

Section 34 of the Insolvency Act

By **Marius van Rensburg** (Partner)

11 November 2024

INTRODUCTION

Section 34 of the Insolvency Act provides that when a Trader (as defined in the Act) sells (or transfers) its business, the goodwill thereof, or goods or property forming part of such business, except in the ordinary course of business or for securing the payment of a debt, that Trader is required to publish a notice to that effect.

The purpose of the publication of the notice is to provide creditors of the business with notice of the sale (transfer) of the business, thus enabling them to claim any debts due to them from the seller before the transfer takes place. The notice must be published in the Government Gazette and two issues of an English and Afrikaans newspaper which are circulated in the district in which the business is carried on and must be published not less than 30 days and not more than 60 days before the date of transfer.

In cases where Section 34 is applicable, the publishing of the notice is important for the protection of the purchaser and also any financial institution that finances the purchase of the business.

The consequence of the failure to publish the notice (when applicable) is that the failure renders the sale void as against the seller's creditors for a period of 6 months after transfer and is void against the trustee of the seller's estate if sequestrated within the 6 month time period aforesaid. In other words the seller's creditors could claim the seller's debts against the assets of the business notwithstanding that these have been sold to the purchaser.

IMMOVABLE PROPERTY SALES

It is clear that when an "owner occupier" sells immovable property, Section 34 is not applicable, i.e. when an owner of commercial immovable property sells that property (occupied by that seller) to a purchaser and no lease agreement in respect of the property exists.

The question that arises for property practitioners is whether publication of a Section 34 notice is required where the seller of immovable property sells that property to a purchaser and such property is used as a letting enterprise.

In other words the seller owns immovable property which property is let to a tenant and that property is sold to a purchaser with the tenant in place, i.e. sale of a letting enterprise. Financial institutions granting finance often call for proof of publication to ensure compliance with the Act prior to releasing any funds. This query thus needs to be effectively and accurately dealt with.

CASE: KEVIN & LASIA PROPERTY INVESTMENT CC vs ROOS NO

The issue was dealt with and decided in the Supreme Court of Appeal in the case of *Kevin & Lasia Property Investment CC and another v Roos NO and Others 2004 (4) SA 103 (SCA)* where it was confirmed that the sale of a letting enterprise (such as immovable commercial property which is let to tenants) by a company will not need to be advertised as is required with other businesses.

The rationale is that such company does not fall within the definition of a 'trader' as set out above as the asset being sold is not deemed to be trading stock, nor is the owner of the company engaged in a scheme of profit-making by selling buildings, but rather the immovable property being sold is a capital investment from which an income is generated and the sale thereof is the sale of a capital asset.

CONCLUSION

The above is a simplification of complex law and situation specific advice must always be taken before proceeding.



Marius van Rensburg
(Partner)