



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL

30 September 2011

STATUS: Immediate

**GAVIN CECIL GAINSFORD NO V TIFFSKI PROPERTY
INVESTMENTS (PTY) LTD**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today upheld the appeal with costs.

The appellants are the joint liquidators of Tiffindell Ski Limited (the company) which was placed under final liquidation by order of the South Gauteng High Court on 31 March 2009. That application was opposed by Tiffski Property Investments (Pty) Limited (the first respondent, hereinafter referred to as Tiffski) who had taken 'transfer' of the disputed property and the State Bank of India Limited (the third respondent, hereinafter referred to as the Bank) in whose favour the disputed mortgage bonds were registered. The Bank also filed a counter-application conditional upon the success of the appellants' claim in terms of which it sought an order directing the appellants to pay it a sum of R19 878 422.70 representing the amount 'secured' by the disputed mortgage bonds and costs of the counter-application.

The South Gauteng High Court, Johannesburg (Victor J) dismissed the appellants' application with costs. Concerning the counter-application it held that the conclusion reached by it in relation to the main application rendered it unnecessary to deal with the counter-application. Thus it dismissed it and made no order as to costs.

The issues before the SCA, as in the court below, were whether: the applicants discharged the onus to prove their reliance on s 34(1); the transfer was not in the ordinary course of business; the company was a trader as defined; the insolvency took place within the six months' period; and whether the appellants were legally required to tender restitution to the Bank as an innocent third party that had in good faith and for value acquired a real right in the immovable property as a pre-requisite for the setting aside of the transfer.

It was contended, on behalf of the appellants, that the transfer of the business took place less than six months prior to the commencement of the proceedings for the winding-up of the company. That being the case, so it was argued, such transfer was in terms of s 34(1) of the Insolvency Act 24 of

1924 (the Act) void as against the company's liquidators. It was contended that even assuming that Tiffski took delivery of the movable assets and took occupation of the immovable property on January 2008 the company was nonetheless not divested of its ownership of such assets for the company did not have the requisite intention to transfer ownership to Tiffski nor did Tiffski have the intention to accept ownership. It was further contended that if the finding of the court below were allowed to stand, it would render s 34(1) of the Act ineffective and thus undermine the central purpose for which the section was enacted which 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 as required by the section. The SCA upheld these contentions.

Tiffski asserted that the agreement of sale was entered into in the ordinary course of business. The appellants submitted that if this is taken to mean that the transfer of the business of the company in terms of the written contract of sale was effected in the ordinary course of the business of the company, such a contention is manifestly untenable because the disposal by the company of all its assets being the immovable property and the movable assets employed by the company in conducting its ski resort business can by no stretch of the imagination be said to be in the ordinary course of business. The SCA stated that the onus to prove the transfer was not in the ordinary course of the company's business was on the applicant. Counsel for the appellants contended that the appellants had discharged such onus, the SCA agreed with this submission. The SCA held that the facts amply demonstrate that in concluding the written contract with Tiffski on 12 July 2008, the company divested itself of its major asset base necessary to enable it to continue with its ski resort enterprise. In considering the provisions of s 34(1) of the Act, the SCA stated that sight should not be lost of the mischief that they seek to guard against, which 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 as required by the section. As to Tiffski's denial that the company was a trader at the time of the transfer, the SCA held that the answer lies in the definition of a 'trader' in s 2 of the Act which after providing in terms what a trader is continues to provide that 'and any person shall be deemed to be a trader for the purposes of this Act . . . unless it is proved that he is not a trader as hereinbefore defined'. The SCA stated that the deeming provisions of s 2 clearly contemplate that the onus of establishing that someone who is alleged to be a trader is not one would be on the person alleging the contrary. Tiffski merely contented itself with making a bald denial to the appellant's averment that the company was a trader at the material time. The SCA held that Tiffski therefore failed to discharge the onus resting on it.

The Bank contended that in lending moneys to Tiffski it acted bona fide and reasonably as it was unaware of the possible financial difficulties that the company faced. Consequently the mortgage bonds passed by Tiffski over the immovable property constituted real rights in the said property that serve as its only 'real security' for the moneys lent and advanced by it to Tiffski. Thus any order declaring such mortgage bonds void would cause it irreparable harm as it would not have granted a loan to Tiffski without the security of the mortgage bonds. The SCA rejected these contentions and held that as the transfer of the property to Tiffski was void the Bank's mortgage bonds had to suffer the same fate. That the Bank acted bona fide and reasonably was immaterial when s 34(1) applied and that the registration of the mortgage bonds in the Deeds Office therefore fell to be cancelled.

The final argument by the Bank that declaring the mortgage bonds void would infringe its property rights in terms of s 25(1) of the Constitution was also not sustained. The SCA held that as the transfer of the property was contrary to s 34(1) the bank had not acquired any limited real rights in the property despite the registration of the mortgage bonds in its favour and therefore s 25(1) of the Constitution did not apply.

For all the aforementioned reasons the SCA concluded that both Tiffski and the Bank failed to establish valid defences to the appellant's application on any of the grounds relied upon by them. Thus the application in the court below should have succeeded.

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