Helmsman Ready Mix (Pty) Ltd.

[2] These proceedings were instituted after the First Claimant obtained and the Applicant executed, an execution order of this Court dated 28 June 2019 in the case of New Era Investments (Pty) Ltd and Q Crete Ready Mix CC (Case Number HC-MD-CIV-ACT-CON – 2018/01853). For purposes of this judgement, it is also necessary to give a brief background of the proceedings in this matter. The First Claimant instituted legal proceedings out of the High Court of Namibia against Q-Crete Ready Mix CC, claiming an amount of N\$1 448 173,30 for contractual damages suffered by the First Claimant as a result of a breach of contract by Q-Crete Ready Mix CC. This claim specifically related to Q-Crete Ready Mix CC's business activities. The summons was issued on 16 May 2018 and the action subsequently became defended. On 27 June 2019, judgement was granted against Q-Crete Ready Mix CC and on 28 June 2019, the warrant of execution was authorized by the court.

[3] The Deputy Sheriff then attached the following goods on 4 July 2019, which goods were subsequently advertised for sale in execution:

- a) 1 x Mercedes Benz Axor 3535 truck with registration number N147-963W
- b) 1 x Mercedes Benz Axor 3535 truck with registration number N176-214W
- c) 2 x Red 6 Metre Containers
- d) 1 x Ready Mix Concrete Plant inclusive of 2 x Mobile Conveyors and 2 x Tanks/Silos
- e) 4 x 10 000 Ltr Water Tanks
- f) 3 x Office Cubicles
- g) 1 x 5000 ltr Diesel Tank with Nozzle
- h) 1 x 6 Metre Office Container
- i) Pumps and Pipes

[4] The 5000lt Diesel Tank with nozzle was claimed by a Third Claimant, Bachmus Oil & Fuel Supplies (Pty) Ltd, which claim was not opposed by the First Claimant. The remainder of the goods are however claimed by the Second Claimant as their goods pursuant to a sales agreement entered into between them, AT Helmsman Ready Mix (Pty) Ltd, and Q-Crete Ready Mix CC in terms of which certain properties of Q-Crete Ready Mix CC were sold to the Second Claimant. These included the two Mercedes Benz Axor trucks, the Windhoek plant, 4 prefab containers, two other containers, a shade net and a workshop shed. The contract is not dated but two separate invoices were provided for the Mercedes Benz Axor trucks and these were dated

1/8/2018. It further transpires that the sale of the two trucks was financed through a hire-purchase agreement with Bank Windhoek, who is not a claimant in the current matter.

[5] The Second Claimant prayed for an order releasing all the assets from attachment by virtue of the fact that they are the sole owners of the property which they bought from Q-Crete Ready Mix CC on or about 1/8/2018. The argument further was that the two Mercedes Benz Axor 3535 trucks did not belong to the Second Claimant but in fact to Bank Windhoek, but the Second Claimant has use of these trucks.

[6] The First Claimant contests these claims on the basis that the Second Claimant fails to allege that they are the lawful owners of the property and further that the First Claimant instituted legal proceedings against the Execution Debtor in regard to a claim in connection with the business, which the Execution Debtor conducted in the High Court before the alienation of the business assets by Q-Crete Ready Mix CC to the Second Claimant. It is their argument that the provisions of s 34(3) of the Insolvency Act 24 of 1936 regulates the alienation of assets in this regard and determines that under these conditions, such alienation should be void against the First Claimant for the purpose of enforcing the First Claimants claim against Q-Crete Ready Mix CC.

[7] All the properties that were attached were found at the business premises of Q-Crete Ready Mix CC at Farm Ujams, Northern Industrial Area, Windhoek.

### The Law

[8] Section 34 of The Insolvency Act 24 of 1936 reads as follows:

‘Voidable sale of business

34. (1) If a trader alienates 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 alienation 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 alienation, the said alienation shall be void as against his creditors for a period of six months after such alienation, 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 alienation, 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 alienated knew at the time of the alienation 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 alienation shall be void as against him for the purpose of such enforcement.'

[9] The definition of a trader is then also defined in the said act under s 2 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-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 any person shall be deemed to be a trader for the purpose of this Act ....'

From the above it is clear that Q-Crete Ready Mix CC meets the definition of a "trader".

[10] Section 34 of the Act dealing with the alienation of his business by a trader was clearly designed for the protection of the creditors of that business.<sup>1</sup> In *Gore and Another NNO v Saficon Industrial (Pty) Ltd*,<sup>2</sup> the above purpose of s 34 was further strengthened in that the 'Legislature's intention with the creation and enacting of s 34 had plainly been to protect all creditors of the specific company whose business was being alienated; the aim of s 34 was to prevent traders in financial difficulties from disposing of their businesses to third parties who were not liable for the debts of the business.'

[11] It further seems as if s 34 has two requirements of which either one can be met. In *Soomar v Avon Leigh CC t/a Elsea Products*,<sup>3</sup> Leach J said the following:

'In terms of s 34(3) of the Act, on the other hand, a claimant who has instituted proceedings against a trader before the transfer of his business, is afforded protection (a) if the person to whom the business is transferred had knowledge of legal proceedings pending in respect of a claim in connection with the business (s 34(3)(a)), or (b) if the litigation is being conducted in a court having jurisdiction in the district in which the business is carried on, in which case the

<sup>1</sup> *Joosab v Ensor No 1966 (1) SA 319 (A)*.

<sup>2</sup> 1994 (4) SA 536 (W).

<sup>3</sup> 2000 (1) SA 524 (E).

Legislature was presumably of the view that the new owner of the business could reasonably have learned of the litigation (s 34(3)(b)). In the event of either of these requirements being fulfilled, then, whether a notice under s 34(1) has been published or not, s 34(3) provides that the transfer shall be void against the claimant for purposes of the enforcement of his claim.’

[12] In *Weltmans Custom Office Furniture (Pty) Ltd (in liquidation) v Whistlers CC*,<sup>4</sup> Madlanga AJA in a minority judgement summarised the factors in s 34(3) which trigger the creditor's protection as the following:

- “(i) the creditor should have a claim against the trader;
- (ii) the claim should be in connection with the business of the trader;
- (iii) the business, or its goodwill, or its goods or property should have been transferred in terms of a contract;
- (iv) before the transfer the creditor should have instituted proceedings against the trader; and
- (v) the proceedings should have been instituted for the purpose of enforcing the claim.’

Application:

[13] From the definition given under s 2 of the Insolvency Act it is clear that Q-Crete Ready Mix CC meets the definition of a “trader” and the provisions of section 34 of the same act should therefore be applicable on any transaction in which goods belonging to the trader is sold.

[14] Madlanga AJA's criteria for triggering the creditor's protection can be used as follows:

*The creditor should have a claim against the trader:* In this instance, the claim against the trader is one originating from a court judgement granted in favour of New Era Investments (Pty) Ltd on 27 June 2019. On 28 June 2019, the Registrar authorized a Warrant of Execution in favour of New Era Investments (Pty) Ltd – the First Claimant. Goods were then attached by the Applicant, the Acting Deputy Sheriff of Windhoek on 4 July 2019 when he executed this warrant.

[15] *The claim should be in connection with the business of the trader:* The claim instituted against the trader dealt with the selling and delivering of ready mix concrete to the Creditor. The guarantee was that this concrete mix which was delivered by the trader will reach the strength of 40 mpa or 30 mpa respectively within 28 days of delivery. The concrete failed to reach the required strength within the 28 day period and as a result, the creditor suffered damages in the amount of N\$1 448 173.30. The business of the trader was at all times to manufacture and deliver ready mix concrete. The claim is therefore in connection with the

<sup>4</sup> 1999 (3) SA 1116 (SCA) at 1127 and further

business of the trader.

[16] *The business, or its goodwill, or its goods or property should have been transferred in terms of a contract:* The contract entered into between Q Crete Ready Mix CC (the original debtor) and AT Helmsman Ready Mix (Pty) Ltd specifically dealt with the goods of Q Crete Ready Mix CC which was sold to AT Helmsman Ready Mix (Pty) Ltd and which specifically according to the contract, belongs to Q Crete Ready Mix CC. The goods seem all to be goods, like vehicles, trucks, containers and plant which were used to conduct the day to day business of Q Crete Ready Mix CC as, for e.g., the trucks are described in the invoices provided by Q Crete Ready Mix CC, Mercedes Benz Axor Mixer trucks and as per the documentation of the items attached by the Deputy Sheriff, the plant is described as a ready mix concrete plant inclusive of 2 x mobile conveyers and 2 x tanks/silos.

[17] *Before the transfer the creditor should have instituted proceedings against the trader:* This process was instituted on 16 May 2018 by way of approved summons out of the High Court of Namibia, which has jurisdiction in this regard, which was before the invoice date of 1 August 2018, which is the best date to go on as the sales contract between Q Crete Ready Mix CC and AT Helmsman Ready Mix (Pty) Ltd was not dated. The proceedings were therefore instituted against Q Crete Ready Mix CC before the date of the sale of the goods.

[18] *The proceedings should have been instituted for the purpose of enforcing the claim:* That was the specific purpose of instituting the proceedings in May 2018.

[19] Using the above criteria in determining whether s 34(3)(b) of the Insolvency Act is applicable in these circumstances, the court can come to no other conclusion that it in fact is applicable and that the sale of goods or property by the trader, Q Crete Ready Mix CC to AT Helmsman Ready Mix (Pty) Ltd, the Second claimant, is void for the purposes of protecting the rights of New Era Investments (Pty) Ltd.

In the result, I make the following order:

- a) The Second Claimant's claim is dismissed.
- b) The Second Claimant and all persons claiming under it be barred against Applicant and the Plaintiff/First Claimant from making any claim on the attached goods.
- c) The Second Claimant to pay the costs of the First Claimant in these interpleader proceedings.
- d) The Second Claimant to pay the costs/expenses of the Applicant/Deputy Sheriff in these interpleading proceedings.

<hr/> E Rakow Acting Judge	
<b>Judge's signature</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Claimants</b>	
<i>1 st Claimant</i>  <i>Mr. Behrens</i>  <i>On instruction of Behrens &amp; Pfeifer</i>	<i>2<sup>nd</sup> Claimant</i>   <i>On instruction of Etzold-Duvenhage</i>